* * * INTERIM ORDER * * *

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

PRESENT: **Kornreich, Shirley Werner, J.** PART 54
Justice

PIER 59 STUDIOS L.P.

- v -

MODERN CONCRETE

INDEX NO. 601211/04

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 1 were read on this motion for: a default judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1,2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that the emergency portion of plaintiff's motion/defendant's cross-motion is decided in accordance with the annexed Interim Decision and Order.

SHIRLEY WERNER KORNREICH J.S.C.

Dated: January 31, 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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 54

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PIER 59 STUDIOS L.P.,

Plaintiff,

-against-

CHELSEA PIERS, L.P.,

Defendant.

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Index No.: 601211/04

INTERIM DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

This action was originally brought by plaintiff Pier 59 Studios L.P. ("Pier 59" or the "Sublessee") 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 sublessees, including Pier 59.

Pier 59 now moves, by order to show cause, to enjoin defendant from, inter alia, taking any steps to terminate plaintiff's Sublease or to exercise self-help, based on a Ten Day Notice to Cure letter, dated December 23, 2004. Pier 59 also seeks injunctive relief as to a Five Day Rent Demand, dated December 20, 2004; however, this portion of the relief sought will be addressed in a subsequent decision. The Court here will only consider the portion of Pier 59's motion that relates to the December Ten Day Notice to Cure. In support of its motion, plaintiff submits the affirmation of counsel and the affidavit of Darius Toraby, a registered architect, as well as copies of: the Five (5) Day Rent Demand, dated December 20, 2004 (the "Rent Demand"); the Ten Day

Notice to Cure, dated December 23, 2004 (the "December Notice to Cure"); the Court's Decision and Order, dated November 8, 2004 (the "Yellowstone Injunction"); the transcript of the Court's June 25, 2004 hearing, on Pier 59's original order to show cause, dated June 23, 2004; a Ten Day Notice to Cure, dated June 8, 2004 (the "June Notice to Cure"); pleadings; the affidavit of Federico Pignatelli, plaintiff's Chief Executive Officer, submitted with Per 59's contempt motion; the affidavit of Michael A. Braito, Senior Vice President of Chelsea Piers, originally submitted in opposition to plaintiff's motion to fix a bond amount; Chelsea Piers' Memorandum of Law in Opposition to Plaintiff's Motion to Fix Bond; and the Sublease, executed between plaintiff and defendant on or about October 27, 1994.

Defendant Chelsea Piers opposes plaintiff's motion and also cross-moves for injunctive relief, seeking an order modifying the Yellowstone Injunction and directing Pier 59 to remove the "two-story fabric building enclosing the exterior roof deck on [Pier 59's] premises[,]" and directing Pier 59 to pay all outstanding "rent" that it has withheld.[1] Defendant has submitted the affirmation of counsel and the unsigned affidavit of Michael A. Braito, its Senior Vice-President.[2]

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

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[1] As with plaintiff's motion, the Court will not, in the instant interim order, address the dispute over unpaid "additional rent."

[2] Although the Braito Affidavit is unsigned, the Court will consider its arguments, which are, more often than not, duplicative of arguments properly submitted, with signed affidavits, in support of various additional motions currently before the Court.

second floor of Pier 59, which it used as a fashion "photography studio, private dining facility, outside roof deck, and offices" (the "Premises"), paying a yearly rent of over $1.5 million. See Aff. of Federico Pignatelli at ¶¶ 3-5 (submitted in support of the June 23, 2005, Order to Show Cause, hereinafter "Pignatelli June Aff."). Plaintiff avers that, as the original occupant and developer of the Premises, it has invested over $20 million therein. Id. at ¶¶ 4, 5.

Sometime in 1999, Pier 59 erected a structure, apparently consisting of fabric and steel beams (the "Fabric Structure"), that presently stands on its premises. Subsequently, additions were added to the Structure. Although the exact nature, size, material and various other aspects of the Fabric Structure are disputed by the parties, the Court need not resolve these issues of fact in order to decide the issue before it.

Plaintiff contends that, with defendant's permission, it constructed a fabric "awning" on the deck of its premises (the "Deck"). Defendant admits that it gave plaintiff permission to construct an awning, but contends that the Fabric Structure, as it now exists, is far more extensive than the original awning. Moreover, the City of New York Department of Buildings (the "DOB") has determined, on December 17, 2004, that the Fabric Structure is in violation of Section 27-147 of the Administrative Code of the City of New York. See Notice of Violation, dated December 17, 2004. The DOB has issued a "Preemptory Vacate Order" (the "Vacate Order"), which states that "there is imminent danger of the life and safety of the occupants [of Pier 59], in that unsafe condition created by tent structure." (Emphasis supplied). On December 17, 2004, together with the Vacate Order, the DOB issued a "Notice of Violation and Hearing" containing the DOB's "Order to Correct Violations" (the "Notice of Violation"). The Notice of Violation was directed to Chelsea Piers, not Pier 59, and noted that the violation was

"hazardous." The Notice of Violation further stated that the remedy was to, "[i]f feasible file and obtain approval and permit /or remove illegal awning extension." Notice of Violation (Violation No. 34455351Y) (emphasis supplied). The word "Hazardous" was written in lieu of a cure date. See id.

On or about December 23, 2004, Chelsea Piers served Pier 59 with the December Notice to Cure, informing Pier 59 that it was in default of the Sublease for having "erected on the outdoor deck of the premises a fabric 'tent structure' without required permits and approvals, which structure constitutes an 'imminent danger of the life and safety of the occupants[.]'" December Notice to Cure. The December Notice to Cure further stated that "if the foregoing default is not cured on or before January 2, 2005 . . . the Landlord will exercise its right pursuant to paragraph 27 of the Sublease to cure such default." Id.

The "Use" clause of the Sublease provides that:

> If any governmental license or permit shall be required for the proper and lawful conduct of Sublessee's business in the Premises or any part thereof which arises from Sublessee's particular use of the Premises, Sublessee, at its expense, shall procure and thereafter maintain such license or permit and furnish a photostatic copy thereof to Sublessor upon Sublessor's request. Sublessee shall at all times comply with the terms and conditions of each such license or permit and shall operate such business in compliance with all applicable laws, rules, orders, ordinances, regulations and statutes.

Sublease at Paragraph 7(B) (emphasis supplied). The Sublease further provides, pursuant to Paragraph 27, that Chelsea Piers has the "Right to Cure Sublessee's Defaults," as follows:

> If Sublessee shall at any time fail to . . . perform any other obligation of Sublessee hereunder, then Sublessor shall have the right, but not the obligation, after 10 days' notice to Sublessee, or without notice to Sublessee in the case of any emergency . . . [to] perform such other obligation of Sublessee in such manner and to such extent as Sublessor shall deem necessary.

Id. at ¶ 27.

II. **Conclusions of Law**

Before addressing the voluminous, multiple motions submitted in this action, the emergency nature of the instant application militates in favor of a decision on the present injunction. The essential issue is whether the Fabric Structure poses a risk to the public and should be removed. While both sides dispute the feasibility of obtaining DOB approval for the Fabric Structure, the fact remains that the DOB has determined that the Fabric Structure as it now stands is in violation of the Administrative Code and is an "unsafe condition" which poses "imminent danger of the life and safety of the occupants[.]" See the Vacate Order; Notice of Violation. Nor is there any dispute that the remedy offered by the DOB is to either cure the violation or remove the Fabric Structure and that Pier 59 is unable to file the necessary permits.

Pier 59 argues that it cannot cure the violations by obtaining DOB approval for the Fabric Structure because defendant refuses to execute certain "documents required to be submitted to the Department of Buildings." Affidavit of Mathew E. Hoffman at ¶ 5. While the Appellate Division, First Department has held that "one who frustrates another's performance may not hold the frustrated party in breach of contract" (WPA/Partners LLC v. Port Imperial Ferry Corp., 307 A.D.2d 234, 237 (1st Dept. 2003), the issue here goes beyond the claimed breach of the Sublease and overlease. Apart from the question of breach, the Court is clearly confronted with a business entity who built a structure without the proper DOB permits, and whose structure is "hazardous" and of "imminenet danger of the life and safety of the occupants." Chelsea Piers' present refusal to sign documents for submission to the DOB does not affect these facts. The Fabric Structure should, therefore, be removed.

Additionally, Pier 59's motion for an additional Yellowstone injunction is denied. The December Notice to Cure does not contemplate terminating plaintiff's Sublease. See Dunwoodie

Communs. v. Noto, 225 A.D.2d 484 (1st Dept. 1996) (denying Yellowstone injunction where notice to cure did not involve termination of lease). Further, Pier 59 is not entitled to a preliminary injunction as it has not shown that it will be irreparably harmed by the removal of the Fabric Structure. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990) (Court may grant preliminary injunction where plaintiff shows "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in [its] favor") (emphasis supplied); CPLR § 6301. If, after litigation of this action, Pier 59 is successful and has suffered damages, its relief can be supplied via monetary damages, viz., the cost of reconstructing the Fabric Structure. See Zandman v. Nissenbaum, 53 A.D.2d 837 (1st Dept. 1976) (plaintiff cannot demonstrate "irreparable injury" where its relief can be rendered in money damages if plaintiff ultimately prevails); see also New York City Off-Track Betting Corp. v. New York Racing Ass'n, 250 A.D.2d 437, 442 (1st Dept. 1998).

Moreover, granting Chelsea Piers the relief it seeks will not violate the existing Yellowstone Injunction. The original Yellowstone injunction requires that plaintiff abide by the terms of the Sublease; continue to pay rent under the Sublease and its subsequent amendments; and post a preliminary injunction bond in an amount to be determined. It also enjoins defendant from "taking any action to cancel or terminate plaintiff's sublease" during the pendency of the action. Nothing in the original Yellowstone injunction restricts defendant's ability to exercise self-help pursuant to Paragraph 27 of the Sublease. Accordingly, it is

ORDERED that plaintiff's motion for injunctive relief is denied in its entirety; and it is further

ORDERED that defendant's motion to modify the existing Yellowstone Injunction is

granted to the extent that the Court will not prevent defendant Chelsea Piers from proceeding pursuant to the Sublease's Paragraph 27, by which Chelsea Piers may remove the Fabric Structure from Pier 59's premises; and it is further

ORDERED that the remainder of the instant motion is severed and will be decided at a later date.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 31, 2005
New York, New York

SHIRLEY WERNER KORNREICH