Tag 380, LLC v Commet 380, Inc.

2005 NY Slip Op 30271(U)

May 5, 2005

Supreme Court, New York County

Docket Number: 0118730/2002

Judge: Marcy S. Friedman

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SCANNED ON 5/16/2005

[*1]

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

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C. PART 57

TAG 380 LLC v Commet 380, Inc. Action No 1 INDEX NO. 118730/02

Commet 380, Inc. -v- GMAC Commercial Mortgage Inc Action No 2 MOTION DATE 89131/02

MOTION SEQ. NO. SEQ# 009

MOTION CAL. NO.

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

UNFILED JUDGMENT COPY

	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~~

Papers on Motion by Commet in Action No 1: 1-Notice of Motion; 1A-Exhibits - 2- Notice of Cross-Motion by TAG; 3, 4-Reply Aff; Memos of Law-M1-M4

Papers on Motion By GMAC in Action No 2: 1-Notice of Motion; 1A, 1B-Exhibits - 2-Notice of Cross-Motion; 2A-Exhibits; 3- Commet Aff In Opp; ~~4-Reply Aff~~; Memos of Law —

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

Dated: 5/5/05

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

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TAG 380, LLC,

Plaintiff,

- against -

COMMET 380, INC.,

Defendant.

Action No. 1
Index No.: 118730/02

DECISION

---------- x

COMMET 380, INC.,

Defendant/Third-Party Plaintiff,

- against -

GMAC COMMERCIAL MORTGAGE CORPORATION,

Third-Party Defendant.

Action No. 2
Index No. 591131/02

---------- x

These actions, involving a tenant under a master lease for a prime commercial building in New York City, its owner, and the owner's lender, seek determination of the parties' respective obligations to procure terrorism insurance for the building. The actions arose as a result of the difficulty and expense of obtaining terrorism insurance in the aftermath of September 11 and prior to the enactment of the Terrorism Risk Insurance Act of 2002 (15 USC §§ 6701 et seq.).

In the main action, plaintiff TAG 380, LLC ("TAG"), the lessee of the building owned by

defendant COMMET 380, Inc. ("COMMET"), sought a declaration that it did not breach its lease by failing to procure "adequate insurance against losses resulting from terrorism," as alleged in COMMET'S notice to cure to TAG, dated August 5, 2002 (Ex. 1A to Paulsen Aff. In Support of COMMET's Motion In Main Action ["Paulsen Aff."]). COMMET interposed a second amended answer containing counterclaims, among others, for a declaration that TAG is required by its lease to procure insurance for losses due to terrorism, and for damages for breach of contract based on TAG's alleged failure to procure such insurance. (Ex. 17A to Paulsen Aff.) COMMET moves for summary judgment dismissing the complaint, and awarding it declaratory relief and damages on its counterclaims. TAG cross-moves for summary judgment dismissing COMMET's counterclaims.

In the third-party action, COMMET sued third-party defendant GMAC Commercial Mortgage Corporation ("GMAC"), its mortgage lender, for a declaration that (i) "it is not obligated to purchase any insurances with respect to the property under the Loan Agreement and therefore is not in default thereunder, [or] (ii) that the Loan Agreement does not require [COMMET] to purchase terrorism insurance." (Third-Party Complaint, ¶ 2 [Ex. 3 to Greaney Aff. In Support of GMAC's Motion for Summary Judgment ["Greaney Aff."].) GMAC interposed an answer with a counterclaim seeking a declaration, among others, that COMMET is required by the loan agreement to maintain terrorism insurance for the building; and that an "operating event" as defined by the loan agreement occurred when TAG failed to purchase terrorism insurance, thus entitling GMAC to purchase terrorism insurance and to obtain reimbursement therefor from COMMET. (GMAC Answer, ¶ 115 [Ex. 4 to Greaney Aff.].) GMAC moves for summary judgment dismissing the third-party complaint and granting the

requested declaratory relief. COMMET cross-moves for summary judgment dismissing GMAC's counterclaim.

The following material facts are not in dispute: TAG and COMMET are parties to a long-term ground lease (Ex. 1C to Paulsen Aff.), which was entered into on January 26, 1989 and expires on January 16, 2014, for a commercial building located at 380 Madison Avenue in Manhattan. COMMET is the assignee of the landlord's interest and TAG is the assignee of the tenant's interest in this lease. Section 6.01 of the lease (Ex. 1C to Paulsen Aff.), which requires the tenant to procure insurance on the building, provides in pertinent part:

> During the Term Tenant will, at its sole cost and expense, keep and maintain the following insurance policies: (a) insurance on the Building against loss or damage by fire and against loss or damage by other risks included under the standard Extended Coverage Endorsement as presently adopted for use with the New York Standard Fire Insurance Policy, in an amount not less than the then full insurable value of the Building, with a deductible of not more than $50,000.

The standard Extended Coverage Endorsement ("Endorsement") in effect at the time of execution of the lease required coverage for perils including windstorm or hail, smoke, riot or civil commotion, explosion, and physical contact of aircraft or vehicles. The Endorsement also contained an Exclusions section which enumerated exclusions for losses, among others, caused by certain waters, volcanic eruption, and war risk. Losses due to terrorism were not among the exclusions set forth in the Endorsement.[1]

It is further undisputed that prior to the commencement of this action, TAG maintained

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[1]The parties differ as to the form used as of 1989 for the standard Extended Coverage Endorsement. However, the forms submitted by the parties (Ex. 4A to Paulsen Aff; Ex. C to Cherniak Aff. In Support of TAG's Cross-Motion In Main Action ["Cherniak Aff."]) both covered the perils enumerated in the text. They differed only as to whether the additional perils, not here relevant, of vandalism, sprinkler leakage, sinkhole collapse, and volcanic action, were also covered. The Exclusions section of neither form included an exclusion for losses due to terrorism.

an all-risk insurance policy for the building, effective through June 30, 2002, which did not contain an exclusion for losses due to terrorism. Upon expiration of this policy, TAG procured an all-risk policy, for the policy period from June 30, 2002 through June 30, 2003, which expressly excluded terrorism. (Insurance Certificate [Ex. 4B to Paulsen Aff.].) COMMET contends, and TAG does not dispute, that in early August 2002, TAG's then counsel, Harold Meriam, advised RREEF, COMMET's real estate investment manager, that TAG had by then also purchased $100 million of terrorism insurance for the building. COMMET claims that Mr. Meriam agreed to provide evidence of the coverage but failed to do so. COMMET then served the notice to cure, dated August 5, 2002 (Ex. 1A to Paulsen Aff.), which precipitated TAG's commencement of the main action. This notice to cure provided in pertinent part:

> This letter constitutes notice to Tenant, as contemplated by Article 11 of the Lease, that the insurance policies Tenant has obtained for the Property do not comply with the requirements of Article Section 6.01(a) of the Lease in that said insurance does not contain adequate insurance against losses resulting from terrorism. Consequently, Tenant is in default of its obligations under the Lease and Landlord hereby demands that Tenant cure such default immediately.
>
> Landlord hereby advises Tenant that it considers the lack of such insurance as an emergency situation permitting (but not requiring) Landlord to immediately and without further notice obtain such insurance for the account and at the expense of Tenant as contemplated by Article 12.01 of the Lease. Tenant's lack of such insurance constitutes an immediate, material and ongoing risk of loss to Landlord in the event of a terrorist attack.
>
> Furthermore, Tenant's failure to cure the same within the time period provided for in Article 11.01(b) the Lease could result in further action by Landlord as provided in the Lease.

This action by TAG for a declaratory judgment that it had not breached the lease followed. By order dated October 28, 2002, this court granted TAG a Yellowstone injunction, enjoining COMMET, pending determination of this action, from terminating or cancelling plaintiff's lease based on the August 5, 2002 notice to cure, and tolling the cure period set forth in that notice.

In October 2002, RREEF purchased $100 million terrorism insurance for COMMET's properties throughout the United States, with a sub-limit of $25 million for properties in New York, including 380 Madison Avenue. (See Aff. of Stephen Burger, Vice Pres. of RREEF, ¶19 [Ex. 10 to Paulsen Aff.].) However, this insurance concededly did not cover the full replacement value of 380 Madison Avenue. By letter dated October 10, 2002, GMAC notified COMMET that failure to maintain terrorism insurance in the amount of the full replacement value of the building constituted a default under the loan agreement. (Ex. 21to Greaney Aff.) This letter stated in pertinent part:

> You have indicated to us that RREEF has bound a contingent $100 million blanket policy providing terrorism coverage for all locations in your property portfolio. However, you further advised that a sub-limit of only $25 million terrorism coverage applies under this policy to San Francisco and New York City locations only, and the Mortgaged Property is located in New York City.
>
> Although you have made us aware that the Borrower [COMMET] is currently involved in litigation with the Master Lessee [TAG] under the Master Lease, pursuant to the Loan Agreement, the Borrower must secure insurance to the extent that the Master Lessee does not. You agree, as you have stated in your pleadings in the litigation, that terrorism coverage is required for the Mortgaged Property.
>
> Given the unpaid principal balance of $89 million, the $25 million sub-limit of terrorism coverage is unacceptable. Therefore, you must secure additional coverage to adequately protect the Mortgaged Property. * * * *
>
> We continue to emphasize that the failure to maintain the insurance as required by the loan documents constitutes a default. We have the right under Section 8.1.1(e)(ii) of the Loan Agreement to obtain insurance against terrorist acts and to seek reimbursement from you.
>
> The deadline you were given to procure terrorism insurance has passed. Therefore, unless we receive a commitment from you to purchase an acceptable amount of insurance by the close of business Friday, October 11, 2002, we will resume our efforts to enforce our rights under the Loan Agreement, including the right to purchase insurance against terrorist acts on the Borrower's behalf, and to require that the Borrower reimburse us for the cost of such insurance.

In October 2002, COMMET responded by commencing the instant third-party action against GMAC.

As stated above, it is uncontested that prior to the expiration of TAG's policy on June 30, 2002, TAG maintained an all-risk policy for the building which included coverage for terrorism. Upon expiration of this policy, TAG procured an all-risk policy, for the period from June 30, 2002 through June 30, 2003, which expressly excluded terrorism. It is further uncontested that subsequent to the commencement of the main action, TAG procured, and has since maintained, terrorism insurance for the building, the adequacy of which is not challenged by either COMMET or GMAC: Documents produced during the course of discovery in this action show that as of July 2002, TAG had in fact obtained $100 million terrorism insurance coverage for the building under a policy for a term from July 12, 2002 to July 12, 2003. (See Ex. 17F to Paulsen Aff.) TAG purchased an additional $300 million terrorism coverage for the building for the period from October 11, 2002 through October 11, 2003. (Ex. 17H to Paulsen Aff.) For the periods from June 30, 2003 through June 30, 2004 and June 30, 2004 through June 30, 2005, TAG has maintained all-risk policies for the building which do not contain an exclusion for losses due to terrorism. (See Cherniak Aff., ¶¶ 52-54.)

Claims in the Main Action

Although TAG is maintaining terrorism insurance for the building, it takes the position that it is not obligated to do so under its lease with COMMET, and merely elects to purchase the more "generous" all-risk coverage. (See TAG Memo. In Opp. To COMMET's Motion for Summary Judgment and In Support of TAG's Cross-Motion ["TAG Memo. In Opp."] at 3.) COMMET concedes that by procuring terrorism coverage, TAG has cured the breach of lease alleged in its August 5, 2002 notice to cure. However, in view of TAG's refusal to concede that it is obligated to provide terrorism coverage, COMMET contends that it requires a declaration to

that effect.

As a threshold matter, the court rejects TAG's contention that as a result of its procurement of terrorism insurance, the main action no longer presents a justiciable controversy that would support declaratory relief. TAG's complaint seeks a declaration that "plaintiff has not breached the terms of the Lease as alleged in the August 5 Notice." (Complaint, Wherefore Clause [Ex. 1B to Paulsen Aff.].) As COMMET does not dispute that TAG has cured the alleged breach, TAG acknowledges that its complaint "should be dismissed as moot." (TAG Memo. In Opp. at 5.) TAG's further assertion that COMMET's counterclaim should also be dismissed is, however, without merit. COMMET's counterclaim seeks not only a declaration that TAG has breached the lease, but also a broader declaration that TAG "has a duty under Section 6.01 of the Lease to obtain insurance for 380 Madison which does not exclude coverage for terrorism." (Answer, ¶37 [Ex. 17A to Paulsen Aff.].) Given that TAG takes the position that its purchase of terrorism insurance is voluntary, and that its current insurance policy expires in June 2005, the parties' dispute as to TAG's obligation to purchase terrorism insurance may recur. It is therefore appropriate for this court to entertain COMMET's request for declaratory relief on its counterclaim. (See Matter of Doe v Coughlin, 71 NY2d 48 [1987], rearg denied 70 NY2d 1002 [1988], cert denied 488 US 879 [1988]; Waverlree Corp. v 136 Waverly Assocs., 258 AD2d 392 [1st Dept 1999].)

Turning to the merits, section 6.01(a) of the lease between TAG and COMMET requires TAG to maintain "insurance on the Building against loss or damage by fire and against loss or damage by other risks included under the standard Extended Coverage Endorsement as presently adopted for use with the New York Standard Fire Insurance Policy * * *." Insurance Law § 3404

codifies the minimum requirements for standard fire insurance policies issued on property in New York State. (Lane v Security Mut. Ins. Co., 96 NY2d 1 [2001].) Section 3404(e) requires an insurer to insure the property, up to the specified dollar amounts,"against all direct loss by fire, lightning and by removal from premises endangered by the perils insured against in this policy, except as hereinafter provided." This section further provides for exclusions limited to the following:

> This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

It is well settled that a policy that insures against the peril of fire may not contain terms and provisions that are "less favorable to the insured" than those contained in the standard fire policy. (See Lane, 96 NY2d at 5 [citing Insurance Law § 3404[f][1][A]].)

The lease between TAG and COMMET requires TAG to procure named perils insurance coverage. Insurance Law § 3404 applies to named perils policies. It is further settled that such policies apply "only against the perils specifically cited in the coverage provisions, and any unnamed peril is not covered, while all-risk policies reverse this and cover all perils not specifically excluded." (10 Couch on Insurance § 148:4 [3d ed].) A named perils policy insuring against losses by fire will ordinarily be construed to cover damage from fire caused in any manner other than by the insured's arson (see id., § 149:4) or by a cause specifically enumerated

in the exclusions section of the policy. (See Ennar Latex, Inc. v Atlantic Mut. Ins. Co., 1995 WL 325640 [SD NY 1995].)

Insurance Law § 3404(e) does not contain an exclusion for losses caused by terrorism.[2] Section 6.01 of the parties' lease, read in light of the requirements of Insurance Law § 3404, thus obligates TAG to maintain named perils coverage for losses by fire and by the other perils included in the standard Extended Coverage Endorsement, even if such losses are caused by terrorism.

In so holding, the court rejects TAG's assertion that because terrorism was not specifically named as an insured peril under the Extended Coverage Endorsement, it is not a peril as to which coverage is required. TAG cites no authority that supports this contention. On the contrary, as held above, terrorism is not itself a peril but a potential cause of loss by the peril of fire and other perils named under the Extended Coverage Endorsement. Indeed, on its reply, TAG itself effectively withdraws its claim that terrorism is an insurable peril that must be named in order to be covered, and acknowledges that "any fire that ensues from an intentional act, including terrorism, cannot be excluded from fire coverage pursuant to Section 3404 of the Insurance Law." (TAG Reply Memo. of Law at 8.)

The court further notes that New York Department of Insurance General Counsel has issued an opinion concluding that Insurance Law § 3404 prohibits an insurer from issuing a policy for any property in this state that contains a terrorism exclusion with respect to the peril of fire.

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[2]TAG does not argue that the exclusions in Insurance Law § 3404(e) for enemy attack, invasion or insurrection apply to acts by terrorists as opposed to military forces of a sovereign or group having de facto governmental status. (See Pan Am. World Airways, Inc. v Aetna Cas. & Surety Co., 505 F2d 989 [2d Cir 1974]; 10 Couch on Insurance § 152.15 [as to the inapplicability of the "war risk" exclusion to terrorist acts].)

(2002 NY Insurance GC Opinions Lexis 247, Opinion No. 02-11-13 [Nov. 14, 2002][Ex. 2 to COMMET Memo. of Law In Support of Motion for Summary Judgment in Main Action]["COMMET Memo. In Support"].) While this opinion is not binding upon this court, it confirms the court's conclusion that the parties' lease requires TAG to procure terrorism insurance.

The remaining issue in the main action is thus whether COMMET is entitled to damages as a result of TAG's temporary failure either to procure, or to notify COMMET of its procurement, of terrorism insurance. At the outset, the court rejects TAG's purported reservation of a right to oppose COMMET's claims for damages. (See TAG Memo. In Opp. at 15, n 5.) Contrary to TAG's contention, COMMET did not move for summary judgment as to liability only. Rather, COMMET's notice of motion sought summary judgment without a limitation to liability. COMMET's memorandum of law in support of the motion expressly sought damages on COMMET's second and third counterclaims, alleging TAG's breach of lease, for COMMET's attorney's fees in connection with this action as well as its payment of premiums for terrorism insurance. (See COMMET Memo. In Support at 23-25.) The court will accordingly consider COMMET's entitlement to each of these items of damages.

COMMET bases its claim for attorney's fees in the main action on the parties' lease. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989].) Section 12.01 of the lease provides in pertinent part:

* * * bills for all costs, expenses and disbursements of every kind and nature

> whatsoever, including reasonable attorneys' fees, involved in * * * enforcing any right against Tenant, under or in connection with this Lease, or pursuant to law, including (without being limited to) any such costs, expense and disbursement involved in instituting and prosecuting summary proceedings * * * may be sent by Landlord to Tenant monthly, or immediately, at Landlord's option, and shall be due and payable in accordance with the terms of said bills and if not paid when due the amount thereof shall immediately become due and payable as additional rent under this Lease.

This lease provision contains language that clearly permits COMMET to recover from TAG attorney's fees incurred in defending or prosecuting an action between COMMET and TAG involving enforcement of COMMET'S rights under the lease. COMMET is accordingly entitled to recover its attorney's fees in connection with the instant action. (See Hooper, 74 NY2d at 492; Chatanow Assocs., Inc. v 527 MDN Prop., Inc., 161 AD2d 258 [1st Dept 1990].)

COMMET also seeks reimbursement for premiums for terrorism insurance that COMMET purchased for the building. As set forth above, it is undisputed that between July and October 2002, TAG purchased $400 million of terrorism insurance for the building – an amount that COMMET and GMAC concede is adequate. However, TAG did not provide evidence of this coverage to COMMET until February through May 2003, during the discovery stage of this action.

TAG's reasons for purchasing the required insurance but refusing, except in the context of this litigation, to disclose the purchase are unexplained, if not unfathomable.[3] Section 6.03 of the lease expressly requires TAG to deliver to COMMET "not less than thirty (30) days prior to the

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[3]TAG's CEO, Steven Cherniak, states merely that because TAG's position was that it was not required by the terms of its lease to provide terrorism insurance coverage, it "did not immediately advise ComMet of this insurance upon the effective date of the coverage. Instead, in response to ComMet's document demands, documents evidencing this coverage were duly disclosed to ComMet during the course of discovery in this action." (Cherniak Aff., ¶ 45.)

expiration date of any expiring policy" evidence of the purchase of insurance required under the lease. Section 12.01 further permits COMMET to make payments to remedy TAG's default in the performance of any term of the lease "for the account and at the expense of [TAG], immediately and without notice in the case of emergency." TAG does not argue, nor could it plausibly do so, that the purchase of terrorism insurance was not an emergency in the months following September 11. The court accordingly holds that given TAG's obligation under the lease to procure terrorism insurance for the building, and its failure to comply with its further lease obligation to furnish timely evidence to COMMET of its purchase of such insurance, COMMET is entitled to recover the costs of the terrorism insurance that it purchased for the building in October 2002, prior to its receipt of the required documentation showing that TAG had in fact purchased the insurance.

As TAG points out, there is evidence in the record of these motions that COMMET's real estate investment manager was looking into the purchase of terrorism insurance for COMMET's entire portfolio of properties, including 380 Madison Avenue, as early as October 2001. Contrary to TAG's contention, however, any independent intention on COMMET's part to purchase terrorism insurance does not raise a material issue of fact as to TAG's liability to COMMET for the cost of the premiums, under these circumstances in which TAG failed to deliver required proof of its purchase of terrorism insurance to COMMET prior to COMMET's own purchase.

COMMET further claims that it is required to indemnify GMAC for GMAC's expenses in connection with a default by TAG, and that COMMET has reimbursed GMAC for attorney's fees for which TAG is now liable. However, COMMET not only relegates this claim to a footnote, but fails to identify the provision in the lease or to cite any legal authority supporting its recovery of these fees from TAG. (See COMMET Memo. In Support at 25, n 11.) COMMET also does not

seek such fees on its counterclaims as pleaded. (See Amended Answer [Ex. 17 to Paulsen Aff.].) This claim will therefore be denied.[4]

COMMET's final claim in the main action is for sanctions based on TAG's failure to disclose its procurement of terrorism insurance at the time it was purchased. Although this failure has clearly not been satisfactorily explained, the court finds that it constitutes a breach of the lease rather than an independent basis for sanctions, which will accordingly be denied.

Claims in the Third-Party Action

In the third-party complaint, COMMET sought a declaration that it is not required by its loan agreement with GMAC to procure any insurance for the property, while GMAC counterclaimed for a declaration that based on TAG's failure to procure terrorism insurance, COMMET was obligated by the loan agreement to procure the insurance and that, upon its failure to do so, GMAC was entitled to procure the insurance and recover the cost from COMMET. The claims of the parties to this action have changed in light of the changed circumstances since this action was brought– namely, TAG's disclosure of its procurement of adequate terrorism insurance. GMAC does not claim that COMMET is currently obligated to procure terrorism insurance. Rather, it seeks a declaration that if TAG fails to maintain terrorism insurance in the future, COMMET will be obligated by the provisions of the loan agreement to maintain such insurance. (GMAC Memo. of Law In Support at 2; GMAC Memo. of Law In Further Support of GMAC's Motion and In Opp. to COMMET's Cross-Motion ["GMAC Reply Memo."] at 3-4.)

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[4]In view of the court's holding that COMMET is entitled to damages (other than attorney's fees paid to GMAC) under its counterclaims for breach of contract, the court does not reach COMMET's duplicative claims for damages under its fourth and fifth counterclaims for negligent misrepresentation and breach of the covenant of good faith and fair dealing, respectively.

GMAC's claim for declaratory relief is based on the following provisions of the parties' loan agreement, dated June 30, 1997 (Ex. 2 to Greaney Aff.): Section 8.1.1(a), which requires COMMET to cause TAG to procure insurance, provides:

> Borrower [COMMET] shall, at its sole cost and expense or prior to the occurrence of an Operating Event, shall [sic] cause the Master Lessee [TAG] at its sole cost and expense to, for the mutual benefit of Borrower and Lender [GMAC], keep the Property insured and obtain and maintain policies of insurance insuring against loss or damage by standard perils included within the classification 'All Risks of Physical Loss'.

Section 8.1.1(h) of the loan agreement further provides that "[a]fter the occurrence of an Operating Event and upon Lender's reasonable request, Borrower shall obtain insurance to satisfy the insurance requirements set forth in this Section 8.1.1." As defined in section 1.1, the term "operating event" means that "the Master Lessee defaults on any of its obligations under the terms and conditions of the Master Lease such that Borrower is entitled to assume obligations of the Master Lessee with respect to the control, operation and management of the Property."

GMAC argues that TAG is obligated by the TAG/COMMET lease to procure terrorism insurance and that, upon TAG's default in procuring such insurance, an "operating event" within the meaning of the loan agreement occurs, thus obligating COMMET to procure the insurance. (GMAC Memo. of Law In Support at 17.) In opposition, COMMET disputes that a mere default on TAG's part in purchasing terrorism insurance would constitute an operating event, and contends that it would not be "entitled to assume obligations of [TAG] with respect to the control, operation and management of the Property" until it took the steps required to terminate TAG's tenancy pursuant to Article 11 of its lease with TAG. (COMMET Memo. of Law In Opp. to GMAC's Motion and In Support of COMMET's Cross-Motion ["COMMET Memo. In Opp."] at

19-20; COMMET Reply Memo. of Law In Further Support of COMMET's Cross-Motion ["COMMET Reply Memo."] at 11.)

The parties have not submitted legal authority in support of their respective positions on whether an operating event may be found based on the mere occurrence of the default. This court therefore will not grant declaratory relief on the proper construction of the term operating event. In any event, the court need not reach the issue, as GMAC no longer seeks relief based on the actual occurrence of an operating event but instead seeks a declaration that the loan agreement requires COMMET to purchase terrorism insurance should an operating event occur in the future.

GMAC's request for declaratory relief also, however, includes a request for a declaration on the more basic issue of whether the loan agreement requires terrorism insurance to be maintained for the building – whether by TAG or, upon the occurrence of an operating event (however defined), by COMMET. GMAC contends that it needs declaratory relief on this issue because COMMET "has refused to concede that it has the obligation to ensure that [terrorism] coverage is maintained throughout the term of the Loan and the existing insurance is about to expire." (GMAC Reply Memo. at 10.) COMMET contends that such declaratory relief is both premature and non-justiciable.

In support of its claim of prematurity, COMMET argued that the loan agreement does not require COMMET to maintain any greater insurance than that which TAG is obligated to maintain under the TAG/COMMET lease, and that because TAG's obligation to procure terrorism insurance had not yet been determined, COMMET could not be held liable to procure such insurance if TAG did not. (COMMET Memo. In Opp. at 2, 18.) This argument is moot as a result of this court's decision determining that TAG is required to maintain terrorism insurance.

COMMET further argues that an operating event has not occurred because TAG has cured its failure to procure terrorism insurance. It also asserts that because an operating event may never occur, GMAC's claim for declaratory relief is non-justiciable. (COMMET Reply Memo. at 3.)

COMMET's claim of non-justiciability is unpersuasive. While focusing on the fact that an operating event may not occur in the future, COMMET ignores the central dispute between the parties as to whether the loan agreement requires terrorism insurance to be maintained (whether by TAG or by itself, upon the occurrence of an operating event). This dispute may recur, as TAG's policies for the building expire every year. On the authority cited in connection with COMMET's request for declaratory relief in the main action, GMAC's claim for a declaration on this issue therefore presents a justiciable controversy.

Although COMMET opposes a declaratory judgment memorializing that the loan agreement requires terrorism insurance, COMMET fails to raise a bona dispute in this regard. In its opposition to GMAC's motion and in the papers in support of its own motion for summary judgment dismissing GMAC's counterclaim, COMMET does not dispute that section 8.1.1(a) of the loan agreement requires COMMET to cause TAG to maintain terrorism insurance. COMMET also argues, and the court has held, that the TAG/COMMET lease requires TAG to procure such insurance. Indeed, COMMET does not contest the merits of GMAC's claim that the loan agreement requires terrorism insurance but instead, as noted above, rests on its contention that GMAC's claim for declaratory relief is premature and non-justiciable.

Significantly, moreover, COMMET's arguments throughout this litigation have been consistent with an acknowledgment – in fact, one that has sometimes been explicit – that the loan agreement requires maintenance of terrorism insurance, whether by TAG or COMMET. Thus, in

arguing the prematurity of GMAC's claim for declaratory relief, COMMET states that the requested declaration of COMMET's obligations "is wholly contingent on the outcome of the underlying action between ComMet and TAG," and that a determination that COMMET must maintain terrorism insurance "is necessarily contingent on whether TAG is in fact required to maintain terrorism insurance pursuant to the Lease." (COMMET Memo. In Opp. at 18.) In support of COMMET's motion for a preliminary injunction, Stephen Burger, Vice President of COMMET's real estate investment manager, represented that "under Section 8.1.1(h) of the Loan Agreement, the Landlord [COMMET] is required to maintain, in order to not default under the Loan Agreement, the same coverage as required of the Tenant under the Lease." (Burger Aff., ¶ 15 [Ex. 22 to Greancy Aff.].) COMMET also argues that it "has expended hundreds of thousand of dollars, in corresponding with TAG * * * to obtain copies [of] insurance policies, to confirm that TAG maintains policies of insurance as provided for under the Loan Agreement." (COMMET Memo. In Opp. at 18 [emphasis supplied].)

The court notes that COMMET argues, for the first time on a reply to which GMAC had no opportunity to respond, that even if an operating event occurs, the loan agreement does not by its terms require COMMET to maintain terrorism insurance. (COMMET Reply Memo. at 8-10.) This argument will not be considered by the court. Not only is the new argument improperly asserted on the reply (see Ritt v Lenox Hill Hosp., 182 AD2d 560 [1st Dept 19920. Accord Lumbermens Mut. Cas. Co. v Morse Shoe Co., 218 AD2d 624 [1st Dept 1995]), but it is wholly inconsistent with COMMET's position in all prior papers submitted on the motions that the loan agreement requires terrorism insurance.

The court accordingly holds that GMAC is entitled to a declaration that COMMET is

required, pursuant to section 8.1.1(h) of the loan agreement between GMAC and COMMET, after the occurrence of an Operating Event and upon Lender's reasonable request, to obtain insurance to satisfy the insurance requirements set forth in section 8.1.1 of the loan agreement, including insurance for losses caused by terrorism.

This constitutes the decision of the court. A separate order shall issue.

Dated: New York, New York
May 5, 2005

MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT