

**Kaygreen Realty Co. v IG Second Generation
Partners, L.P.**

2005 NY Slip Op 30514(U)

August 29, 2005

Supreme Court, Queens County

Docket Number: 13633/03

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X
KAYGREEN REALTY CO.,

Plaintiff,

Index No.: 13633/03

Motion

Dated: July 12, 2005

-against-

Cal. No.: 33

IG SECOND GENERATION PARTNERS, L.P. and
I BLDG CO., INC.,

Defendants.

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The following papers numbered 1 to 17 read on these motions by plaintiff for summary judgment, and the cross-motion by defendants for summary judgment pursuant to CPLR § 3212.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits, Memo.....	1-5
Notice of Cross-Motion, Affirmation, Exhibits, Memo..	6-10
Reply Affirmation, Exhibits, Memo.....	11-14
Reply Affirmation, Exhibits.....	15-17

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Plaintiff commenced this action for a declaratory judgment that it had not defaulted on its lease with defendants. Plaintiff, the commercial tenant of defendants, received a notice of violations and demand to cure on March 13, 2003. Plaintiff later received a notice of default on April 4, 2003 and subsequently commenced this action. Plaintiff also moved for a Yellowstone injunction, which was granted on September 16, 2004, along with an undertaking of \$369,501.

Plaintiff moves for summary judgment, arguing that as a matter of law it is not in default of the lease. Plaintiff seeks leave of the court for its late motion, arguing that it waited

until the Building Department records reflected the dismissal of all violations before making its motion. Plaintiff also has good cause for the delay because it waited for defendant to schedule discovery before making the motion. Once the violations were dismissed and defendant failed to timely schedule discovery, plaintiff proceeded with this motion. Plaintiff argues that its motion should be granted because it cured all violations listed in defendants' notice to cure. Plaintiff presents records from the Building Department to confirm the violations cited by defendants were dismissed. Plaintiff hired lawyers to represent defendants in the personal injury matters, in accordance with the lease. Plaintiff also named defendants as additional insureds on its insurance policy prior to defendants' notice to cure. Plaintiff further argues that there were no acts of waste regarding the elevators, as plaintiff was permitted to deactivate one elevator pursuant to the lease. Plaintiff submits an affidavit of merit from Robert Fisher, a partner in plaintiff's company, to confirm that all violations were cured. Plaintiff also submitted in its reply an affidavit from Robert Olshever, a certified construction inspector, who rebutted defendants' arguments that the property was in disrepair and in improper condition.

Plaintiff opposes defendants' cross-motion for summary judgment, arguing that defendants improperly raise new complaints for which they did not send a notice to cure. Plaintiff argues that any problems with the working elevators will be cured and were also not subject to any new notice to cure. Plaintiff also alleges in its reply papers that defendants are not the proper landlords, as the property owners are Irving and Sol Goldman. Plaintiff challenges the validity of any deed declaring defendants as owners, and also claims that defendants waived discovery.

Defendants oppose plaintiff's motion and cross-move for summary judgment. Defendants argue that plaintiff's motion is untimely and without good cause, as plaintiff waited for two years to allegedly cure the violations after receiving defendants' notice. Defendants argue that plaintiff's motion should be denied, as there are issues of fact regarding plaintiff's maintenance of the premises that should be decided by a trier of fact. Defendants present affidavits from Albert Stanton, a supervisor at Servitech Elevator Co., Keitaro Nei, an architect, and Sara Nieves Fontanet, defendants' commercial property manager. They inspected the premises and found them in severe disrepair with numerous code violations. Defendants argue that plaintiff's deactivation of elevator 1738 was improper and in violation of the lease requiring adequate maintenance and repair of the premises. Defendants' experts also inspected the two working elevators and found them in severe disrepair. Plaintiff's failure to repair and maintain the elevators qualify as waste

and will result in significant cost to defendants. Since plaintiff failed to cure the violations regarding the elevator, it is not entitled to summary judgment and the Yellowstone injunction should be vacated. Plaintiff has had over two years since receiving the notice of default, yet failed to comply with the lease and cure the violations. Plaintiff also failed to submit current insurance policies listing defendants as additional insureds, in violation of the lease. As plaintiff wilfully failed to cure the violations, defendant is entitled to summary judgment and dismissal of plaintiff's complaint. Should the summary judgment motions be denied, this Court should permit defendant the opportunity to receive discovery it previously demanded.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

This Court finds that there are numerous issues of fact that preclude a finding of summary judgment for either plaintiff or defendants. (See *Somekh v. Ipswich House, Inc.*, 81 AD2d 662 [2nd Dept. 1981]; *Garland v. Titan West Associates*, 165 AD2d 782 [1st Dept. 1990].) Specifically, there are issues of fact with regard to violations on the property. While plaintiff presents evidence from the Department of Buildings that the violations have been dismissed, defendants present evidence from expert witnesses that the premises continue to have numerous violations. There is evidence that the ceiling in the furniture store may be in a loose and dangerous condition and that the elevators are not in proper working condition. There are also issues of fact as to whether plaintiff's insurance policy includes defendants as additional insureds. Plaintiff claims that defendants are not the rightful landlords, but defendants present evidence that the property was transferred from the Goldmans to defendants by deed. As plaintiff challenges the legitimacy of the deed, that also raises an issue of fact to be resolved at trial.

Defendants' motion to vacate the Yellowstone injunction is denied. Defendants failed to demonstrate as a matter of law that

plaintiff had not in good faith attempted to cure the violations. (Cf. *Linmont Realty, Inc. v. Vitocar1, Inc.*, 147 AD2d 618 [2nd Dept. 1989].) As plaintiff presented evidence that they cured the violations, there are issues of fact that preclude vacating the Yellowstone injunction at this stage. (See *Matter of Langfur*, 198 AD2d 355 [2nd Dept. 1993].)

Defendants' motion to permit discovery is denied without prejudice. Defendants claim that plaintiff never responded to defendants' discovery demands, but present no evidence that they moved to compel plaintiff to comply or sought sanctions for plaintiff's noncompliance. Therefore, defendants' motion for discovery is denied, with leave to renew before the trial judge.

Accordingly, plaintiff's motion for summary judgment is denied. Defendants' cross-motion for summary judgment is denied.

Dated: August 29, 2005

Augustus C. Agate, J.S.C.