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

PRESENT: MADDEN Justice

PART 11

143-145 MADISON AVENUE LLC

INDEX NO. 100254/06

- v -

MOTION DATE

TRAVEL, INC.

MOTION SEQ. NO. 02

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED

JAN 11 2008

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 2, 2008.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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143-145 MADISON AVENUE LLC,

Plaintiff,

INDEX NO. 100254/06

-against-

TRANEL, INC.,

Defendant.

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JOAN A. MADDEN, J.:

In this action involving a dispute between the tenant/net lessee of a commercial building and its landlord, the defendant landlord moves for an order pursuant to CPLR 2221(e) granting leave to renew the plaintiff tenant's motion for a Yellowstone injunction which was granted by a decision and order of this court dated September 19, 2006; upon renewal defendant seeks an order denying plaintiff's motion and vacating the Yellowstone injunction. Defendant also seeks an order pursuant to CPLR 3025(b), granting leave to amend its answer to assert a counterclaim for an injunction directing plaintiff to correct certain violations issued by the New York City Department of Buildings (DOB), after the commencement of this action.

"An application for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and therefore not made known to the court." Foley v. Roche, 68 AD2d 558, 567-568 (1st Dept 1979); accord Elson v. Defren, 283 AD2d 109, 113 (1st Dept 2001).

In support of renewal, defendant relies on "new facts" that arose after the Yellowstone injunction was issued, and argues such facts demonstrate that when plaintiff made the original motion, it "had absolutely no desire or ability to cure" the defaults listed in the notice to cure. Specifically, defendant asserts that plaintiff's undisputed failure, since the issuance of the Yellowstone injunction more than a year ago, to perform the sprinkler or heating system work, "has made it abundantly clear that, at the time of the issuance of the [Yellowstone] Order, Tenant had absolutely no desire or ability to cure those alleged defaults."

As stated in the court's previous decision and order, the purpose of a Yellowstone injunction is to "maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits, the tenant may cure the default and avoid a forfeiture." Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assocs., 93 NY2d 508, 514 (1999). "As such, it may be granted on less than the normal showing required for preliminary injunctive relief." Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 (1st Dept. 1994). In order to obtain a Yellowstone injunction, a tenant must demonstrate that: 1) it holds a commercial lease; 2) it received from the landlord a notice to cure, a notice of default, or a threat that the lease would be terminated; 3) it requested injunctive relief prior to the expiration of the cure period and 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. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., supra.

In previously opposing plaintiff's motion for a Yellowstone injunction, defendant argued, as it does now, that plaintiff did not satisfy the fourth element listed above, namely a willingness and ability to cure the alleged lease violations. The court rejected that argument, finding that plaintiff had adequately met its burden by submitting sworn statements from its principal, James Ludlow, as to the efforts already and continued to be taken in addressing the purported lease violations. See TSI West 14, Inc. v. Samson Assocs, Inc., 8 AD3d 51 (1st Dept 2004); Terosal Properties, Inc. v. Bellino, 257 AD2d 568 (2nd Dept 1999); 225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp., 211 AD2d 420 (1st Dept 1995). The court also noted that the law is clear that a tenant is not required to prove its ability to cure prior to obtaining a Yellowstone injunction, as "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises." WPA/Partners LLC v. Port Imperial Ferry Corp., 307 AD2d 234, 237 (1st Dept 2003)(quoting Herzfeld & Stern v. Ironwood Realty Corp., 102 AD2d 737, 738 [1st Dept 1984]).

Now, in seeking renewal, defendant asks the court to revisit the identical issue, based on facts that came into existence only after the Yellowstone injunction was issued.[1] However, as noted above, generally a motion to renew is based on new or additional facts that existed at the time the prior motion was made, but for some reason were not known to the party seeking renewal, and consequently not revealed to the court. See CPLR 2221; Foley v. Roche, supra at 567-568; Elson v. Defren, supra at 113.

[1]Defendant submits no legal authority to support its argument that renewal is appropriate based on facts that came into existence after the motion was made.

In any event, even if the new facts were considered, the result would remain unchanged. Defendant asserts that from the outset, plaintiff never had any "true desire or ability to cure" the sprinkler or heating system lease violations, since more than two years have passed since the notice to cure was served and more than one year has passed since the Yellowstone injunction was issued, and plaintiff still has not performed or provided any plans for such work." To support this assertion, defendant submits an affidavit from Debbie Freeman, an employee of its managing agent, Williams Real Estate Co., explaining that she conducted a walk-through inspection of the building on September 23, 2007, and observed that neither sprinkler nor heating system work had been performed. She states that she was advised that plans were being drawn for the sprinkler work but had not been filed with the DOB, and that nothing had been done as to the heating system. Freeman further states that the tenant has not provided "any firm indication as to exactly what work will be performed and when," and has "apparently ignored its obligation to perform the required work since the date the Notice to Cure was served."

While plaintiff acknowledges that no construction work has taken place with respect to the sprinkler or heating systems, under the circumstances presented, an adequate explanation for the delay has been provided. It is not disputed that plaintiff, 143-145 Madison Avenue LLC, is no longer in control of the building, as in September 2006, the net lease was assigned and taken over by the Bank of Smithtown (the "Bank"), the mortgagee-in-possession.[2] Robert Staron, the Vice President of the Bank, submits an affidavit stating that since the Bank took possession of

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[2]Defendant argues that "the Bank is not a party . . . and, therefore, it is improper for the Bank to assert any position on this motion or for the court to consider the Bank's opposition papers." However, plaintiff, not the Bank, has submitted opposition papers which include an affidavit from a vice president of the Bank, properly considered on this motion.

the building in September 2006, it "has complied with all of the requirements under the net lease," and that defendant has at times, hindered the Bank's compliance with important and necessary work at the Building." Specifically, Staron explains that pursuant to an assignments of rents, it has been collecting rents and paying the operating expenses of the building since 2005, and even though James Ludow, plaintiff's principal, continued to hold himself out as manager of the building, his management "was infrequent with respect to important matters." Staron states that since 2005, the Bank has participated in attempts to cure the default relating to the sprinkler system, including meeting with defendant's attorney in August 2005, at which time the Bank informed defendant that it was "committed to assist whatever work needed to be done, and Defendant was in agreement." According to the Bank, at that time a question arose as to whether the work would be performed by the plumber hired by Ludlow, or whether defendant wanted to do the work. When the Bank did not hear back from defendant, it contacted defendant and was advised that Ludlow should use the contractor of his choice. Staron states that "[a]t this point, I encouraged Ludow to arrange a meeting with his sprinkler contractor and to move the work along." Staron and Ludlow subsequently met with Michael Lewis of PAR plumbing, who promised to prepare a schedule and estimate of the work; Staron states that he made clear that the Bank would be funding the work, gave Lewis his card and asked him to keep him apprised.

In April and May 2006, Staron made several calls to Ludow and Lewis as to the status of the work, and Ludlow told him that he had executed an agreement with PAR Plumbing and PAR was contacting a engineer. Staron states that it was his understanding that plans would be drafted and completed, the necessary applications would be filed with the City, and that it would take several months to commence the project. Staron explains that from August to December 2006,

he followed up with Ludlow, but that became "difficult" once Ludlow and 143-145 Madison Avenue LLC defaulted on the mortgage, and the Bank became the sole party responsible for the day-to-day operations of the building. Staron states that he still understood that PAR Plumbing was submitting plans to the City and was waiting to hear from them.

In February 2007, Staron learned that PAR Plumbing filed a Mechanic's Lien against the building for $7,000 that Ludlow failed to pay. Staron states that Ludlow never sent the Bank any invoices from PAR. The Bank then paid PAR the outstanding balance, executed a contract directly with PAR, and paid PAR $20,000 toward the sprinkler work.

Staron explains that in May 2007, the Bank was notified that there was not enough water pressure from the street to support a sprinkler system. The Bank and PAR Plumbing then met with defendant's owner, Jonathan Rosen, who advised that he did not want a water tank on the roof of the building, which was one way of increasing water pressure. PAR Plumbing and Collado Engineering then advised that the only option to increase the pressure was the installation of a water tank and pump in the basement, which required the use of space in the basement that was currently occupied by a tenant. The Bank ultimately gained possession of that space in September 2007, as a result of settling a nonpayment proceeding.

According to Staron, since September 2007, the Bank has been in contact with PAR Plumbing, Collado Engineering and an architect, Hugh Robotham, and they were scheduled to meet on September 17, to assess the basement space for the installation of the pump, prior to the architect's drafting new plans.

Plaintiff also submits an affidavit from the engineer, Albert Collado, confirming that Collado Engineering was hired by PAR Plumbing to prepare the file drawings for the sprinkler

system work. Collado explains that the flow test performed by the New York City Department of Environmental Protection (DEP) determined that the water pressure was inadequate, and that a water storage tank would have to be installed either on the roof or in the basement of the building. Collado states that since the roof option is not available, the tanks must be placed in the basement and "there will need to be a carve out space from the existing floor plan to house storage tanks and equipment," which introduces "new Code requirements that must be met as part of the project." According to Collado, "[a] project of this complexity and with this many details requires the direction of an architect to ensure Code compliance." Collado recommended an architect, Hugh Robotham, who was scheduled to do a site inspection the week of September 18, 2007.

Plaintiff also submits an affidavit from Michael Lewis, the project manager for PAR Plumbing. Lewis explains that in March 2006, PAR entered into a contract with Ludlow for the installation of sprinkler system in the building, and PAR began developing drawings to be submitted to the DOB and the DEP. Lewis states that when Ludlow failed to remit payment, PAR placed a mechanic's lien on the building, and that PAR did not know that the Bank had taken over management of the building. PAR subsequently received payment from the Bank, and the Bank entered into a contract directly with PAR for the sprinkler work. Lewis states that on May 17, 2007, the DEP conducted a "flow test" which concluded there was inadequate water pressure from the street to the building, so they were "unable to proceed with our original proposal" for the sprinkler system. He states that they are working with Collado Engineering and have scheduled a site meeting with a licensed architect for the week of September 18, 2007 "so he can assess the extent of the work needed to be done and to then draft the plans necessary

to submit to the Department of Buildings."

Based on the foregoing affidavits, plaintiff has provided a reasonable explanation for the delays in performing the sprinkler and heating system work, since the issuance of the Yellowstone injunction on September 19, 2006. The fact that plaintiff subsequently defaulted on its mortgage and failed to pay the plumber, does not, in retrospect, necessarily establish or create a reasonable inference, that at the time plaintiff sought Yellowstone relief, it had neither the willingness nor ability to cure the defaults regarding the sprinkler or heating systems. The affidavits from the plumber and the engineer also demonstrate that the sprinkler work is more complex than originally thought, and what is important here, is that substantial steps are being taken towards curing the violations and the Bank is actively working toward that end. See Baruch, LLC v. 587 Fifth Avenue, LLC, 44 AD3d 339 (1st Dept 2007). Significantly, under the circumstances presented, where the Bank has taken over control of the premises and is actively engaged in taking the many steps needed before the sprinkler work can commence, including hiring a plumber, engineer and architect, and paying the plumber $27,000, the court is not persuaded that a Yellowstone injunction is not warranted to maintain the status quo. However, in view of the fact that more than a year has passed since the Yellowstone injunction was issued, the Bank must move forward expeditiously. At the conference scheduled for February 7, 2008, plaintiff and the Bank shall report to the court as to the status of the sprinkler work.

Finally, that portion of defendant's motion to amend its answer to add a second counterclaim for a injunction requiring plaintiff to cure DOB violations issued on March 2, 2007, is denied as moot. In his affidavit, Staron explains that all of the violations listed on the March 2, 2007 Notice of Violation were found on the premises occupied by Vapor Bar, and Vapor Bar

surrendered possession in connection with the settlement of the non-payment proceeding. Staron further states that the Bank "completed removal of the violations four (4) days after the Bank received possession, and is submitting a Certificate of Correction" to the DOB. Absent competent proof showing or suggesting that the violations still exist, a viable basis for the proposed counterclaim no longer exists.[3]

Accordingly, it is hereby

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for the conference previously scheduled for February 7, 2008

DATED: January 2, 2008

ENTER:

J.S.C.

[3]Defendant's proposed Second Counterclaim is limited to the violations listed on the DOB March 2, 2007 Notice of Violation. Although defendant mentions the nuisance proceeding brought by the City regarding the "illegal massage parlor" on the 5th floor of the building, defendant is not seeking to amend the answer or any other relief based on that proceeding. Plaintiff states, however, that once the Bank received notice of the alleged nuisance proceeding, it "immediately contacted the attorney representing the City and negotiated a settlement," and that the Bank paid the reduced fine and "cooperated fully with the City."