

**Elghanayan v 77 Bleeker St. Corp.**

2007 NY Slip Op 31351(U)

May 17, 2007

Supreme Court, New York County

Docket Number: 0100660/2006

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Solomon  
Justice

PART 53

JEREMY ELGUTANAYAN  
- v -  
77 BLEEKER ST CORP

INDEX NO. 100660/06  
MOTION DATE 5/25/07  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 9 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
MAY 23 2007

PAPERS NUMBERED
<u>1-5</u>
<u>6-8</u>
<u>9</u>

Cross-Motion:  Yes  No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order

M.R. - ① Note of Issue deadline extended to June 30, 2007.

② If needed, call Part 53 for a compliance conference

Dated: 5/17/07

JANE S. SOLOMON J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
JEFFREY ELGHANAYAN,

Plaintiff,

Index No.: 100660/06  
DECISION/ORDER

-against-

77 BLEEKER STREET CORP.,

Defendant.

-----X  
JEFFREY ELGHANAYAN,

Third-Party Plaintiff,

- against -

RENEE SCOTT ENTERPRISES, L.L.C.,

Third-Party Defendant.

-----X  
**HON. JANE SOLOMON, J.S.C.:**

**FILED**  
MAY 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this commercial real estate action, plaintiff moves by order to show cause for summary judgment on his complaint and to dismiss defendants' counterclaims (motion sequence number 002). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

The Parties

Defendant 77 Blecker Street Corp. (77 Blecker) is the owner and landlord of a building located at 77 Blecker Street in the City, County and State of New York (the building). See Order to Show Cause, Gross Affidavit, ¶ 8. The building's upper stories are occupied by a residential cooperative corporation, while the first floor contains commercial space. *Id.* On April 2, 1984, 77 Blecker executed a 25-year master lease for one of the building's commercial units (the master lease) with an entity called Southbro Company (Southbro). *Id.*, ¶ 9; Exhibit A. On April 17, 1986, Southbro assigned its interest in the master lease to a real estate management company

called Bi-Coastal Properties, Inc. (Bi-Coastal), which is owned by plaintiff Jeffrey Elghanayan (Elghanayan). Id., ¶ 10; Exhibit B. Although the master lease is due to expire on April 1, 2009, it affords Elghanayan the right to three successive renewal options for terms of 25, 25 and 24 years, respectively. Id., ¶ 9.

Elghanayan subleased Bi-Coastal's commercial unit on several occasions. Id., ¶ 11. Most recently, on March 25, 1997, Elghanayan executed a 10-year sublease (the sublease) with third-party defendant Renee Scott Enterprises, L.L.C. (Renee Scott) to operate a Haagen Dazs ice cream shop there.<sup>1</sup> Id., ¶ 13; Exhibit C. Later, on March 1, 2005, Elghanayan and Renee Scott executed a modification to the sublease (the modification), which extended the sublease term for an additional 10 years (i.e., until February 28, 2015), and which permitted Renee Scott to modify the unit so as to add a Subway sandwich shop to its existing business.<sup>2</sup> Id., ¶ 15; Exhibit D.

#### The Master Lease and Subsequent Agreements

The relevant portions of the master lease provide as follows:

4. Alterations; As Is. Tenant may, without Landlord's consent, place signs upon and make any and all alterations, additions, restorations, changes, replacements or improvements in, to or about the Premises, provided same shall be done in compliance with applicable laws. Landlord agrees to join in applications for permits or authorizations required to be obtained from governmental authorities having jurisdiction in connection with any work to be done pursuant to the right(s) granted under the preceding sentence. Tenant acknowledges that it is hiring the Premises on an "as is" basis. Tenant assumes no responsibility with respect to latent defects in the Premises. The responsibility for correcting such defects shall be Landlord's. Unless Tenant hereafter otherwise elects, fixtures and other items installed at the Premises shall remain the property of Tenant.

---

<sup>1</sup> Bi-Coastal signed the sublease on behalf of Elghanayan as "agent." See Order to Show Cause, Exhibit A.

<sup>2</sup> Again, Bi-Coastal signed the modification on behalf of Elghanayan as "agent." Id.

10. Defaults; Remedies. If Tenant defaults ... in the performance of any of the covenants or conditions hereof, Landlord may give Tenant notice of such default and if Tenant does not cure any ... default within 30 days, after the giving of such notice (or, if the default is of such nature that it cannot be completely cured within such 30 days, if tenant does not commence such curing within such 30 days and thereafter proceed with reasonable diligence and in good faith to cure such default), then Landlord may terminate this Lease on not less than 30 days' notice to Tenant, and on the date specified in said notice the term of this Lease shall terminate, and Tenant shall then quit and surrender the Premises to Landlord. If this Lease shall have been so terminated by Landlord, Landlord may at any time thereafter resume possession of the Premises by any lawful means and remove Tenant or (subject to the rights under then existing non-disturbance agreements and if otherwise lawful) other occupants and their effects.

11. No Waiver or Changes. The failure of either party to insist on strict performance of any covenant or condition hereof, or to exercise any option herein contained, shall not be construed as a waiver of such covenant, condition or option in any other instance. This lease cannot be changed or terminated orally.

12. Landlord's Right to Collect Rent from any Occupant; Non-Disturbance of Sublessees. If (a) the Premises are underlet or occupied by anybody other than Tenant and Tenant is in default hereunder, or (b) this Lease is assigned by Tenant, then, Landlord (after default and failure to cure by Tenant) may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved.

See Order to Show Cause, Exhibit A, at 2, 9, 11. Paragraph 8 of the sublease sets forth a general subordination clause that provides, in pertinent part, that:

This Lease is subject to all ground or underlying leases ... and to all renewals, modifications, consolidations, improvements and extensions of any such underlying leases ... . This clause shall be self operative and no further instrument of subordination shall be required by any ground or underlying lessor ... .

See Order to Show Cause, Exhibit C, at 2. Similarly, paragraph 7 of the modification sets forth a savings clause that provides, in pertinent part, that "[e]xcept as otherwise set forth in this Agreement, all of the terms and provisions of the Lease [i.e., the sublease] ... shall remain in full force and effect." See Order to Show Cause, Exhibit D, at 2.

### Prior Proceedings

Renee Scott set about installing the Subway sandwich shop in a portion of its leased commercial space in early 2005. See Order to Show Cause, Gross Affidavit, ¶ 16. In March of that year, 77 Bleeker's managing agent signed the application forms that Renee Scott was required to submit to the New York City Department of Buildings (DOB) and New York City Landmarks Preservation Commission (LPC) in order to obtain permission to commence work. Id., ¶ 17; Exhibit E. The DOB subsequently issued a work permit to Renee Scott on April 27, 2005. Id., ¶ 18; Exhibit F. Thereafter, Renee Scott completed construction on its Subway sandwich shop in June of 2005 and opened it for business in July of 2005. Id., ¶ 19.

Subway's franchisees are normally required to bake fresh bread for their sandwiches on any premises where a franchise is operated. Id., Exhibit G (Schuster Affirmation), ¶ 6. Renee Scott states that the plans that it submitted to 77 Bleeker's managing agent disclosed that Renee Scott was going to install an electric oven in the unit for bread baking purposes. Id. Renee Scott also states that, several days after it had opened the Subway sandwich shop, it began to receive complaints about the odor of the baking bread from Ed and Caroline Maher, two of the tenants in the co-op portion of the building (the Mahers). Id., ¶ 10. In response, Renee Scott undertook a number of measures to eliminate any odors that its bread baking operations might cause including, inter alia, the following: 1) in July of 2005, Renee Scott ceased baking the most aromatic of the several varieties of bread that it makes daily; 2) in September of 2005, Renee Scott installed a new ventilation and filtration system in the unit and resealed the basement ceiling; 3) in October of 2005, Renee Scott installed a secondary filtration system in the unit; 4) in November of 2005, Renee Scott treated the ceiling of its unit (which is also the floor of the

Maher's apartment) with "spray insulation" sealant, and also upgraded the speed of the fans in its ventilation and filtration systems; 5) in January of 2006, Renee Scott further modified its ventilation and filtration systems by extending the stove hood and installing an additional blower and an air washing device. Id., ¶¶ 12-38. In September of 2006, after the commencement of this action, Renee Scott further agreed to have all of its bread baked off premises and delivered to the building. See Order to Show Cause, Gross Affidavit, ¶ 46.

Despite the foregoing actions, and although they admit that the smell of baking bread is no longer detectable, the Mahers continue to complain that their apartment is permeated by odors from Renee Scott's Subway sandwich shop. See Maher Affidavit in Opposition, ¶¶ 4-5. The Mahers also state that a number of violations have been issued with respect to this condition including, inter alia, the following: 1) at some point in 2005, the DOB issued violation # 083005C2CF02 to Renee Scott for failure to extend its external exhaust system to the proper height on the outside of the building; 2) at some point in 2005, the New York City Environmental Control Board (ECB) issued violation # 344-843-41N to Renee Scott for the same reason; 3) on August 30, 2005, the New York City Department of Environmental Protection (DEP) issued notice of violation # 1148906 to the building owner (i.e., 77 Bleeker) regarding odors emanating from the Subway sandwich shop; 4) on August 26, 2005, DEP issued violation # 175463N to Renee Scott for odors emanating from the Subway sandwich shop; 5) on September 6, 2005, DEP issued violation # 175144L to Renee Scott for odors emanating from the Subway sandwich shop; and 6) on October 28, 2005, DEP issued violation # 176269J to Renee Scott for odors emanating from the Subway sandwich shop. Id., ¶ 5; Colbert Affidavit in Opposition, ¶ 12. Although 77 Bleeker has presented two notices of ECB hearings with respect

to the second of the foregoing items, the court notes that 77 Bleeker has not presented copies of the actual violations.<sup>3</sup> Id.; Exhibit F, at 12-13 (pages not numbered).

On November 16, 2005, while Renee Scott was in the midst of its efforts to rectify the Maher's odor intrusion problem, 77 Bleeker issued a 30-days' notice to cure to Southbro, Bi-Coastal and Elghanayan (the notice to cure). See Order to Show Cause, Gross Affidavit, ¶ 26; Exhibit H. In pertinent part, the notice to cure states as follows:

WHEREAS, under paragraph 4 of the Lease, the Lessee "may, without Landlord's consent, ... make any and all alterations, additions, restorations, changes, replacements or improvements in, to or about the Premises, provided same shall be done in compliance with applicable laws;"

WHEREAS, the Lessee made or permitted to be made alterations, additions, restorations, changes, replacements or improvements in, to or about the Premises to add a Subway Restaurant;

WHEREAS, the Lessee has caused or permitted to be caused a nuisance unreasonable and substantial in nature, by causing or permitting noxious and offensive odors to be emitted from the Subway Restaurant at the Premises, interfering with the rights of residents of the Building to use and enjoy their apartments, in violation of paragraph 4 of the Lease and applicable law.

Id.; Exhibit H, at 2 (pages not numbered). Thereafter, on December 27, 2005, 77 Bleeker also issued a 30-days' notice of termination to Southbro, Bi-Coasta and Elghanayan (the termination notice). See Order to Show Cause, Gross Affidavit, ¶ 41; Exhibit I. The termination notice restates the foregoing allegations and further states, in pertinent part, as follows:

WHEREAS, pursuant to paragraph 10 of the Lease you were served with a Thirty (30) Days Notice to Cure (the "Notice to Cure") on November 16, 2005, which required you, the Lessee, to cure the aforesaid default before December 23, 2005, a date at least 30 days after the Notice to Cure was served upon you, by

---

<sup>3</sup> Instead, 77 Bleeker has presented copies of e-mail correspondence between the Mahers and principals of Renee Scott in which the Mahers refer to the above violation numbers. See Maher Affidavit in Opposition, Exhibit E.

discontinuing to cause or permit noxious and offensive odors to be emitted from the Subway Restaurant at the Premises;

PLEASE TAKE NOTICE that the cure period set forth in the Notice to Cure has expired and you, the Lessee, remain in default of paragraph 4 of the Lease and applicable law, in that you have failed and refused to discontinue causing or permitting noxious and offensive odors to be emitted from the Subway Restaurant at the Premises, and you, the Lessee, have failed to cure, and failed to commence with due diligence any effort to cure, the aforesaid default on or before December 23, 2005;

PLEASE TAKE FURTHER NOTICE that pursuant to paragraph 10 of the Lease, Lessor hereby notifies you that on January 31, 2006, a date at least thirty (30) days after the service upon you, the Lessee, of this notice, the term of the Lease shall expire as fully and completely as if the date set forth herein were the date definitively fixed in the Lease for the expiration of the term thereof, and all of your right, title and interest thereunder shall wholly cease and expire on January 31, 2006, and you shall thereupon quit and surrender the premises to the Lessor.

Id.; Exhibit I, at 2 (pages not numbered). Despite these notices, Elghanayan refused to accede to the termination of the lease, and Renee Scott remained in possession of the building's commercial space where it continued its efforts to rectify the odor intrusion problem, as discussed above.

#### This Action

Elghanayan commenced this action on January 17, 2006. See Order to Show Cause, Exhibit J. The complaint sets forth causes of action for: 1) a declaratory judgment that (a) the notice to cure and (b) the termination notice are defective and of no force and effect, (c) that the lease remains in full force and effect, (d) that it is not in default of the lease, and (e) that it is under no obligation to ameliorate the condition complained of in the notice to cure; and 2) a preliminary injunction to prevent 77 Bleeker from (a) taking any action to cancel the lease or (b) taking any action to terminate Bi-Coastal's tenancy based on the allegations in the notice to cure

and termination notice. Id., ¶¶ 26-34. 77 Bleeker filed an answer on March 29, 2006 that sets forth counterclaims for: 1) a private nuisance, and 2) a preliminary and permanent injunction against Elghanayan from “permitting offensive Subway odors to emanate from the leased premises.” Id.; Exhibit K, ¶¶ 37-48.

Also in January of 2006, Elghanayan served 77 Bleeker with an order to show cause seeking a Yellowstone injunction to toll the running of the termination notice. See Order to Show Cause, Gross Affidavit, ¶ 42; Exhibit L. This court granted Elghanayan’s application on April 10, 2006, in an order that provided that “this motion is granted to the extent that defendant is enjoined from proceeding under the notices at issue based on plaintiff’s representation that it has [the] desire and intention to cure if the condition is a violation of the lease.” Id., Exhibit L. The court’s April 10 order also incorporated a preliminary conference order in which the parties agreed upon their respective discovery deadlines. Id.; Exhibit M. However, Elghanayan alleges that 77 Bleeker failed to provide disclosure of any of the items listed in that order, and has presented a quantity of correspondence between it and 77 Bleeker’s counsel that details its efforts to obtain 77 Bleeker’s compliance. See Order to Show Cause, Fialkoff Affirmation, ¶¶ 6-11; Exhibits P, Q, R, S. On September 18, 2006, the court conducted - and later adjourned - a hearing for the purposes of seeing whether this action could be settled. Id., ¶¶ 13-17. When it developed that no settlement could be reached, the court entered a second preliminary conference order on October 16, 2006 that modified and extended the parties’ respective discovery deadlines to final dates. Id., ¶ 18; Exhibit N. However, Elghanayan alleges that 77 Bleeker failed to comply with the terms of this order, too. Id., ¶¶ 19-23. As a result, on December 7, 2006, Elghanayan moved via order to show cause for: 1) a summary judgment on his cause of action

for a declaratory judgment;<sup>4</sup> 2) a summary judgment dismissing 77 Bleeker's two counterclaims; and 3) an order to strike 77 Bleeker's answer as a result of its failure to abide by the court's discovery orders. See Order to Show Cause, Gross Affidavit, ¶¶ 51-56. 77 Bleeker opposes this motion, and asserts that it has now fully complied with the foregoing discovery orders. See Colbert Affidavit in Opposition, ¶ 19; Exhibit F.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1<sup>st</sup> Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1<sup>st</sup> Dept 2003). It is well settled that ““on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.”” Maysek & Moran, Inc. v S.G. Warburg & Co., Inc., 284 AD2d 203, 204 (1<sup>st</sup> Dept 2001), quoting Lake Constr. & Development Corp. v City of New York, 211 AD2d 514,

---

<sup>4</sup> Although it is not listed in the prayer for relief, as would have been proper, the court notes that Elghanayan also requested a summary judgment on his second cause of action (for a preliminary/permanent injunction) in both the affidavits annexed to support the moving papers and in his memorandum of law. See Order to Show Cause, Gross Affidavit, ¶ 52; Plaintiff's Memorandum of Law, at 1.

515 (1<sup>st</sup> Dept 1995).

### I. Declaratory Judgment

The first branch of Elghanayan's motion seeks a summary judgment on his cause of action for declaratory relief. 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). It has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. See Leibowitz v Bickford's Lunch System, 241 NY 489 (1926). There does not appear to be, and the parties do not raise, any issue regarding justiciability in this action. Instead, Elghanayan raises three arguments to support his request for a summary judgment that the terms of the lease entitle him to declaratory relief.

Elghanayan's first cause of action specifically seeks a declaration of five points: (a) that the notice to cure and (b) the termination notice are both defective and of no force and effect; (c) that the lease remains in full force and effect; (d) that Elghanayan is not in default of the lease; and (e) that Elghanayan is under no obligation to ameliorate the condition complained of in the notice to cure. See Notice of Motion, Exhibit J, ¶ 31. Elghanayan's first argument pertains to the fourth and fifth of the foregoing points. He contends that, in the absence of explicit language in the lease that requires a commercial tenant to control odors or aromas emanating from the premises, the persistence of such odors or aromas is not a lease violation and the commercial tenant is not required to cure them. See Plaintiff's Memorandum of Law, at 9-12. The only legal support that Elghanayan cites for his argument is the general axiom of contract construction that

“courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing’.”

Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 476 (2004), quoting Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001). In response, 77 Bleeker refers to the portion of paragraph 4 of the lease that states that a tenant may “make any and all alterations, additions, restorations, changes, replacements or improvements in, to or about the Premises, provided same shall be done in compliance with applicable laws.” See Defendant’s Memorandum of Law, at 3 (pages not numbered). 77 Bleeker then argues that the odors that emanate from the commercial unit occupied by Renee Scott’s Subway sandwich shop constitute an unlawful nuisance. Id. 77 Bleeker offers the ECB and DEP violations referred to in the opposition papers as evidence of this unlawful nuisance. See Maher Affidavit in Opposition, ¶ 5; Colbert Affirmation in Opposition, ¶ 12; Exhibit F. Elghanayan’s reply papers merely restate his original argument. See Semaya Reply Affirmation, ¶¶ 6-7. After review, the court finds that 77 Bleeker’s proposed construction of paragraph 4 accords with New York State law.

In Burrito Factory, Inc. v City of New York (270 AD2d 217 [1<sup>st</sup> Dept 2000]), the Appellate Division, First Department, held that “Administrative Code § 24-141 (b) (24), which defines “air contaminants” to include “Processing of food stuffs”, encompasses the usual and ordinary odors produced by spicy food, escaping into a complainant’s residential apartment, where such odors “cause [ ] or may cause detriment to the health, safety, welfare or comfort” of the complainant’.” Id. at 217. The Appellate Division accordingly affirmed the trial judge’s decision that upheld the ECB’s determination to impose fines against a commercial tenant who had been found in violation of that Administrative Code provision. Id. The facts in Burrito

Factory are very similar to those in this action, because it is clear that the odors and aromas that the Mahers describe would also necessarily result from the “Processing of food stuffs,” as that phrase is defined in Administrative Code § 24-141 (b) (24). The Burrito Factory holding further acknowledges that violations of that Code provision are “violations of the law” that the ECB (and the courts) are empowered to sanction. This being so, 77 Bleeker’s proposed reading of paragraph 4 of the instant lease to subsume activity that results in the violation of that statute as activity that is not “in compliance with applicable laws” is clearly both reasonable and is not overly broad. It therefore follows that 77 Bleeker’s conclusion that said activity also constitutes a lease violation that a tenant is required to cure is also reasonable. The court further believes that to impose the restrictive reading of paragraph 4 of the lease that Elghanayan urges would lead to the potentially unlawful and absurd result of relieving a commercial tenant from the responsibility for any act of “non-compliance with applicable laws” that is not listed in the lease, including, potentially, violations of the Fire Safety Code, Building Code, asbestos regulations, etc. The Appellate Division, First Department, recognizes “the long-settled general proposition that the law frowns upon an agreement intended to exculpate a party from the consequences of its own negligence and requires that such contracts be subjected to close judicial scrutiny.” Ash v New York University Dental Center, 164 AD2d 366, 368 (1<sup>st</sup> Dept 1990), citing Gross v Sweet, 49 NY2d 102 (1979). The Appellate Division, First Department, also acknowledges “the rule ... that, absent evidence that the parties intended to violate the law, a contract that may be performed lawfully as well as unlawfully should be construed in favor of its legality.” Telemark Constr., Inc. v Greenberg, 205 AD2d 438, 439 (1<sup>st</sup> Dept 1994), citing Galuth Realty Corp. v Greenfield, 103 AD2d 819 (2d Dept 1984). Thus, the court rejects Elghanayan’s proposed interpretation of

the lease, and finds instead that the intrusive odors and aromas complained of herein would, if proven, constitute a lease violation that Elghanayan or his sub-tenants would be contractually obligated to cure. Accordingly, the court denies so much of Elghanayan's motion as seeks a summary judgment that he is entitled to declaratory relief on these two points.

Elghanayan's second argument pertains to his request for a declaration that the notice to cure and the termination notice are both defective and of no force and effect. He specifically argues that he is entitled to a summary judgment finding that both of those notices are defective and unenforceable because they fail: "(a) to describe the purported default in sufficient detail so as to give Plaintiff adequate notice of the claimed default; (b) to identify the specific Lease provision(s) that Plaintiff is purportedly violating; and (c) to give an adequate description of the Lease provisions that Plaintiff has purportedly violated so as to give Plaintiff sufficient notice of the alleged default." See Plaintiff's Memorandum of Law at, 13-14. 77 Bleeker responds that the instant notices are not defective because they do include the foregoing descriptions - i.e., that the default consisted of "altering the premises to add Subway restaurant that emits noxious and offensive odors;" that paragraph 4 was the lease provision that was violated; and that the lease violation was in the nature of a nuisance - and further apprise Elghanayan and Renee Scott of the consequences of their failure to act within a specified time frame. See Defendant's Memorandum of Law, at 4-6 (pages not numbered). Upon review, the court finds that 77 Bleeker is correct. The law holds that "[t]he purpose of a notice to cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time." Filmtrucks, Inc. v Express Industries and Terminal Corp., 127 AD2d 509, 510 (1<sup>st</sup> Dept 1987).

Here, both the notice to cure and the termination notice clearly include all of the legally required information that Elghanayan unaccountably claims is missing. See Notice of Motion, Exhibits H, I. Therefore, the court rejects Elghanayan's contentions regarding the notice to cure and the termination notice, and finds instead that they are not defective and unforceable. Accordingly, the court denies so much of Elghanayan's motion as seeks a summary judgment that he is entitled to a declaration that the instant predicate notices have no force and effect.

Elghanayan's third argument pertains to his request for a declaration that the lease remains in full force and effect. He argues that he is entitled to a summary judgment that said lease is still in effect because 77 Bleeker waived its right to terminate it by accepting rent payments during the time that Renee Scott's alleged lease violation was purported to be ongoing and with full knowledge of that alleged default. See Plaintiff's Memorandum of Law at, 14-16. 77 Bleeker disputes this claim on the ground that the law permits it to accept ongoing rent payments because the court's grant of a Yellowstone injunction on April 10, 2006 tolled the running of the period set forth in the termination notice for the expiration of the subject tenancy. See Defendant's Memorandum of Law, at 6-7 (pages not numbered). 77 Bleeker is correct. New York State law upholds non-waiver provisions in commercial leases when they "clearly and unambiguously" express the parties' intent that certain conduct shall not be deemed a waiver. See e.g. Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C., 1 AD3d 65 (1<sup>st</sup> Dept 2003). Here, paragraph 12 of the instant lease specifically provides that "[i]f ... this Lease is assigned by Tenant, then, Landlord (after default and failure to cure by Tenant) may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved." This language clearly precludes Elghanayan's waiver argument.

Further, the Court of Appeals has also held that the intent to waive a plaintiff's default should not be inferred from the defendant's acceptance of rent during the period of a Yellowstone injunction. See Jefpaul Garage Corp. v Presbyterian Hosp. in City of New York, 61 NY2d 442 (1984). Here, the Yellowstone injunction that the court approved on April 10, 2006 has remained in effect until the date of this decision. This fact also precludes Elghanayan's waiver argument. Therefore, the court rejects Elghanayan's waiver argument, and declines to find that the instant lease remains in force and effect on this ground. Accordingly, the court denies the first branch of Elghanayan's motion. However, as will be discussed, there are other grounds upon which the lease might be found to remain in force and effect, although the court may not make a determination of those grounds at this juncture. Therefore, the court's denial of summary judgment on the issue of whether Elghanayan is entitled to a declaration that the lease remains in force and effect is without prejudice to Elghanayan's right to renew the application at the close of the presentation of evidence at trial.

## II. Preliminary Injunction/Yellowstone Injunction

Elghanayan's motion also evidently seeks a summary judgment on his cause of action for preliminary/permanent injunction. Although it is not set forth in the motion's prayer for relief, as would have been proper, both the affidavits annexed to the moving papers and Elghanayan's memorandum of law ask that "the Court ... enjoin and restrain Defendant from (a) taking any action to cancel or terminate the Lease based on the ... [predicate] Notices; and (b) cancelling or terminating Plaintiff's tenancy in and to the Premises or from commencing any action or proceeding to obtain the eviction of Plaintiff or his Sub-tenant based on the aforementioned Notices." See Order to Show Cause, Gross Affidavit, ¶ 52; Plaintiff's Memorandum of Law, at

1. This request tracks the language of Elghanayan's second cause of action word for word. See Notice of Motion, Exhibit J, ¶ 33. Although Elghanayan's memorandum of law does not advance any specific arguments in connection with the foregoing request, it is evident that he based it on the same arguments regarding the notice to cure and termination notice that were discussed supra with respect to the first cause of action. 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. 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). Here, however, the court has rejected Elghanayan's argument that the instant notice to cure and termination notice omitted certain legally required information, and has found that those notices were not defective. It therefore follows that Elghanayan is not likely to prevail on the merits of his claim that he is entitled to injunctive relief because of defective predicate notices. Thus, this argument is an insufficient ground upon which to base a request for summary judgment, and the court rejects it, too. That does not end the current inquiry, however.

On April 10, 2006, the court granted Elghanayan's motion for a Yellowstone injunction.

See Notice of Motion, Exhibit L. As the Appellate Division, First Department, has 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

1997) (citations omitted). The Appellate Division, First Department, also holds that:

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.

Id. at 228 (internal citation omitted). Here, paragraph 10 of the lease permits 77 Bleeker to terminate the lease only:

If Tenant defaults ... in the performance of any of the covenants or conditions hercof ... and if Tenant does not cure any ... default within 30 days ... (or, if the default is of such nature that it cannot be completely cured within such 30 days, if tenant does not commence such curing within such 30 days and thereafter proceed with reasonable diligence and in good faith to cure such default) [emphasis added].

See Notice of Motion, Exhibit A, at 9-10. The court's April 10, 2005 order granted Elghanayan a Ycllowstone injunction "based on plaintiff's representation that it has [the] desire and intention to cure if the condition is a violation of the lease." Id.; Exhibit L. Here, the fact that Renee Scott has made five expensive renovations to the commercial unit - all, as the Mahers allege, to no effect - renders it abundantly clear that the odor intrusion from the Subway sandwich shop into the Mahers' apartment is a "default ... of such nature that it cannot be completely cured within

such 30 days.” The court also credits the fact that Renee Scott began its attempts to rectify the odor intrusion problem in July of 2005 - four months before 77 Bleeker served the notice to cure - and continued its efforts through at least September of 2006 - some eight months after the commencement of this action. Thus, the court concludes that Renee Scott has “proceed[ed] with reasonable diligence and in good faith to cure such default” as required by paragraph 10 of the lease, and rejects the assertions that counsel for 77 Bleeker makes to the contrary. See Colbert Affirmation in Opposition, ¶¶ 6-8. “An attorney’s affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof.” Adam v Cutner & Rathkopf, 238 AD2d 234, 239 (1<sup>st</sup> Dept 1997). The court here reiterates that the odor intrusion is a lease violation. However, whether Renee Scott has already effected, or can effect, a complete cure of this violation is currently unknown and is in any matter a factual issue that is properly committed to a jury for resolution. In the event that Renee Scott has or can effect a cure, then 77 Bleeker will have no grounds upon which to terminate the lease. For the time being, however, the court finds that the evidence discussed supra merits the continuation of the previously granted Yellowstone injunction until such time as this action proceeds to trial. Therefore, the court’s denial of summary judgment on the issue of whether Elghanayan is entitled to an injunction preventing 77 Bleeker from terminating the lease on the grounds set forth in the predicate notices is without prejudice to Elghanayan’s right to renew the application at the close of the presentation of evidence at trial.

### III. Counterclaims

The third branch of Elghanayan’s motion seeks a summary judgment dismissing 77 Bleeker’s counterclaims for private nuisance and injunctive relief. A cause of action for nuisance

requires the proponent to demonstrate “a substantial, intentional and unreasonable interference with plaintiff’s use and enjoyment of” his or her property. Handler v 1050 Tenants Corp., 295 AD2d 238, 239 (1<sup>st</sup> Dept 2002), citing Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc., 41 NY2d 564, 570 (1977) (“[T]he elements of such a private nuisance ... are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.”). 77 Bleeker’s counterclaim states that:

The conduct of Plaintiff in permitting the offensive subway odors to emanate from the leased premises and enter onto the property of the Cooperative and the apartments of its shareholders has interfered with the Cooperative’s and its shareholders’ use and enjoyment of their property.

See Notice of Motion, Exhibit K, ¶ 38. Elghanayan notes that 77 Bleeker does not allege that he actually caused the odor intrusions, and also that Bi-Coastal subleased the premises to Renee Scott in 1997. See Plaintiff’s Memorandum of Law, at 16-18. Elghanayan then cites the Appellate Division, First Department’s, holding in Bernard v 345 East 73rd Owners Corp. (181 AD2d 543 [1<sup>st</sup> Dept 1992]) that “a cause of action for [private] nuisance does not lie as against defendants ... [who] did not create the nuisance and had surrendered control of the premises” to the party who did create the nuisance. Id. at 544, citing New York Telephone Co. v Mobil Oil Corp., 99 AD2d 185, 188-189 (1<sup>st</sup> Dept 1984); see also Herbert Paul, CPA., P.C. v 370 Lex, L.L.C., 6 Misc 3d 1031(A) (Sup Ct, NY County 2005). Elghanayan finally argues that, pursuant to this rule, 77 Bleeker may not maintain a private nuisance claim against him. See Plaintiff’s Memorandum of Law, at 16-18. 77 Bleeker does not address this argument. Instead, it merely asserts that the odor intrusion nuisance was an “intentional act” without explaining the legal

significance, if any, of this assertion. See Defendant's Memorandum of Law, at 7-8 (pages not numbered). The court finds that Elghanayan's legal argument - that no liability for private nuisance can attach to him because he did not create the nuisance, and because he (via Bi-Coastal) gave up control of the subject premises (via sublease) before the alleged nuisance arose - is meritorious. In this connection, the court also notes that Bi-Coastal's lease-assignment conveyed the subject commercial unit in "as is" condition, and that the sublease does not include any provisions for Bi-Coastal to retain control over the operation of the unit. Accordingly, pursuant to the holding of Bernard v 345 East 73rd Owners Corp., the court finds that Elghanayan is entitled to a summary judgment dismissing 77 Bleeker's first counterclaim for private nuisance, and grants so much of Elghanayan's motion as seeks this relief.

With respect to 77 Bleeker's second counterclaim, as previously discussed, 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 at 750. Here, 77 Bleeker bases its request for injunctive relief solely on the allegations of its nuisance claim. See Notice of Motion, Exhibit K, ¶¶ 44-48; Defendant's Memorandum of Law, at 8-9 (pages not numbered). However, the court has already determined that that claim is deficient as a matter of law. Therefore, it follows that 77 Bleeker cannot demonstrate "a likelihood of ultimate success on the merits" of that claim, and that 77 Bleeker's attendant request for injunctive relief must also fail. Accordingly, the court finds that Elghanayan is entitled to a summary judgment dismissing 77 Bleeker's second counterclaim for a preliminary and permanent injunction, and grants so much

of Elghanayan's motion as seeks this relief.

#### IV. Order to Strike

Finally, Elghanayan's motion seeks an order to strike 77 Bleeker's answer for failure to comply with discovery demands. Pursuant to CPLR 3126:

If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: ...

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

CPLR 3126. The Appellate Division, First Department, holds that “[a] court may strike an answer only when the moving party establishes ‘a clear showing that the failure to comply is willful, contumacious or in bad faith’.” Reidel v Ryder TRS, Inc., 13 AD3d 170, 171 (1<sup>st</sup> Dept 2004), quoting Palmenta v Columbia University, 266 AD2d 90, 91 (1<sup>st</sup> Dept 1999). Here, Elghanayan argues that the court should strike 77 Bleeker's answer because 77 Bleeker willfully violated the terms of both of the preliminary conference orders that were previously entered in this action. See Plaintiff's Memorandum of Law, at 18-22. Elghanayan's argument refers specifically to 77 Bleeker's failure to timely respond to his Notice of Discovery and Inspection of documents in 77 Bleeker's possession. Id. at 20. In response, counsel for 77 Bleeker asserts that it “did not willfully violate any discovery order,” and annexes a copy of Defendant's Response to Plaintiff's Notice of Discovery and Inspection to 77 Bleeker's opposition papers. See Colbert Affirmation in Opposition, ¶ 19; Exhibit F. In his reply papers, counsel for Elghanayan questions the sufficiency of 77 Bleeker's response, but does not specify what, if any, other discovery

demands 77 Bleeker has not yet complied with. See Semaya Reply Affirmation, ¶ 44. The court notes that, pursuant to the second preliminary conference order, 77 Bleeker was to have responded to Elghanayan's document demand by October 31, 2006, and that 77 Bleeker's actual response is dated January 12, 2007. Although the court is not satisfied with 77 Bleeker's excuse for this two-and-a-half-month delay, it nonetheless appears that Elghanayan's request for documents is now moot, and that there are no discovery items outstanding. Under these circumstances, the court believes that it would be an improvident exercise of its discretion to strike 77 Bleeker's answer. Accordingly, the court denies so much of Elghanayan's motion as seeks this relief.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

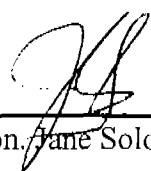
ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Jeffrey Elghanayan is granted solely to the extent of awarding plaintiff a summary judgment dismissing the counterclaims of defendant 77 Bleeker Street Corp., but is in all other respects denied without prejudice to plaintiff's right to renew his application at the close of the presentation of evidence at trial as discussed above; and it further is

ORDERED that plaintiff's time to serve and file a note of issue is extended to June 30, 2007.

Dated: May 17, 2007

**FILED**  
MAY 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
Hon. Jane Solomon J.S.C.

JANE S. SOLOMON