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

Kornreich

0601211/2004

PART 54

PIER 59 STUDIOS L.P.
vs
CHELSEA PIERS, L.P.

SEQ 2

DISMISS

INDEX NO. 601211/04

MOTION DATE 12/9/04

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for Dismiss

	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

is decided in accordance with the annexed decision and order.

FILED

APR 25 2005

NEW YORK
COUNTY CLERK'S OFFICE

SHIRLEY WERNER KORNREICH J.S.C.

Dated: 4/8/05

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 54

----------X

PIER 59 STUDIOS L.P.,

Plaintiff/Counter-Defendant,

Index No.: 114328/03

DECISION AND ORDER

-against-

CHELSEA PIERS L.P.

Defendants/Counter-Claimant

----------X

KORNREICH, SHIRLEY WERNER, J.:

This is an action originally brought by plaintiff Pier 59 Studios L.P. ("Pier 59") against Chelsea Piers, L.P. ("Chelsea Piers"), in connection with alleged overcharges under a sublease between the parties, executed on or about October 27, 1994 (the "Sublease"). See Compl. at para. 5. Chelsea Piers leases the Chelsea Piers complex located on the Hudson River from the State of New York, through its representative, the Hudson River Park Trust, which succeeded the State Department of Transportation as the agency designated Master Lessor by the State of New York. In turn, Chelsea Piers subleases portions of that space to its sublessees, one of whom is Pier 59.

Pier 59's complaint, dated April 27, 2004, alleged that Chelsea Piers overcharged it for various common charges and thereby breached the sublease, and committed fraud. Chelsea Piers counterclaimed, alleging that Pier 59 had been violating the terms of the sublease by "operating for commercial gain a 10,000-plus square foot restaurant and lounge in the subleased premises that is open to and admits the general public." Answer and Counterclaim, para. 30. The counterclaim further alleged that the restaurant and lounge were situated on an unapproved and

dangerous "wooden roof deck," and that Pier 59 had been operating the restaurant illegally by, inter alia, "selling alcohol without a liquor license... ." Id. at 31-32. Pier 59 served a First Amended Complaint, dated June 22, 2004, which added causes of action for breach of contract (in connection with a November 19 letter agreement between the parties), breach of implied covenant of good faith and fair dealing, and breach of quiet use and enjoyment.

I. Factual Background

A. The Sublease and Prime Lease

1. Permitted Uses

In October 1994, plaintiff and defendant entered into a ten-year Sublease, which incorporated by reference the lease agreement dated June 24, 1994, between Chelsea Piers and the New York State Department of Transportation ("Prime Lease"). Pursuant to the Sublease, and three amendments thereto, plaintiff subleased approximately 54,000 feet on the second floor of Pier 59, (the "Premises"), paying a yearly rent of over $1.5 million. Affidavit of F. Pignatelli at paras. 3-5 (submitted in support of the June 23, 2005, Order to Show Cause). Plaintiff avers that, as the original occupant and developer of the Premises, it has invested over $20 million therein. Id. at paras. 4, 5.

Article 7 of the Sublease provides, in pertinent part, that Pier 59

> shall use and occupy the Premises for the sole purpose of operating a first-class photography studio and private dining facility incidental thereto (which dining facility shall not exceed 3,000 square feet and shall be provided for the photography studios' clients, patrons and employees) or any other use relating to film, television and photography production, reproduction, distribution or processing, provided that at all times not less than seventy-five percent (75%) of the aggregate square footage of the Premises shall be used for photography studio and ancillary purposes, provided

> that ... ancillary purposes shall include fashion shows and promotional events and provided further that ... in 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. ... [Pier 59] shall comply with the certificate of occupancy relating to the Premises and with all laws, statutes, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governments and the appropriate agencies, officers, departments, boards and commissions thereof...
>
> If any governmental license or permit shall be required for the proper and lawful conduct of [Pier 59's] business in the Premises ... [Pier 59], at its expense, shall procure and thereafter maintain such license or permit and furnish a photostatic copy thereof to [Chelsea Piers]... . [Pier 59] 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.

Affidavit of D. Tewksbury in Support of Motion for Partial Summary Judgment (hereinafter "Tewksbury Aff., Oct. 27, 2004."), Exhibit A.

The Sublease prohibits Pier 59 from making any "alteration, addition, change, replacement or installation in or to the Premises without obtaining the prior written consent of [Chelsea Piers] in each instance." Tewskbury Aff. Oct 27, 2004, Ex. A. However, the Sublease specifically allows Pier 59 "to construct a roof deck not to exceed 180' x 22' in size ... provided the roof deck complies with all applicable building codes and all applicable laws and regulations and the design and method of construction is approved by Sublessor in writing." Id.

2. Termination for "Event of Default"

The Sublease provides for termination by Chelsea Piers if "an Event of Default has occurred [as defined in the Prime Lease] which shall include in each case the same rights to

notice and an opportunity to cure as are provided in the Prime Lease... ." Id., Ex. A. Under the Prime Lease, an "Event of Default" occurs if

> Lessee fails to observe or perform one or more of the other terms, conditions, covenants or agreements contained in this lease ... and such failure is not the result of Unavoidable Delays, and such failure continues for a period of thirty (30) days after notice thereof by Lessor to Lessee specifying such failure (unless such failure requires work to be performed, acts to be done, or conditions to be removed that cannot by their nature or by reasons of Unavoidable Delays be practicably performed, done or removed, as the case may be, within such thirty (30) day period, in which case no Event of Default shall be deemed to exist as long as Lessee commences curing the same within such thirty (30) day period and diligently and continuously, subject to Unavoidable Delays, prosecutes the same to completion... .

Tewskbury Aff., Oct 27, 2004, Ex. C at 153.

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., Ex. A at 18.

Finally, the Prime Lease provides for a maximum 60-day tolling period on an "Event of Default" if the Lessee contests a claimed default by "Dispute Resolution or legal proceeding" and requests a judicial order tolling its time to cure. Notwithstanding any such stay, if the Lessee "creates, in Lessor's opinion, a condition dangerous to public health or safety, then ... Lessor shall have the right to enter the Premises and cure the dangerous condition" at the Lessor's

expense, pending "ultimate resolution" of the issue. Tewskbury Aff., Oct 27, 2004, Ex. C at 157. Finally, the Prime Lease gives the Lessor the right to terminate upon any Event of Default that has gone uncured for 10 business days following Lessor's giving notice to cure the default. Id.

3. Common Operating Expenses ("CAM Charges")

Under Article 13 of the Sublease, Pier 59 is required to pay, as "additional rent," its "Proportionate Share of Common Operating Expenses." Tewksbury Aff., Oct 27, 2004, Ex. A at 7. The "Proportionate Share" is defined as 3.1% (with caps at $1.00 per square foot per annum during the first 5 years; and $2.00 per square foot thereafter, with certain annual increases connected with the Consumer Price Index ("CPI") beginning in the seventh year). Id. The common operating charges, denominated by Pier 59 as "CAM Charges," are defined as

> including, but not limited to the cost of cleaning, snow removal, trash removal, security, landscaping, decorations, pylon signs, lighting and other utilities, resurfacing, painting, supplies, policing, wages of personnel to implement such services, workmen's compensation insurance, payroll taxes, public liability and property damage insurance, insurance against vandalism and malicious mischief, taxes on the personal property of whatever nature and however described, charged or assessed, straight line depreciations of equipment and personal property, and [Chelsea Piers'] actual administrative and overhead expenses.

Tewksbury Aff., Oct 27, 2004, Ex. A at 8.

Pier 59 is also required under the Sublease to pay "electrical charges for electricity (which is to be provided on a submetered basis), payable at actual cost plus a 10% administrative/line loss surcharge." Id.

B. The November 19, 1996 Letter Agreement

By letter agreement dated November 19, 1996, the parties agreed that Pier 59 could,

during the term of the Sublease, use the premises for "'non-fashion' corporate and special events on the premises, which use falls outside of the use provision of the sublease." Id., Ex. B. In consideration of this additional use of the Premises, Pier 59 agreed to "pay Chelsea Piers 7.5% of the gross revenue generated to us by such events (in addition to any cost reimbursements to Chelsea Piers for security, cleanup, etc. or event referral fees earned pursuant to the November 20, 1995 letter agreement)." Id.

C. The "Fabric Structure"

Sometime in 1999, Pier 59 erected a structure, apparently consisting of fabric and steel beams (the "Fabric Structure") on the roof deck of the Premises. Subsequently, additions were made to the Structure. The exact nature, size, material and various other aspects of the Fabric Structure are disputed by the parties. Plaintiff contends that, with defendant's permission, it constructed a fabric "awning" on the roof deck of the Premises. 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 it authorized. Chelsea Piers' Executive Vice President David Tewksbury avers that Pier 59 constructed, without its approval, or the approval of the prime lessor, the NYC Buildings Department or the State of New York, a "massive two-story fabric building structure enclosing half the 4,000-square-foot roof deck." Tewksbury Aff., Oct. 27, 2004 at para. 20. Pier 59's attorney Howard Weiss affirms that Mr. Tewksbury's averment as to lack of approvals is "patently false." Affirmation of H. Weiss at para. 36. Mr. Weiss further avers that "a prior architect employed by Pier 59, William Fegan, did prepare plans that were filed with the Department of Buildings related to the canopy installation and the plans were approved." Id. Weiss admits that the approved plans did not "cover the

entirety of the work performed" and were never "signed-off" on, but contends that this circumstance is "by no means extraordinary," as demonstrated by the fact that the notice of violation issued by the Department of Buildings on June 24, 2004 (see infra, Part F) in connection with the Fabric Structure, does not call for its removal, but, rather prohibits its occupancy pending compliance with applicable codes. Id. Weiss affirms that Pier 59 has endeavored to correct the discrepancy by hiring a new architect and consultant, reinstating the previously filed and approved applications to the Building Department, and preparing new plans and application forms, which can be filed with the Department of Buildings upon approval by Chelsea Piers." Id. at paras. 40-42.

D. The June 8, 2004 "Notice to Cure"

By letter dated June 8, 2004, Chelsea Piers wrote to Pier 59 to address several operational issues that Pier 59 had raised previously, and to inform Pier 59 of "significant violations" of the Sublease. Affirmation with Allegations of Emergency of M. Hoffman ("Hoffman Emergency Aff."), Exhibit D. Chelsea Piers asked Pier 59 to consider the June 8 letter a "ten (10) day notice to cure all outstanding Sublease defaults," and as "revocation of special permission given under [the] November 19, 1996 letter." Id. The June 8 letter alleged that Pier 59 had (1) violated the 3,000-square foot maximum restriction for a private dining facility, as evidenced by an "advertisement" on Pier 59's website; and (2) created a roof deck that was not in compliance with the New York City building code, and not approved for occupancy or "public assembly" by Chelsea Piers or the New York City Building Department. Id. Furthermore, the letter alleged that "numerous illegal structures and improvements have been installed on the roof deck area without proper approvals or NYC Building Department permits." Id.

E. Motion for Yellowstone Preliminary Injunction

In response to the notice to cure, Pier 59 sought a Yellowstone injunction in order 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." Affirmation of M. Berkowitz at para. 3. Pier 59 represented that it stood willing and able to cure any breaches, if the Court so required. Id. at para. 5. The Court granted the injunction upon the condition that Pier 59 abide by the terms of the Sublease and continue to pay rent under the Sublease and its subsequent amendments. The Court's order enjoined Chelsea Piers, 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."

F. Department of Buildings and Fire Department Notices

On June 24, 2004, the City of New York Department of Buildings (the "DOB") issued a notice of violation to Pier 59.[1] Affidavit of D. Tewksbury in Opposition to Motion to Amend and Supplement the Complaint, Exhibit B. The notice appears to describe a "completely illegal occupancy," and a "permanent metal and fabric structure [that] has been erected w/o permits." Id. The notice requires that Pier 59 "discontinue illegal occupancy until such time that safety of occupants can be insured by compliance with required codes." Id.

On July 15, 2004, the New York City Fire Department issued three separate Vacate

[1]The notice is addressed to "Studio Caffe LLC" and "Pier 59 Studios (The Deck) c/o Federico Pignatelli." Due to its handwritten nature, and the quality of the copy submitted to the Court, the contents of the notice are not entirely clear. Studio Caffe LLC is a subsidiary of Pier 59, which operates the private dining facility; Pier 59 Studios is the name of the photography studio; "The Deck" is the name Pier 59 has used to describe its roof deck lounge.

Orders to Federico Pignatelli, as "owner" of Pier 59. The first Vacate Order directed Pignatelli to "discontinue use of open air patio structure until the following items are complied with: (1) provide Building Dept. Approval CO showing occupancy load for outside deck." Tewksbury Aff., Oct. 27, 2004, Ex. L. The second Vacate Order directed that Pignatelli "provide approval for floor plan for open outside deck showing maximum load of persons without tables and with tables and seating." Id. The third Vacate Order directed Pignatelli to "if applicable, provide public assembly permit from buildings dept. presented to Fire Commissioner or his/her rep. for examination and approval of open outside deck." Id.

Pier 59's attorney Howard Weiss affirms that after Pier 59's receipt of the Fire Department Vacate Orders, his firm "communicated with the Fire Commissioner, and thereafter dealt at length with Fire Department officals to resolve the concerns that led to the issuance of the vacate orders." Affirmation of H. Weiss at para. 22. Pier 59 then furnished to the Fire Department the affidavit of Mr. Pignatelli stating that Pier 59 would limit the use and occupancy of the "open air deck which is partially covered by a tent structure" as follows: "(a) no more than 74 persons will be permitted on the Deck; (b) the total number of persons on the Deck and elsewhere in the premises will not exceed the total number of persons permitted on the Premises by its Temporary Certificate of Occupancy issued by the City of New York Department of Buildings ('DOB'); and (c) food and beverages will not be served on the Deck. The Limited Deck Occupancy will be maintained by [Pier 59] until such time as the DOB authorizes the use of the Deck as a place of public assembly or otherwise permit the use of the Deck for more than 74 persons, in accordance with the applicable provisions of the New York City Building Code and any other applicable codes, rules and regulations." Weiss Aff., Ex. B. Mr. Weiss further

affirms that the Vacate Orders have been lifted, and that Pier 59 "has been allowed by the City to continue to use and occupy the deck area in accordance with the terms of [Pignatelli's] affidavit." Id. at para. 29.

On December 17, 2004, the DOB issued a Preemptory Vacate Order directing Pier 59 to vacate the "Tent structure, extension thereof, and open Pier Deck Area Only" due to "imminent danger of the life and safety of the occupants, in that unsafe condition created by tent structure." Hoffman Emergency Aff., Ex. B. On the same day, 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.

G. Second Notice to Cure

On or about December 23, 2004, Chelsea Piers served Pier 59 with a second Notice to Cure ("Second 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[.]'" Hoffman Emergency Aff., Ex. B. 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. Also, Chelsea Piers served Pier 59 with a "Five (5) Day Rent Demand" dated December 20, 2004.

H. Motion to Modify Preliminary Injunction

By order to show cause dated December 29, 2004, Pier 59 moved to modify the preliminary injunction to stay enforcement of the Second Notice to Cure and Five Day Rent Demand, or, alternatively, for a new Yellowstone injunction accomplishing the same. Chelsea Piers cross-moved for an injunction requiring Pier 59 to remove, or allow Chelsea Piers to remove, the Fabric Structure, and to pay Chelsea Piers its outstanding rent. In support of Chelsea Piers' cross-motion, Michael Braito, Chelsea Piers' Senior Vice President and General Manager for Property, averred that it was "not feasible [for Pier 59] to obtain permits for the fabric tent structure ... [because] the use for which the fabric structure was erected violates the Certificate of Occupancy for the premises and the structure violates the Sublease and the Master Lease of the Chelsea Piers [sic] because it was not and will not be approved by Chelsea Piers L.P. or the State of New York." Affidavit of M. Braito at para 3. In making this statement, Braito cited to a letter dated July 8, 2004 from the Hudson River Park Trust (the successor to the Department of Transportation as the representative of the State of New York, the prime lessor) addressed to David Tewksbury. See Tewksbury Aff., Oct. 27, 2004, Ex. N. In the letter, HRPT referred to the "reported use of Pier 59 Studios as a 'members-only outdoor lounge... ." Id. HRPT noted that such use "appears to be in violation of the June 24, 1994 Lease between Chelsea Piers L.P. and the State of New York," and stated that HRPT "fully support[s] [Chelsea Piers'] efforts to rectify the violations." Id. HRPT did not indicate in the letter that it would not approve any of Pier 59's plans.

Braito further averred that he is "a structural engineer licensed in the State of New York," and that "the work required to conform the structure to the Building Code is so extensive that the

structure would have to be removed and rebuilt." Braito Aff. at para. 3. Braito also admitted that Chelsea Piers had "communicated its concerns about the safety of the existing fabric structure to the DOB, which conducted a further inspection of the structure. Id. at para. 5. On the other hand, Pier 59's architect Darius Toraby averred that "the existing awning structure [was] safe," and that he had prepared plans to improve the structure, which could be filed with the Department of Buildings to obtain the necessary work permits, upon approval by Chelsea Piers. Affidavit of D. Toraby at paras. 4-5. Moreover, Pier 59's attorney Matthew Hoffman affirmed that "the original canopy (which will remain) was approved by [Chelsea Piers], the predecessor to the Hudson River Trust (the State Department of Transportation) and the Department of Buildings. Affirmation of M. Hoffman

Deciding only so much of the motions as concerned the Second Notice to Cure, and reserving for later decision the issues raised with respect to the Five Day Rent Demand, the Court denied Pier 59's motion in its entirety, and granted Chelsea Piers' cross-motion only to the extent of allowing Chelsea Piers to proceed, pursuant to the Sublease Paragraph 27, to remove the Fabric Structure from Pier 59's premises.

II. Motions

Now before the Court are Motion Sequence Nos. 2, 6, 7, 8 and 9, as described below.

A. Motion Sequence No. 2

Chelsea Piers moves pursuant to CPLR 3211(a) to dismiss the first cause of action in the First Amended Complaint, for breach of contract, to the extent it seeks damages outside the applicable statute of limitations, and to dismiss in their entirety the second (fraud), sixth (breach of implied covenant of good faith and fair dealing), seventh (breach of quiet use and enjoyment)

and eighth (attorney's fees) causes of action, and the demand for punitive damages. Chelsea Piers submits the affirmation of its attorney, together with copies of pleadings. In opposition, Pier 59 submits its memorandum of law. In reply, Pier 59 submits the affidavit of its CEO Federico Pignatelli.

B. Motion Sequence No. 6

Chelsea Piers moves for: (1) partial summary judgment on the first and third causes of action in its counterclaim; (2) preliminary and permanent injunctive relief (a) barring any operation of a public restaurant or bar on the premises and limiting Pier 59 Studios' use of the premises to the uses specified in paragraph 7(A) of the Sublease; (b) barring the sale of alcoholic beverages on the premises; and (c) compelling Pier 59 to remove from its premises all structures, equipment and improvements for which it has not obtained required permits and approvals from the New York City Department of Buildings, Chelsea Piers, or the State of New York, including the two-story fabric building enclosing the exterior roof deck on its premises. Chelsea Piers submits the affirmations of its attorneys, and the affidavit of its Executive Vice-President David Tewksbury, together with documentary evidence. In opposition, Pier 59 submits the affirmation of its attorney, the affidavits of its COO and CFO Deborah Jackson, restaurateur Jeffrey Hacker, its Catering and Special Events Manager Virgine Asatrian, Giusto Priola, the manager of its "exclusive private dining facility," its employee John Denota, together with documentary evidence. Chelsea Piers submits the reply affidavit of Mr. Tewksbury, together with further documentary evidence.

C. Motion Sequence No. 7

Pier 59 requests leave to amend and supplement its complaint, and submits the

affirmation of its attorney, together with documentary evidence. In opposition, Chelsea Piers submits the affirmation of its attorney, together with documentary evidence.

D. Motion Sequence No. 8

Pier 59 moves to fix the bond amount at $5,000, submitting the affirmations of its attorneys, and the affidavits of its employee Darwin Perez and architect Darius Toraby, together with documentary evidence. In opposition, Chelsea Piers submits the affidavits of its Senior Vice President and General Manager Michael Braito.

E. Motion Sequence No. 9

Pier 59 moves, by order to show cause, for a Yellowstone injunction staying and tolling the deadlines set forth in the Ten Day Notice to Cure dated December 23, 2004, and the Five Day Additional Rent Demand dated December 20, 2004, and permanently restraining Chelsea Piers from terminating the sublease, refusing to perform its obligations thereunder, taking any action to recover possession of Pier 59's space, including self-help, or otherwise interfering with Pier 59's use of its space. Pier 59 submits the Affirmation of its attorney and the affidavit of architect Darius Toraby, together with documentary evidence. In opposition, Chelsea Piers submits the affidavit of its Senior Vice President and General Manager Michael Braito, together with documentary evidence.

The Court will consolidate the foregoing motions for unitary disposition.

III. Conclusions of Law

A. Motion to Dismiss

The Court's task in a CPLR 3211 motion to dismiss is "to determine whether plaintiffs pleadings state a cause of action." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98

N.Y.2d 144 (2002). In making its determination, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Accord Campaign for Fiscal Equity, Inc. v. State of N.Y., 86 N.Y.2d 307, 318 (1995). Chelsea Piers argues that: (1) Pier 59's causes of action for fraud, and breach of implied covenant of good faith should be dismissed as duplicative of its breach of contract claims; (2) that the breach of contract claims are time-barred to the extent they accrued prior to April 27, 1998; (3) that the quiet enjoyment claim should be dismissed for failure to plead facts showing actual or constructive eviction; and (4) that the claims for attorney's fees and punitive damages should be dismissed as a corollary to the foregoing dismissals. As set forth below, the Court agrees in part, and disagrees in part.

1. Fraud

A claim of fraud is duplicative of a breach of contract claim, and therefore, should be dismissed, where "[t]he fraud alleged is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages." J.E. Morgan Knitting Mills v. Reeves Bros., Inc., 243 A.D.2d 422, 423 (1st Dept. 1997). Here, taking the facts as alleged in the complaint as true, and according Pier 59 the benefit of every possible favorable inference, Chelsea Piers: (1) overcharged Pier 59 for CAM Charges and electric charges based on "estimated" rather than actual expenses, including some expenses that were actually Chelsea Piers' responsibility to pay; and (2) used an improperly "overstated percentage" to calculate Pier 59's proportionate share, all in violation of the Sublease. Pier 59's fraud claim is simply that Chelsea Piers deliberately

misled Pier 59 by overcharging it, and providing invoices as to the overcharges. The Court concludes that Pier 59's fraud claim is based on the identical facts as its breach of contract claim, is not collateral to it, and, with the exception of punitive damages, does not allege any damages that would not be recoverable under breach of contract. Therefore, the cause of action for fraud is dismissed.

2. Breach of the Covenant of Good Faith and Fair Dealing

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. ... This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389 (1995) (citations and internal quotation marks omitted). A claim for breach of the implied covenant of good faith and fair dealing is subject to dismissal where it is "intrinsically tied to the damages allegedly resulting from a breach of the contract." Canstar v. J.A. Jones Constr. Co., 212 A.D.2d 452, 453 (1st Dept. 1995) citing Fasolino Foods Co. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992). Here, unlike the claim for fraud, Pier 59's claim for breach of the covenant of good faith and fair dealing is not duplicative of its breach of contract claim. The breach of covenant claim is alleged as a result of Chelsea Piers' "conduct ... in connection with the Subleases for the Studio and Suite 203, and the Special Events Agreement... ." Amended Complaint at para. 69. According Pier 59 every favorable inference, this allegation encompasses Chelsea Piers' conduct with respect to, inter alia, the permitted use of Pier 59's premises under the November 19, 1996 letter agreement, an issue necessarily beyond the scope of the CAM and electric charges. Therefore, Chelsea Piers' motion to dismiss Pier 59's claim for breach of the

covenant of good faith and fair dealing is denied.

3. Timeliness of Breach of Contract Claims

CPLR 213(2) imposes a six-year limitation period on breach of contract claims. "In New York, a breach of contract cause of action accrues at the time of the breach." Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993) (citations omitted). An exception lies where the "plaintiff has established that defendant's conduct and misrepresentations caused plaintiff to fail to interpose its breach of contract cause of action in a timely fashion. Defendant thus is estopped from asserting the Statute of Limitations as a defense to the breach of contract cause of action." Eagle Comtronics, Inc. v. Pico Prods., Inc., 256 A.D.2d 1202, 1203-1204 (4th Dept. 1998). It is undisputed that some of the alleged overcharges by Chelsea Piers occurred prior to April 27, 1998. Any such charges are, therefore, time-barred unless Chelsea Piers is estopped by the foregoing exception from asserting the statute of limitations as a defense. Pier 59 argues that the exception should apply because Chelsea Piers' misrepresentations caused the delay in discovering the breaches. The Court disagrees. As discussed above, Pier 59 has failed to allege facts sufficient to sustain a cause of action for fraud. Nor has it pled with particularity any "facts from which scienter may be inferred." See Giant Group, Ltd. v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dept. 2003) (dismissing fraud claim where defendant allegedly "knew or recklessly failed to discover certain improprieties in the financial statements of the corporate entity which defendants were purportedly to review on plaintiff's behalf"). Therefore, the Court concludes that Pier 59's breach of contract claim is time-barred with respect to any charges imposed on Pier 59 by Chelsea Piers prior to April 27, 1998, and is otherwise timely.

4. Breach of Covenant of Quiet Use and Enjoyment

A breach of the covenant of quiet enjoyment occurs where a tenant is physically ousted from the premises, or, by constructive eviction, where "a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended." Dinicu v. Groff Studios Corp., 690 N.Y.S.2d 220, 224 (1st Dept. 1999) (citation omitted). To show constructive eviction, a plaintiff must show that it was forced to abandon at least part of the premises "due to the landlord's acts in making that portion of the premises unusable by the tenant." Minjak Co. v. Randolph, 140 A.D.2d 245, 248 (1st Dept. 1988) (upholding constructive eviction claim where landlord's construction activities caused tenants to abandon use of music studio connected to their living quarters). Pier 59's First Amended Complaint alleges simply that Chelsea Piers' activities "were intended to and have denied Pier 59 the quiet use and enjoyment of" its Premises. In papers, Pier 59 argues that it was constructively evicted from its premises to the extent it was unable to use the roof deck for "Special Events" due to Chelsea Piers' wrongful prohibition of such events in a June 6, 2004 letter, a fact that is alleged in the First Amended Complaint. However, Pier 59 does not allege that it was physically ousted from, or abandoned, the Premises, or any portion thereof.[2] Therefore, the Court concludes that Pier 59 has not alleged facts sufficient to support a finding of constructive eviction–total or partial–and, therefore, the cause of action for breach of the covenant of quiet use and enjoyment is dismissed.

5. Attorney's Fees

It is undisputed that Section 22.12 of the Prime Lease provides for an award of costs, expenses, and reasonable attorney's fees, to either party to the Sublease which "successfully"

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[2]Indeed, any ouster was caused by the Department of Buildings, not by Chelsea Piers.

enforces "any of the covenants and provisions" of the lease, or prevails in an action "on account of" the same. See Tewksbury Aff., Oct. 27, 2004 at 165. Pier 59's cause of action for attorney's fees is, therefore, properly alleged.

6. Punitive Damages

"Although generally in breach of contract claims the damages to be awarded are compensatory, in certain instances punitive damages may be awarded when to do so would deter morally culpable conduct. The determining factor is not the form of the action but the moral culpability of the defendant, and whether the conduct implies a criminal indifference to civil obligations." Minjak, supra at 249-250 (citations, internal quotation marks omitted). Here, the Court cannot conclude, based only upon the First Amended Complaint, that Chelsea Piers' conduct did not "involve that degree of bad faith evincing a 'disingenuous or dishonest failure to carry out [the parties'] contract so as to justify the imposition of punitive damages." See Suffolk Sports Ctr. v. Belli Constr. Corp., 212 A.D.2d 241, 247 (1st Dept. 1995). Therefore, Pier 59's demand for punitive damages shall not be dismissed at this stage in the proceedings.

B. Motion for Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the movant makes out a prima facie case, the opponent must come forward and "lay bare his proofs" of any alleged triable issues of fact. See In re Dissolution of Rencor Controls, Inc., 263 A.D.2d 845 (3rd Dept. 1999) citing Hanson v. Ontario Milk Producers Coop., Inc., 58 Misc.2d 138 (Sup.Ct. Oswego County 1968)

(Aronson, J.). Chelsea Piers argues that it is entitled to partial summary judgment on its counterclaims for breach of contract and preliminary and permanent injunctive relief. Specifically, Chelsea Piers argues that Pier 59 has violated the Sublease and/or Prime Lease by: (1) "operating for commercial gain a 10,000-plus square-foot restaurant and lounge ... that is open to and admits the general public, and at which alcoholic beverages are sold"; (2) "operating a restaurant at which liquor is sold in premises that are not designed or certified for any enclosure, public assembly or occupancy"; and (3) making "improvements and alterations to the roof deck and to other elements of the subleased premises ... that place life and property in imminent and continuing danger, and that are illegal and unapproved by Chelsea Piers, the HRPT or by government agencies charged with inspecting, reviewing, and approving such alterations, improvements, and uses."[3]

Pier 59 contends that summary judgment should be denied because inter alia, (1) Pier 59 has made diligent efforts to cure any violations, which efforts have been frustrated by Chelsea Piers; (2) there is no "blanket prohibition" against serving alcohol in the Sublease, which is demonstrated by Chelsea Piers' officers "purchasing drinks for eight years" at Pier 59's premises;

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[3]Chelsea Piers alleges that the unapproved improvements include, but are not limited to: "(a) Expansion of the open-air shade structure contained on the roof deck by adding permanent structural steel framed roof areas, and installing fabric building walls in an effort to create a permanent enclosed bar and lounge space; (b) Installation and erection of a wood wall around the perimeter of the deck; (c) Installation of two wet bar areas in the illegal fabric building and on the open deck area; (d) Installation of exterior electrical feeds for exterior refrigeration within the unapproved tent structure and on the open deck area; (e) Installation of two HVAC ducts through the exterior wall along the south side of the building into the tent structure; (f) Installation of exterior electrical feeds for exterior lighting within the illegal fabric building structure and open deck area; and (g) Installation of illegal waste lines with unauthorized and non-code-compliant connections to non-Pier 59 Studios waste vent piping outside of Pier 59 Studios' leased premises."

(3) Chelsea Piers' "involvement and approval in the construction of the canopy," and addition thereto, constituted waiver of the violations and/or oral modification of the Sublease, and constitutes grounds for estoppel. Memorandum of Law in Opposition to Motion for Injunction and Summary Judgment, p. 26-27. Pier 59 further argues that Chelsea Piers has acted in bad faith by frustrating its efforts to bring its premises into compliance, and by inappropriately using its influence with various municipal agencies. For the reasons that follow, the Court concludes that triable questions of fact are raised precluding summary judgment.

1. Alleged Operation of Commercial Public Restaurant and Lounge in Violation of the Sublease's Use Restrictions

Where contract interpretation is required to decide a summary judgment motion, interpretation of the written instrument generally is considered the province of the Court, unless "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." Hartford Accident & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 172 (1973). Here, the Sublease allows for the operation of a "private dining facility incidental [to the photography studio] ... which dining facility shall not exceed 3,000 square feet and shall be provided for the photography studios' clients, patrons and employees... ." Tewksbury Aff., Oct 27, 2004, Ex. A at 5. As a threshold matter, the parties dispute whether the Sublease imposes a blanket prohibition on serving alcohol on Pier 59's premises. The Court concludes that it does not. Paragraph 7(A) of the Sublease, a provision which does not stand out as a paragon of clarity, specifically permits use for "ancillary purposes" additional to the primary purpose, i.e., operating a first class photography studio... ." Id. Paragraph 7(A) further provides that such ancillary purposes "shall include fashion shows

and promotional events" but "in 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.

While a facial ambiguity exists in Sublease paragraph 7(A) as to whether the prohibition on "events at which alcoholic beverages are sold..." applies to the operation of a "private dining facility" as well as to the permitted "ancillary uses," the Court concludes that the prohibition applies only to ancillary uses. The fact that the prohibition appears in a series of three types of "events" suggests that it was intended to apply to ancillary uses, which are defined as "fashion shows and promotional *events,*" id. (emphasis added), and not to the regular operation of a private dining facility. See Atwater & Co. v. Panama R. R. Co., 246 N. Y. 519 (1927) (particular words in contract should be construed in context). Moreover, ambiguities in the contract should generally be construed against Chelsea Piers, the drafter of the instrument. See Guardian Life Ins. Co. v. Schaefer, 70 N.Y.2d 888, 890 (1987).

In contrast, the operation of a public dining facility on more than 3,000 square feet of Pier 59's Premises would clearly violate the terms of the Sublease. Here, a question of fact is raised as to whether "The Deck," Pier 59's restaurant/lounge, was operated as a public dining facility. The various press accounts of the venue submitted by Chelsea Piers strongly suggest that the facility was open to the public. See Tewksbury Aff., Oct. 27, 2004, Exs. E-H. On the other hand, Pier 59 submits several affidavits attesting to the fact that The Deck was a private establishment, which admitted guests only if they were "a client, patron or employee or affiliated

with a client, patron, or employee." See Affidavit of F. Pignatelli at para. 19; Affidavit of J. Hacker at para. 4. Chelsea Piers submits no direct evidence that The Deck was open to the public, or that it operated on more than 3,000 square feet of Pier 59's premises. Moreover, Chelsea Pier's allegation that Pier 59 violated the 3,000-square-foot restriction in the Sublease is premised entirely on the same press clippings, as well as a printout from the website for The Deck, which describes the venue as "an exclusive restaurant and lounge at Pier 59 Studios, featuring an expansive 7,000 square-foot outdoor deck and 4,500 square-foot indoor space atop the Hudson River." Tewksbury Aff., Oct. 27, 2004, Ex. D. This evidence is insufficient to establish as a matter of law that Pier 59 was operating a public dining establishment on more than 3,000 square feet of its Premises.

2. Alleged Operation of Restaurant at Which Liquor is Sold in Violation of The Certificate of Occupancy and Without Proper Public Assembly Permits

a. Certificate of Occupancy

Chelsea Piers argues that "the second-floor roof deck is not certified for *any* occupancy, and access from the 4,000-square-foot roof deck to fire exits is only available through the adjoining interior studio and dining facility space, the maximum occupancy of which is limited to 53 persons and 24 persons respectively." Tewksbury Aff., Oct. 27, 2004 at para. 21 (emphasis in original). Chelsea Piers argues that these occupancy restrictions are evidenced by the "Alt. 1 drawings for Pier 59 Studios' premises which form part of the Certificate of Occupancy for the Chelsea Piers filed with the NYC Buildings Department." Id., Ex. J. At the bottom of the "Alt. 1 drawing" submitted by Chelsea Piers is a legend stating "Alt. 1 drawing showing occupancy restrictions of premises occupied by Pier 59 Studios on file with the NYC Department of

Buildings." See id.

Not disputing the authenticity of Chelsea Piers' "Alt. 1 drawings," Pier 59 submits a copy of a document entitled "Certificate of Occupancy" for the premises located at "North River 59, 60, 61, 62," which was "obtained on November 24, 2004 through the on-line database maintained by the Department of Buildings knows as the Building Information System ('BIS')." Weiss Aff. at para. 10 & Ex. A. Pier 59's attorney affirms that the certificate of occupancy "covers the entirety of the Chelsea Piers complex, including Piers 59, 60, 61 and 62." Id. at para. 10. Mr. Weiss affirms that "with respect to Pier 59's premises, the certificate authorizes photo studios with accessory uses, a restaurant, kitchen and offices. The maximum occupancy for the photo studios and accessory uses is 300 persons." Id. at para. 11. At page 7 of the document, the page Mr. Weiss points to as applicable to Pier 59's premises, there is an indication that occupancy of the "Photo Studios w/ Accessory Uses" is limited to a maximum of 300 persons; the "Restaurant" is limited to a maximum of 24; the "Kitchen" is limited to a maximum of 3; and the "Offices" is limited to a maximum of 41. See id., Ex. A. Mr. Weiss further avers that the "deck" appurtenant to Pier 59's space is not separately listed on the certificate of occupancy because, like all of the other "deck areas" at the Chelsea Piers complex, it is encompassed as an "accessory use" to the principal use to which it is attached, i.e., the operation of the photography studio. Chelsea Piers does not dispute the authenticity of the "Certificate of Occupancy" submitted by Pier 59. Based on the foregoing, the Court concludes that a question of fact is raised as to whether the outdoor deck was approved under the certificate of occupancy as an "accessory use" to the of the photography studio, whether that would include use of the deck for a private dining facility, and what the occupancy limit for such use would be.

b. Place of Assembly

New York City Administrative Code Section 27-232 defines place of assembly as:

> An enclosed room or space in which seventy-five or more persons gather for religious, recreational, educational, political or social purposes, or for the consumption of food or drink, or for similar group activities or which is designed for use by seventy-five or more persons gathered for any of the above reasons, but excluding such spaces in dwelling units; or an outdoor space in which two hundred or more persons gather for any of the above reasons or which is designed for use by two hundred or more persons gathered for any of the above reasons.

NYC Administrative Code § 27-232.

Chelsea Piers alleges that Pier 59's use of the Premises violated the temporary public assembly permits that "Pier 59 had obtained, often with misleading applications, from the Buildings Department." Tewksbury Aff., Oct. 27, 2004 at para. 22. As evidence of this, Chelsea Piers points to the June 24, 2004 DOB notice of violation. See id., Ex. K. The notice refers to "operation of place of assembly" but is partially illegible as to the specific violation in that respect. Chelsea Piers has not submitted any copies of the allegedly "misleading applications" for temporary public assembly permits, nor described those in any detail.

Pier 59 contends that:

> the Pier 59 deck area should not be considered a Place of Assembly no matter how many people are permitted on the deck. This is based on the fact that the deck is accessory to the photo studios, which fall under Building Code Occupancy Group E. Only specific occupancy group classifications established by the Building Code are deemed to be public assembly spaces when more than 74 persons are permitted on the premises, and Occupancy Group E is not one of them.

Weiss Aff. at para. 24.

Chelsea Piers has not specifically addressed Pier 59's argument with respect to whether the deck area should be considered a "place of assembly" pursuant to Administrative Code Section 27-232. The Fire Department Vacate Orders suggest that the Fire Department believed it should, and, indeed, Pier 59 has agreed to limit use of the space to 74 persons pending resolution of the issue. Nor is there any evidence on the record as to the number of people that were present on the roof deck at any given time. Under the circumstances, the Court concludes that summary judgment is inappropriate as to whether Pier 59's use of the roof deck violated the requirements for public assembly permits.

c. Allegedly Illegal, Unapproved and Dangerous Improvements

It is undisputed that the 1999 construction of the roof deck was approved by Chelsea Piers. It is, rather, the construction of a "Fabric Structure" partially covering the deck, and additions thereto, that are now in dispute. Chelsea Piers argues that Pier 59's construction was unapproved, illegal and dangerous. As described above, Pier 59 does not dispute that the Fabric Structure, as constructed, has not been approved by Chelsea Piers or HRPT, and is not in compliance with applicable codes. However, Pier 59 represents that it stands ready willing and able to bring the structure into compliance, but has been impeded by Chelsea Piers' refusal to grant its approval, thus stifling the process of obtaining the necessary work permits from the DOB. According to Pier 59, Chelsea Piers' refusal to approve of the new plans was unreasonable, and in retaliation for Pier 59's prosecution of this action.

Chelsea Piers further contends that the Fabric Structure is dangerous and must be removed. For example, Chelsea Piers cites the occurrence of "one accident" on December 6, 2003, where "an employee of Pier 59 Studios attempting to clean snow off the roof of the fabric

building structure slipped and fell through the skylight on the roof deck, falling approximately 50 feet and nearly killing himself." Tewksbury Aff., Oct. 27, 2004 at para. 24. Tewksbury further affirms that "the manufacturer of the fabric building structure, Tenta Inc. of Montreal, Quebec, is also concerned about possible injuries and potential liabilities, and has demanded that Pier 59 Studios allow it to remove the structure." Id. The fact that a Pier 59 employee was injured while working on the roof is insufficient to establish that the Fabric Structure is incapable of being made safe. Moreover, a letter dated October 22, 2004 to Pier 59 from Tenta, the company that installed the Fabric Structure, a copy of which is submitted by Chelsea Piers, suggests that the reason Tenta offered to "remove the enclosure and place the parts in a location of your choosing," is that Chelsea Piers sent Tenta a letter indicating that it had not approved the structure, thus putting Tenta "at risk" of liability. Reply Affidavit of D. Tewksbury, Dec. 7, 2004, Exhibit G.

As discussed, supra, the covenant of good faith and fair dealing is implicit in all contracts, and therefore binds both parties here. See Dalton, supra. This covenant imposes a requirement of acting reasonably so as not to "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Id. at 389. Moreover, "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). Considering that the Sublease, and applicable provisions of the Prime Lease, provide ample opportunities to cure alleged lease violations, and Pier 59 has submitted evidence of its intention, and substantial efforts, to cure the lease violations alleged by Chelsea Piers, question of fact are raised as to: (1) whether the Fabric Structure can feasibly be brought into compliance; and (2)

whether Chelsea Piers' unreasonably, and in bad faith, refused to approve anything short of removal of the structure, frustrated Pier 59's performance of its obligations under the Sublease, and/or improperly attempted to influence municipal agencies. For the foregoing reasons, summary judgment is denied Chelsea Piers as to its causes of action for breach of contract.

d. Waiver, Oral Modification, Estoppel Arguments

"[U]nder New York law, the establishment of a waiver, requiring the intentional relinquishment of a known right, is ordinarily a question of fact which precludes summary judgment. Boston Concessions Group v. Criterion Ctr. Corp., 200 A.D.2d 543, 545 (N.Y. App. Div., 1994) (citations omitted). Here, there is no evidence that Chelsea Piers' conduct constituted a waiver, or that the Sublease was orally modified in any respect. The fact that Chelsea Piers' management employees frequented Pier 59's facility is not sufficient to establish the "relinquishment of a known right" under the Sublease; nor does Pier 59 submit any evidence of any "partial performance unequivocally referable" to any oral modification of the Sublease. See Rose v. Spa Realty Associates, 42 N.Y.2d 338, 343 (1977).

e. Injunctive Relief

In order to obtain temporary injunctive relief, a party must demonstrate: "(1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities." W. T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517. Chelsea Piers seeks a preliminary and permanent injunction barring: (1) "any operation of a public restaurant or bar" on Pier 59's premises; (2) sale of alcoholic beverages on the premises; and (3) requiring Pier 59 to remove all "structures, equipment and improvement for which it has not obtained required permits and approvals... ." Affirmation of R. Greathead at para. 5. Except

as to the "operation of a public restaurant or bar," Chelsea Piers has failed to meet its burden.

The Sublease clearly prohibits the operation of a "public restaurant or bar" on Pier 59's premises, but does not include a blanket prohibition on the sale of alcohol. Therefore, Pier 59 shall be preliminarily enjoined from running a "public restaurant or bar" on its premises, but shall not be prohibited from selling alcohol on its premises, provided it is done in compliance with the use provisions of the Sublease. On the other hand, as Pier 59 has pointed out, the Fabric Structure has been in existence for several years. The precipitating factor to Chelsea Piers' demand for imminent removal of the structure appears to have been the notices issued by the DOB in June and December of 2004. However, none of those notices require the removal of the structure, provided that it can be brought into compliance with applicable codes, which Pier 59 has represented it is prepared to do. Moreover, Pier 59 is cooperating with the DOB in its use of the structure. As discussed above, questions of fact are raised as to whether Chelsea Piers' conduct in refusing to approve Pier 59's efforts to cure the alleged violations was reasonable and in good faith. Under the circumstances, Chelsea Piers has not demonstrated its entitlement to a preliminary injunction requiring the removal of any structures on Pier 59's premises.

C. Motion to Amend

Pier 59 moves to amend its complaint to add factual allegations as to, inter alia, "Emergency Exit Door/Putting Green," "Ground Floor Entrance," "Access/Egress Road," "Parking," "Suite 203," "Loading Dock," "Special Events," "Change of Occupancy," "Substructure and Superstructure of Pier 59," "CPLP's Special Event Parking," and "Temporary Public Assembly Permits"; and a cause of action for reformation of one of the amendments to the Sublease. Pier 59 argues that despite the addition of factual allegations, certain of which are

"very, very recent," its "theories and causes of action remain largely the same." Affirmation of M. Hoffman, Nov. 16, 2004 at paras. 3-4. Pier 59 submits a proposed Second Amended and Supplemental Complaint. Id., Ex. A. In opposition, Chelsea Piers argues that "none of these newly asserted grievances, even if they had some basis in fact, amounts to a breach of the Sublease, material or otherwise, and virtually all of them were admittedly known to Pier 59 Studios at the time it served and filed the original and first amended complaints." Affidavit of D. Tewksbury in Opposition to Motion to Amend and Supplement the Complaint, para. 2.

Leave to amend pleadings "shall be freely given" absent prejudice or surprise resulting from the delay. See Leibowitz v. Mt. Sinai Hosp., 296 A.D.2d 340 (1st Dept. 2002). Chelsea Piers has not shown that it would be unfairly surprised or prejudiced by the addition of factual allegations to Pier 59's complaint in connection with grievances related to the same contractual relationship that form the basis of this action. Indeed, the voluminous submissions now before the Court reveal a relationship that has become contentious and difficult on many fronts. The Court concludes that the resolution of all of the outstanding issues between the parties in one proceeding would be in the best interest of the parties and the court system. Therefore, Pier 59's motion is granted. However, Pier 59's Second Amended Supplemental Complaint is improper because it includes several causes of action which have been dismissed pursuant to this decision. Therefore, the Court grants Pier 59 leave to serve a second amended complaint consistent with this opinion.

D. Motion to Modify Preliminary Injunction and Motion to Fix Bond Amount

1. Five Day Rent Demand

In its previous order dated January 31, 2005, the Court ruled on the parties' motions for

injunctive relief (Motion Sequence No. 9) only insofar as concerned the Ten Day Notice to Cure, and reserved for later decision the issue of the Five Day Rent Demand, which the Court will now consider. Chelsea Piers' "Five (5) Day Rent Demand," dated December 20, 2004 states that Pier 59 is indebted to it in the amount of $194,126.06 "for Additional Rent." Hoffman Emergency Aff., Ex. A. The letter further demands payment by December 31, 2004, or surrender of the premises; failing either, the letter indicates that Chelsea Piers will "immediately commence a summary proceeding seeking possession of the Premises... ." Id. An attachment to the letter indicates that the entire amount sought is for "Past Due Electric," "Past Due Elevator," and "Electric" charges. Id. Pier 59's attorney affirms that the charges represent "electric and elevator charges going back two years," and that Pier 59 has paid and continues to pay the monthly base rent in full as it comes due... ." Id. at para. 28. Pier 59 contends that these charges are "wrong," that "some have been paid," that "some are based on [Chelsea Piers] getting a discount rate from Con Ed and, then with no basis in the Sublease, charging Pier 59 at a nondiscounted rate." Hoffman Emergency Aff. at para. 31. Pier 59 further argues that the charges that are the subject of the demand are the very same charges that are in dispute in this action. Chelsea Piers does not dispute these arguments. Therefore, the Court will grant Pier 59's motion for a preliminary injunction temporarily staying and tolling the December 31, 2004 deadline set forth in the Five Day Rent Demand during the pendency of this action.

2. Motion to Fix Bond

In its decision and order dated November 8, 2004, the Court directed Pier 59 to "post a preliminary injunction bond in an amount to be determined upon the service and filing of a motion by plaintiff to fix the bond amount within fifteen days of the entry of this decision." In so

moving, Pier 59 argues that no bond is required, or alternatively, if a bond is required, the amount should be set at $5,000. Chelsea Piers argues that "a substantial bond is necessary to protect Chelsea Piers' interests," and that "a bond of $400,000 or more would be rationally related to the damages Chelsea Piers might suffer if the Court later determines that it is not entitled to injunctive relief.

CPLR 6312(b) provides that the amount of an undertaking shall be "fixed by the court," in its discretion. See Blueberries Gourmet, Inc. v. Aris Realty Corp., 255 A.D.2d 348, 350 (2nd Dept. 1998) (trial court did not abuse its discretion where it set bond at amount "rationally related to the amount of potential damages the defendants established that they might suffer."). Pier 59 argues that no bond is necessary "in view of the considerable value already invested by [Pier 59] in improvements on the property." See WPA/Partners LLC v. Port Imperial Ferry Corp., 307 A.D.2d 234, 237 (1st Dept. 2003). Chelsea Piers contends that, even if Pier 59 has invested substantial sums in its leasehold, the improvements it has made are actually hazards, posing a significant liability risk to Chelsea Piers. The Court concludes that Pier 59 shall post an undertaking in the amount of $195,000.00, an amount commensurate with the amount of additional rent charges demanded in the Five Day Rent Demand. This amount is rationally related to Chelsea Piers' potential damages, should this issue be determined in Chelsea Piers' favor. Accordingly, it is

ORDERED that the motion to dismiss pursuant to CPLR 3211 of defendant Chelsea Piers L.P. is granted to the extent that plaintiff's causes of action for fraud, breach of the covenant of quiet enjoyment, and breach of contract only with respect to any charges imposed on Pier 59 by Chelsea Piers prior to April 27, 1998, are severed and dismissed; and the remaining causes of

action for breach of contract, breach of the covenant of good faith and fair dealing, punitive damages, and attorney's fees shall continue; and it is further

ORDERED that defendant Chelsea Piers L.P.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that plaintiff Pier 59's motion to amend its complaint is granted, and plaintiff may serve upon defendant a second amended complaint within 20 days hereof, provided that such second amended complaint shall not include any causes of action dismissed in this decision and order; and it is further

ORDERED that plaintiff Pier 59 Studios L.P.'s motion to modify the Yellowstone injunction previously issued by this Court by its Decision and Order dated November 8, 2004, is granted to the extent that the "Five (5) Day Rent Demand" dated December 20, 2004, is stayed and tolled during the pendency of this action; and it is further

ORDERED that plaintiff Pier 59 Studios L.P.'s motion to fix bond is granted to the extent that the bond is fixed at $195,000.00, and plaintiff shall post such amount within twenty (20) days of service of a copy of this order with notice of entry.

The foregoing constitutes the Decision and Order of the Court.

Date: April 8, 2005
New York, New York

SHIRLEY WERNER KORNREICH