

<b>Niteen Hotels (NY) Corp. v 34th St. Penn Assn.</b>
2007 NY Slip Op 31034(U)
May 6, 2007
Supreme Court, New York County
Docket Number: 0113936/2007
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: YORK  
Justice

PART 2

NITEEN HOTELS (NY) CORP.

INDEX NO. 113936/06

MOTION DATE \_\_\_\_\_

- v -  
34TH STREET PENN ASSOC.

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
MAY 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/30/07

Luy  
**LOUIS B. YORK**  
J.S.C. 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: IAS PART 2

-----X  
NITEEN HOTELS (NY) CORP.,

Plaintiff,

Index No.: 113936/06  
DECISION/ORDER

-against-

34<sup>TH</sup> STREET PENN ASSOCIATION,

Defendant.

-----X  
HON. LOUIS B. YORK, J.S.C.:

In this commercial real estate action, plaintiff moves for a preliminary injunction, and defendant cross-moves to dismiss the complaint, pursuant to CPLR 3211 (motion sequence number 001). For the following reasons, plaintiff's motion is denied, and defendant's cross motion is granted.

BACKGROUND

The Parties

Plaintiff Niteen Hotels (NY) Corp. (Niteen) is the commercial tenant and defendant Street Penn Association (Penn) is the landlord/owner of a building (the building) located at 215-221 West 34<sup>th</sup> Street in the County, City and State of New York. See Notice of Cross Motion, Dushey Affidavit, ¶ 6. Niteen and Penn initially executed a lease (the lease) on July 23, 1993, and subsequently also executed lease modification agreements on December 22, 1993, December 26, 1995, July 1, 1999 and November 30, 2003, respectively (the first, second, third and fourth lease modifications). Id.; ¶¶ 6, 13-20; Exhibits A-E. Although the lease initially provided for a 15-year term with a 5-year renewal option, in the first lease modification, the parties agreed upon a flat 20-year term instead (which would, thus, not normally expire until July of 2013). Id.;

**FILED**  
MAY 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

[\* 3 ]

Exhibits A, B. Nonetheless, on March 8, 2006, Penn served Niteen with a termination notice (the termination notice) that purported to end Niteen's commercial tenancy effective September 30, 2006. Id.; Exhibit J. In response, Niteen commenced this action via service of an order to show cause. See Order to Show Cause.

### The Lease and the Modifications

Article 6 of the lease provides, in pertinent part, as follows:

Tenant's Default: This Lease and the term and estate hereby granted are subject to the further limitation that:

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(b) whenever Tenant shall do or permit anything to be done, whether by action or inaction, in default or breach of any of Tenant's obligations hereunder, and if such default shall continue for thirty (30) days after Landlord has given to tenant a notice specifying same, or, in the case of a breach or default which cannot with due diligence be cured within a period of thirty (30) days and the continuance of which for the period required for cure will not subject Landlord to the risk of criminal liability, if Tenant shall not, (i) within said thirty (30) day period advise Landlord of Tenant's intention to duly institute all steps necessary to remedy such breach or default, (ii) duly institute within said thirty (30) day period, and thereafter diligently prosecute to completion all steps necessary to remedy the same and (iii) complete such remedy within such time after the date of the giving of said notice of Landlord as shall be reasonably practicable ...

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then in any of said cases set forth in the foregoing subsections ... Landlord may give to tenant a notice of intention to end the term of this Lease at the expiration of ten (10) days from the date of the service of such notice of intention, and upon the expiration of said ten (10) days this Lease and the term and estate hereby granted ... shall terminate with the same effect as if that day were the Expiration Date, but Tenant shall remain liable for damages as provided herein.

See Notice of Cross Motion, Exhibit A, at 9-10 (pages not Bates-stamped). Article 72 of the lease provides, in pertinent part, as follows:

Landlord's Option To Terminate: In the event Landlord desires to terminate this Lease, for any reason whatsoever ... Landlord shall have subject to and conditioned upon the performance by the Landlord of its obligations arising under Article "72" the absolute right to and may terminate this Lease upon no less than

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one hundred eighty (180) days prior written notice to Tenant (the "Termination Notice"). In the event the Termination Notice is given, this Lease shall expire on the date set forth in the Termination Notice for the expiration of the term demises hereunder (the "Termination Date"), as if the Termination Date had been the date originally set forth in this Lease for the expiration of this Lease.

Tenant hereby unconditionally waives any and all rights it may have to challenge or question the validity of Landlord's intention to exercise its right of termination pursuant to this Article.

Id. at 34-35. Article 74 of the lease provides, in pertinent part, as follows:

Franchise Requirement: Tenant hereby acknowledges and agrees that as an inducement for Landlord entering into this Lease with Tenant, Tenant is obligated to obtain and enter into a franchise agreement with a reputable and financially sound hotel franchise no later than sixty (60) days from execution of this Lease, which franchise must be approved in writing by Landlord, which approval shall not be unreasonably withheld or delayed. Landlord hereby agrees that, without limitation, Best Western and Choice Hotel franchises shall be deemed acceptable to Landlord. Failure of tenant to fulfill the obligation of this paragraph shall be deemed a material default under this Lease.

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Tenant hereby agrees and acknowledges that if at any time during the term of this Lease the franchise agreement, which has been approved by Landlord, is terminated for any reason whatsoever, then Tenant shall immediately replace said franchise with a new franchise, which must be approved by Landlord. Should an approved franchisor terminate an approved agreement by Landlord and should Tenant not replace said agreement with a new franchise agreement approved by Landlord within ninety (90) days of the termination of the previous franchise agreement, then Tenant's failure to procure a new franchise agreement acceptable to Landlord within said ninety (90) day period shall be deemed a material default under this Lease.

Id. at 36-37. The first lease modification provides, in pertinent part, that:

In consideration of the mutual agreement herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Tenant is hereby obligated to obtain and enter into a franchise agreement with a reputable and financially sound hotel franchise (i.e. Quality Inn or its equivalent) within ninety (90) days of the date hereof. Said franchise must be approved in writing by Landlord, which approval shall not be unreasonably withheld or delayed. All language and items pertaining to the franchise agreement

and/or the franchise requirement(s) shall comply with the language contained in Article # 74 of the lease ("Franchise Requirement").

2. Provided Tenant fully complies with Article # 1 above, including but not limited to obtaining and entering into a franchise agreement within ninety (90) days from the date hereof, then in that event:

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B. The term of the Lease shall be extended for a period of five (5) years so that the lease term shall be for a firm twenty (20) year period commencing July 28, 1997 and ending July 27, 2013 (the "Lease Expiration Date"). Notwithstanding anything in the Lease to the contrary, the lease term may not be sooner terminated under any circumstances, except in the case of Tenant's default, in which case the Lease may be sooner terminated by Landlord pursuant to the terms contained in the Lease.

Id.; Exhibit B, at 1. After review, it appears that none of the other provisions of either the lease or any of the lease modifications are germane to the resolution of the instant motions.

#### Plaintiff's Alleged Default

Penn states that Niteen operated the building as a Howard Johnson hotel franchisee until approximately September of 2005, at which time either Niteen or Howard Johnson terminated the franchise agreement for undisclosed reasons. See Notice of Cross Motion, Dushey Affidavit, ¶ 21. Penn further states that Niteen failed to obtain or enter into a new, approved franchise agreement within the 90-day period specified in Article 74 of the Lease. Id. Penn alleges that Niteen now operated the building as a "Regency Inn & Suites," which is not part of a recognized hotel franchise chain as required by the Lease." Id. Niteen replies that, in December of 2006, it negotiated a replacement franchise agreement with Choice Hotels International, Inc. (Choice), an entity that is specifically recognized as an acceptable hotel franchise chain in Article 74 of the lease, but that Penn refused to grant its consent to Niteen entering into this new franchise agreement. See Bhatia Reply Affidavit, ¶ 9; Exhibit G. Niteen also objects that Penn failed to

serve it with a notice to cure its purported default as required by Article 6 of the Lease, and that Penn failed to respond to the termination of the Howard Johnson franchise agreement for more than a year. Id., ¶¶ 12, 15. Penn responds that the proposed new franchise agreement between Niteen and Choice “is of no legal significance,” because Article 74 of the lease only granted Niteen a period of 90 days from the termination of a previous franchise agreement in which to enter into a new one, but Niteen did not present the proposed agreement with Choice for Penn’s approval until 14 months after the Howard Johnson franchise agreement had expired. See Hirschhorn Reply Affidavit, ¶ 8. Penn now states that it plans to demolish and reconstruct the building. See Hirschhorn Reply Affidavit, ¶ 9.

#### Prior Proceedings

Niteen commenced this action on September 27, 2006 by serving an order to show cause<sup>1</sup> which requests: 1) a preliminary injunction to prevent Penn from terminating Niteen’s tenancy pursuant to Article 72 of the lease; 2) a preliminary injunction to prevent Penn from evicting Niteen from the building; 3) a preliminary injunction to toll the operation of the termination notice pending the court’s resolution of the instant motions (a/k/a a “Yellowstone injunction”); 4) a declaratory judgment that the termination notice is void and unenforceable; and 5) such other and further relief as may be just and proper. See Order to Show Cause, at 1-2. Rather than serve an answer, Penn instead cross-moved to dismiss this action pursuant to CPLR 3211.

### DISCUSSION

#### Plaintiff’s Motion

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<sup>1</sup> Niteen also served a summons with notice on that date, but evidently did not serve a complaint.

As previously mentioned, Niteen's moving papers request two counts of preliminary injunctive relief against Penn. Pursuant to CPLR 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

CPLR 6301. As Niteen correctly notes, the Court of Appeals holds that "[a] preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." Doe v Axelrod, 73 NY2d 748, 750 (1988). Niteen then asserts that it meets all three of these criteria. After review, the court disagrees.

Niteen argues that, by the terms of the first lease modification, Penn "expressly relinquished its right to terminate" the lease. See Plaintiff's Memorandum of Law in Support of Motion, at 3. Niteen claims that, under that agreement, the lease cannot be terminated unless it (Niteen) was in default of its tenancy obligations, but that Penn "does not allege that Niteen is in default" of any of them. Id. Penn denies this and argues instead that Niteen's failure to comply with the "Franchise Requirement" set forth in Article 74 of the lease was a material default that justified Penn's termination of the lease. See Defendant's Memorandum of Law in Support of Cross Motion, at 4. Penn is correct. As will be discussed, the plain language of the termination

waiver contained in paragraph 2 of the first lease modification clearly shows that the parties exempted those situations governed by Article 74 of the lease from the scope of that waiver. Thus, Niteen's interpretation of the waiver's language is clearly untenable. Further, Niteen does not dispute that it allowed more than 90 days to lapse between the expiration of its franchise agreement with Howard Johnson and the time it presented its proposed replacement agreement with Choice to Penn. This fact clearly constitutes a breach of the lease that Article 74 designates as a "material default" thereof for which Penn may justly exercise its termination option (set forth in Article 72). In conclusion, the plain language of the lease and the subsequent modification agreements does not support Niteen's argument that it possesses a likelihood of success on the merits of its requests for injunctive relief. Indeed, that language dictates the opposite result. Thus, the court finds that Niteen has failed to demonstrate a likelihood that it will succeed on the merits of its two requests for preliminary injunctive relief.<sup>2</sup>

Niteen next argues that it would be irreparably harmed unless the court grants it preliminary injunctive relief, alleging that: 1) any action by Penn might interrupt Niteen's business and cause it to lose good will; 2) that Penn might wrongfully place a new tenant in possession of the building; and that 3) Penn might "commence construction on the ... building in furtherance of its plan to build a larger hotel." See Plaintiff's Memorandum of Law in Support of Motion, at 4-5. Penn responds that, as a business entity that derives income from renting hotel

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<sup>2</sup> Niteen also argues that the termination notice is defective because it contains unclear language. See Plaintiff's Memorandum of Law in Support of Motion, at 3-4. After review, the court rejects this argument because the termination notice clearly tracks the language of Article 74 of the lease (the Article that specifically authorized Penn to send such a notice in the event that Niteen defaulted on its Franchise Requirement obligation). See Notice of Motion, Exhibit A.

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rooms at fixed rates, any damage that Niteen might suffer is not “irreparable” (as the law defines that term), but rather is easily quantifiable and compensable by an award of monetary damages should Niteen prevail in this action. See Defendant’s Memorandum of Law in Support of Cross Motion at, 5-6. Again, Penn is correct. New York law holds that the party seeking a preliminary injunction has failed to establish “irreparable harm” where it fails to show that it could not be adequately compensated by money damages. See e.g. Coinmach Corp. v Fordham Hill Owners Corp., 3 AD3d 312 (1<sup>st</sup> Dept 2004). Niteen has made no such showing. Indeed, its arguments regarding irreparable harm all center on speculation about what Penn “might” do. Therefore, the court rejects them and finds that Niteen has failed to establish a likelihood that it will suffer irreparable harm in the absence of injunctive relief.

Finally, Niteen argues that the balance of the equities favors it in this case because “in the event that the lease is terminated, [it] will lose its right to a valuable leasehold and will suffer irreparable injury to its reputation.” See Plaintiff’s Memorandum of Law in Support of Motion, at 4-5. Penn responds that the balance of the equities herein actually favors it over Niteen - first, because issuing an injunction would cause a delay that might result in less favorable market conditions for Penn’s planned demolition and reconstruction of the building; and second, because Penn has received complaints that Niteen has permitted heat/hot water and bedbug infestation violations to persist at the building since the expiration of its franchise agreement with Howard Johnson. See Defendant’s Memorandum of Law in Support of Cross Motion, at 5-6; Notice of Cross Motion, Exhibits G, H, I. In balancing the competing equities in a case such as this one, the court is guided by the old principle that it is improvident to grant injunctive relief where such relief would bear heavily on the defendants without benefitting the plaintiffs. See e.g. Mantle

Men & Namath Girls, Inc. v LCR Temporaries, Inc., 39 AD2d 681 (1<sup>st</sup> Dept 1972). Here, both parties have alleged that serious harms will befall in the event that Niteen obtains the injunctive relief that it seeks. Thus, the court finds that the equities do not clearly favor one party over the other in this case. However, the court has also already found that Penn is completely within its contractual rights to terminate Niteen's leasehold, and that Niteen has failed to establish that the resulting harm it will suffer is "irreparable," as the law defines that term. Thus, the court finds that it would be a wholly improper exercise of discretion to grant Niteen's requested relief. Accordingly, Niteen's first and second requests for a preliminary injunction should be denied.

Niteen's moving papers also request a Yellowstone injunction, as defined in the Court of Appeals' holding in First Natl. Stores, Inc. v Yellowstone Shopping Center, Inc. (21 NY2d 630 [1968]). Niteen argues that its request is timely because it commenced this action before the period specified in the termination notice had expired. See Plaintiff's Memorandum of Law in Support of Motion, at 6-8. Penn responds that Niteen is not entitled to a Yellowstone injunction because the lease did not afford Niteen a right to cure. See Defendant's Memorandum of Law in Support of Cross Motion, at 6-7. Both parties misconceive the nature of Yellowstone injunctions. As the Appellate Division, First Department, observed

The purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. In order to obtain a Yellowstone injunction, the commercial tenant must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.

Empire State Bldg. Associates v Trump Empire State Partners, 245 AD2d 225, 227-228 (1<sup>st</sup> Dept

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1997) (internal citations omitted). The Appellate Division, First Department, also noted:

The existence of a period in which a violation may be cured does not depend on the contents of the notice of default, but upon the terms of the lease. Thus, while the failure to state the cure period may render the notice defective, it does not vitiate the cure period itself.

AD2d at 228 (internal citations omitted). In this case, although the lease did not specifically require Penn to serve Niteen with a notice to cure, Article 74 did specifically provide Niteen a period of 90 days in which to obtain and enter into an acceptable replacement franchise agreement in the event that an existing franchise agreement should terminate. Here, Niteen's franchise agreement with Howard Johnson terminated in September of 2005. The 90 days specified in the lease would therefore have expired either in December of 2005 or January of 2006. Nonetheless, Niteen failed to present a proposed replacement franchise agreement for Penn's approval until December of 2006 - approximately a year after the cure period set forth in the lease had expired. The court also notes that Penn waited until September of 2006 to serve the termination notice - i.e., well after that cure period had expired. Nothing in the holding of First Natl. Stores, Inc. v Yellowstone Shopping Center, Inc. (21 NY2d 630, supra.) or its progeny empowers a court to revive an expired cure period in order to toll it. See e.g. Burger King Corp. v 111 Cedar Street Co., 182 AD2d 399, 400 (1<sup>st</sup> Dept 1992) ("Neither the Supreme Court nor the Appellate Division has the power to revive the lease."). Because the instant cure period expired before Niteen commenced this action, Yellowstone relief is unavailable to Niteen. Accordingly, Niteen's request for a Yellowstone injunction is denied.

Finally, Niteen's moving papers request a declaratory judgment that the March 8, 2006 termination notice be deemed void and unenforceable pursuant to the terms of the lease.

Declaratory judgment is a discretionary remedy which may be granted “as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001; see e.g. Jenkins v State of New York, Div. of Hous. and Community Renewal, 264 AD2d 681 (1st Dept 1999). The Court of Appeals has long recognized that trial courts in this state have jurisdiction to determine the respective rights of all parties to a lease. See e.g. Leibowitz v Bickford’s Lunch System, 241 NY 489 (1926). Although it did not address this matter in its initial memorandum of law, Niteen’s reply papers argue that Penn’s termination notice is improper because it does not comply with Article 6 of the lease. See Plaintiff’s Reply Memorandum, at 2-5. Penn responds that the termination notice is, in fact, proper because it complies with Article 72 of the lease. See Defendant’s Reply Memorandum, at 2-4.

After reviewing the contractual language of both the lease and the first lease modification, the court agrees with Penn’s interpretation. Although the first lease modification did contain a waiver of the lease’s termination provision (i.e., Article 72), it specifically exempted from that waiver situations in which Niteen might default on the franchise requirement obligation set forth in Article 74 of the lease. In those situations, the first lease modification provides that “the Lease may be sooner terminated by Landlord pursuant to the terms contained in the Lease.” The only logical reading that the court can give to the phrase “the terms contained in the lease” is that it refers to the “Landlord’s Option to Terminate” set forth in Article 72. Niteen has offered no reason - and the court cannot apprehend one - for referring instead to the “Tenant’s Default” provision set forth in Article 6. In the first lease modification, the parties clearly expressed their intent to limit the landlord’s right to terminate the lease, but expressed no discernible intent to limit or change the definition or consequences of a tenant’s default. Thus, the effect of the first

lease modification was to preserve Article 74 of the lease as the sole ground upon which Penn might seek recourse to the termination procedures set forth in Article 72. As previously discussed, Article 74 contains what is in effect a 90-day cure period in which for Niteen to replace a terminated franchise agreement with a new, mutually acceptable one. Upon Niteen's failure to do so, Article 72 merely requires Penn to serve a termination notice affording Niteen 180 days to vacate the premises. Penn did so. In the court's view, Niteen's interpretation of the contractual language is illogical and self serving, and does not justify its request for declaratory relief. In contrast, the court finds that Penn has abided by the express terms of both the lease and the first lease modification, and would be entitled to a contrary declaratory judgment had it requested one.<sup>3</sup> Accordingly, Niteen's request for a declaratory judgment is denied and its motion is also denied in full.

#### Defendant's Cross Motion

Penn's cross motion seeks dismissal of the causes of action set forth in Niteen's order to show cause. When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained'." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 (1<sup>st</sup> Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." See e.g. Arnav Indus., Inc.

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<sup>3</sup> The court has also reviewed the subsequent three lease modifications, but has found nothing therein that would mandate a different finding than the one expressed above.

Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1<sup>st</sup> Dept 1999); Caniglia v Chicago Tribune-New York News Syndicate, Inc., 204 AD2d 233 (1<sup>st</sup> Dept 1994).

Penn argues that the documentary evidence in this action - i.e., the lease and the first lease modification - flatly contradicts the allegations that Niteen makes to support its first two requests for injunctive relief. See Plaintiff's Memorandum of Law in Support of Cross Motion, at 7-8. Niteen's reply papers merely offer a boilerplate denial of this argument. See Plaintiff's Reply Memorandum, at 10. The court has already found, inter alia, that: 1) the interplay of Articles 72 and 74 of the lease (as confirmed by the first lease modification agreement) render Niteen unable to establish the "likelihood of success" element of those causes of action; 2) Niteen has not established that it will suffer "irreparable damage," as the law defines the term; and 3) the balance of the equities does not especially favor either party herein. Because Niteen's allegations are untenable in the face of the governing contractual provisions herein, its causes of action are also untenable as a matter of law. Accordingly, so much of Penn's cross motion as seeks dismissal of Niteen's two requests for injunctive relief is granted.

The court also denied Niteen's request for a Yellowstone injunction on the ground that the cure period specified in the lease expired long before Niteen sought this relief. Restated, this cause of action, too, is barred by the documentary evidence. Accordingly, so much of Penn's cross motion as seeks dismissal of Niteen's request for a Yellowstone injunction is also granted.

Finally, the court earlier denied Niteen's request for a declaratory judgment because that request derived from an inapplicable portion of the lease (Article 6). The court found that the applicable portions of the lease (Articles 72 and 74) would mandate the opposite result, and that Penn would have been entitled to an opposite declaration had it requested one. Thus, the court now finds that Niteen's request for a declaratory relief is barred by documentary evidence, too. Accordingly, so much of Penn's cross motion as seeks dismissal of Niteen's request for a declaratory judgment is granted, and this action is dismissed in full.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 6301, of plaintiff Niteen Hotels (NY) Corp. is in all respects denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of defendant 34<sup>th</sup> Street Penn Association is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York  
April 30, 2006

**FILED**  
MAY 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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Hon. Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**