MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

SENAGRYPH TRAINING FACILITIES	X	INDEX NO. 26482/2006
- against -		BY: AGATE, J.
OSCAR ARISTIZABAL		DATED: May 8, 2007
	X	

In this action for a declaratory judgment and other related relief, plaintiff Senagryph Training Facilities (Senagryph) seeks to enjoin defendant Aristizabal from terminating its lease, commencing summary proceedings or otherwise disturbing its possession on the basis of a notice to cure dated February 20, 2007. Defendant cross-moves 1) to dismiss the first and third causes of action pursuant to CPLR 3211(a)(1) and (7); 2) for partial summary judgment on the first cause of action and its first counterclaim; 3) in the event injunctive relief is granted, for the imposition of an undertaking in the amount of $169,000; 4) the appointment of a referee; and 5) the payment of rents during the pendency of the action.

Senagryph entered into a 10-year commercial lease with Aristizabal dated July 12, 2001. As set forth in the second paragraph of the lease, occupancy of the subject premises is limited to use as an education or environmental center specializing in training adult individuals in asbestos and lead abatement removal. Defendant previously served two notices to cure, dated

November 28, 2006, and December 27, 2006, both of which were withdrawn following applications to the court for injunctive relief. A third notice to cure dated February 20, 2007 was then served which is the subject of this application. It provides that plaintiff has failed to comply with all applicable statutes and regulations as set forth in paragraph four of the lease by occupying the premises in contravention of the certificate of occupancy, and by making alterations to the premises without the consent of the landlord, as required by paragraph three of the lease.

This court will first address the cross motion as it may be dispositive of this action. In the first branch which seeks to dismiss, it is incumbent upon the court to liberally construe a challenged pleading and accept as true the material allegations of fact and determine whether any cause of action cognizable at law exists. (See, Goshen v Mut. Life Ins. Co., 98 NY2d 314 [2002]; Mendelovitz v Cohen, 37 AD3d 670 [2007].) To prevail on the basis of documentary evidence the documents relied upon must conclusively dispose of plaintiff's claim. (Held v Kaufman, 91 NY2d 425 [1998]; Del Pozo v Impressive Homes, 29 AD3d 621 [2006].) With respect to the first cause of action for a declaratory judgment, the papers presented are insufficient to resolve the issues raised and definitively dispose of the claim which has been adequately pleaded. (See, Ruby Falls, Inc. v Ruby Falls Partners, LLC,

___ AD3d ___, 2007 NY Slip Op 3119 [2nd Dept, April 10, 2007]; Quesada v Global Land, 35 AD3d 575 [2006].) The third cause of action for abuse of process is, however, dismissed. An essential element of this claim is regularly issued process. (Curiano v Suozzi, 63 NY2d 113 [1984].) Although process has been defined as a direction or demand to perform or refrain from doing a proscribed act (see, Williams v Williams, 23 NY2d 592 [1969]), it must also involve the judicial process. (86 NY Jur 2d, Process and Papers, § 157.) Thus, the service of successive notices to cure by a landlord cannot be the predicate for an abuse of process action. (See generally, Julian J. Studley, Inc. v Lefrak, 41 NY2d 881 [1977]; Glaser v Kaplan, 5 AD2d 829 [1958].)

Turning next to that branch of defendant's motion which seeks partial summary judgment, it appears that the answer which includes a counterclaim was served on Senagryph as an exhibit to the motion. Inasmuch as a party may move for summary judgment only after issue has been joined, summary relief is denied as premature with respect to the counterclaim, in that, no reply has been served. (CPLR 3212.)

It is defendant's burden on this cross motion to establish his entitlement to relief as a matter of law. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Korina v New York City Tr. Auth., 37 AD3d 765 [2007].) Upon a review of the subject lease, it is apparent that both parties contemplated that the

premises would be used by plaintiff exclusively for the training of individuals in lead abatement removal. (See, Times Square Stores Corp. v Bernice Realty Co., 141 AD2d 536 [1988].) Inherent in every contract is the implied covenant of good faith and fair dealing. (See, Rowe v Great Atl. & Pac. Tea Co., 46 NY2d 62 [1978]; Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513 [1999].) A breach of this covenant occurs when a party to the contract deprives the other of the ability to receive the benefits under the agreement. (See, P.T. & L Contr. Corp. v Trataros Corp., 29 AD3d 763 [2006].)

This lease contains no express representation as to the certificate of occupancy nor does it specifically impose an obligation on the tenant to obtain a certificate of occupancy in compliance with the exclusive use designated therein. As a result, issues of fact exist at least as to intentions and representations of the parties upon execution of the lease, the subsequent conduct of the defendant and reliance by plaintiff. In addition, the parties sharply dispute the issue of whether alterations were undertaken without Aristizabal's consent which requires resolution at the trial of this matter.

Accordingly summary judgment dismissing the first cause of action is denied.

As to plaintiff's application, Yellowstone injunctions are routinely granted to avoid forfeiture of a commercial tenant's

interest prior to a determination of the merits. (Post v 120 East End Ave. Corp., 62 NY2d 19 [1984]; First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968].) A tenant must demonstrate the existence of a commercial lease, receipt of a notice of default, a timely application for a temporary restraining order and the desire and ability to cure the alleged default. (Purdue Pharma, LP v Ardsley Partners, LP, 5 AD3d 654 [2004].) The standard to be applied for a Yellowstone injunction is far less than that normally required for preliminary injunctive relief. (Post v 120 East Ave. Corp., supra.) While defendant argues that Senagryph has not cured the default, it has yet to be determined upon whom the obligation to obtain a proper certificate of occupancy will fall and whether in fact it is obtainable under these circumstances. In light of plaintiff's valuable leasehold interest in the premises and a sufficient demonstration of the necessary elements, a preliminary injunction to avoid termination is warranted. (See, TSI West 14, Inc. v Samson Assocs., LLC, 8 AD3d 51 [2004];Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harasco Corp., 306 AD2d 254 [2003]; Terosal Props. v Bellino, 257 AD2d 568 [1999].)

Accordingly, plaintiff's application is granted to the extent of enjoining the defendant from taking any action to terminate the subject lease, commencing summary proceedings or otherwise interfering with its occupancy on the basis of defaults set forth in a notice to cure dated February 20, 2007, on the

condition that plaintiff provide an undertaking in accordance with CPLR 6312, which amount is to be fixed in the order to be entered hereon. The foregoing relief is further conditioned on plaintiff paying all rents and obligations due and owing. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

All other requests are denied at this time.

Settle order.

J.S.C.