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

PRESENT: CAROL EDMEAD J.S.C. PART 3

Justice

E.C. Electronics, INC.

- v -

AMBLUNTHORP Holding INC.

INDEX NO. 101194/06

MOTION DATE 12/19/07

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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

FILED

APR 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

	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

The within motion and cross motion are decided in accordance with the accompanying Memorandum Decision.

Accordingly, it is ORDERED that plaintiff's cross motion for summary judgment is granted to the extent of declaring that plaintiff is not in default of the July 24, 1985 lease agreement; or alternatively, if plaintiff was in default, such default has been cured and/or is not material and does not warrant forfeiture of the lease; and it is further

ORDERED that the branch of plaintiff's cross motion seeking sanctions against defendant and its attorney is denied; and it is further

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

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this motion with notice of entry within twenty days of entry on counsel for defendant.

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

Dated: 4/23/08

CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 53

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E.C. ELECTRONICS, INC.,

Plaintiff,

v.

AMBLUNTHORP HOLDING INC.,

Defendant.

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ORDER and JUDGMENT

Index. N[redacted]04/2006

EDMEAD, CAROL, J.S.C.

MEMORANDUM DECISION

In this dispute between a cooperative apartment building and its commercial tenant, defendant, Amblunthorp Holding Inc. ("defendant" or "the cooperative"), the owner of the cooperative located at 788 Ninth Avenue in New York City, moves for summary judgment dismissing the first amended complaint and for an order declaring that plaintiff, E. C. Electronics, Inc. ("E.C."or "plaintiff"), the commercial lease holder, is in default of its lease. Defendant also seeks attorneys' fees. Plaintiff cross moves for summary judgment for an order declaring that it is not in default of its lease and for sanctions against defendant and its attorney.

BACKGROUND

In 1985, E.C. entered into a 99 year lease with the cooperative's sponsor for the commercial space on the ground floor of the cooperative. The lease grants plaintiff the right to sublet and, since the inception of the lease, plaintiff has sublet the space to a number of different subtenants who have operated restaurants on the premises. Q2 Thai, LLC is the current subtenant.

In July, 1997, the Department of Buildings ("DOB") issued Violation Number 34157667P to defendant's then managing agent, Faith Brenner of Elm Management. The violation stated that the cooperative violated DOB regulations by installing an exhaust fan and flue[1] on the roof without filing the necessary plans or applications and without obtaining the necessary permits. The DOB stated that the cooperative could cure the violation by filing the plans and applications and obtaining the approvals or by removing the "illegal construction." (10/11/07 Smith Aff, Ex. B)[2] It appears that this violation was never cleared from DOB's records and, in 2005, when a new subtenant filed plans for renovations to the restaurant space, the DOB stated that the renovation work could not proceed until the 1997 violation was corrected and the outstanding penalty paid.

In December, 2005, Kelly P. Smith ("Smith"), the current property manager for the cooperative, learned that the 1997 violation had somehow been cleared without the cooperative's knowledge and, in an effort to find out how this had been accomplished, she discovered that in October, 2005, allegedly false and/or fraudulent documents had been filed with the DOB regarding the correction of the violation. The allegedly false documents included an October 12, 2005 letter allegedly signed by Faith Brenner ("Brenner")[3] and sent to DOB's Administrative Enforcement Unit that states that Brenner had retained an architect who filed the required documents and received the required approvals and that she had paid the fine (Brenner Aff. Ex.

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[1] Alternately referred to as a ventilation stack

[2] Counsel for plaintiff produced copies of a set of microfiche plans of Bong Yu, P.C., allegedly dated July, 1985, that were filed with the Department of Buildings which plans include the flue and fan. These plans may demonstrate the DOB was in error in issuing Violation No. 34157667P. (See, Smith Aff. P. 20, fn. 1)

[3] It is undisputed that Brenner had not worked as the cooperative's property manager since late 1998 or early 1999.

D); a 10/12/2005 Certificate of Correction allegedly signed by Brenner regarding Violation Number 34157667P (Brenner Aff., Ex. E); Form TT014 ("Plan/Work Report for PC Filing") and Form TR-1 ("Technical Report Statement of Responsibility") that lists Elbert Chan, E.C.'s president, as owner of the cooperative and signed by Elbert Chan on behalf of the cooperative (Brenner Aff., Ex. F & G); Form POC-1 ("Professional & Owner Certification") signed by Elbert Chan as owner of the cooperative.

Based, *inter alia*, on the alleged fraudulent filings, on January 10, 2006, the cooperative served a Five Day Notice of Default (the "Notice") on E.C. The notice states that E.C. breached its lease with the cooperative by: (a) submitting the above referenced fraudulent documentation to the DOB; (b) making alterations to the demised premises without "legally obtaining" permits and approvals and without delivering copies of "legally obtained" permits and approvals to the cooperative'; (c) making alterations without "legally obtaining" permits and approvals in violation of federal, state and local laws and regulations; and (d) failing to procure and maintain a $100,000/$300,000 public liability insurance policy and failing to deliver such public liability insurance policy to the cooperative. (Smith Aff., Ex. K)

The Notice further states that in order to cure the defaults, E.C. must: (1) withdraw the fraudulent filings and re-file legitimate documentation to obtain the required permits and approvals; (2) stop any current work that is based on the fraudulent filings; (3) advise the DOB that the work to correct the violation has not been done; (4) perform all work necessary to correct and remove the violation; and (5) obtain and deliver the required public liability insurance to the cooperative.(Smith Aff., Ex. K)

In response to the notice to cure, E.C. commenced the instant action seeking a declaratory

judgment that E.C. is not in default of the lease or that any such defaults, if they exists, have been cured or are not material. E.C. moved for a *Yellowstone* injunction and by decision and order dated June 30, 2006 that motion was granted. (10/25/07 Berenthal Aff., Ex. A) The *Yellowstone* injunction remains in effect.

The cooperative does not dispute that plaintiff has filed corrected and amended TT014, TR-1 and POC-1 forms with the DOB and that such filing has cured those defaults. However, in support of the motion to dismiss the complaint, defendant contends that Article 39B of the lease requires E.C. to furnish the cooperative with copies of its public liability insurance policy and that plaintiff has failed to produce a copy of the public liability policy that is currently in effect; that Article 57 of the lease requires plaintiff to submit plans for alterations to the cooperative and that plaintiff never submitted the plans, or any other documentation, to the cooperative relating to the recent efforts to legalize the flue and roof fan; that filing the allegedly fraudulent documents was contrary to law and a violation of Article 6 of the Lease and that even if the subtenant filed the allegedly fraudulent documents, E.C. is liable to the cooperative for any action of its subtenant that resulted in a breach of E.C.'s lease with the cooperative.

In opposition to the cooperative's motion for summary judgment and in support of its cross motion, E.C. argues that it has produced a copy of its current (2007–2008) public liability insurance policy and the declaration page for that policy (12/19/07 Berenthal Reply Aff., Ex. A; 10/25/07 Berenthal Aff., Ex. F) as well as the 2006 – 2007 public liability insurance policy and declaration page (Smith Aff., Ex. Q); that the defaults, if any, do not constitute material breaches of the lease and that the alleged defaults regarding the "Brenner" letter and Certificate of Correction have been cured. E.C. contends that the cooperative notified the DOB regarding the

alleged forgeries; that corrected documents were filed in place of the allegedly fraudulent ones; that the architect, Sir James Robinson testified that the documentation necessary to correct the violation was submitted to the DOB and that the fine for the violation was paid; that E.C. is not responsible for filing the allegedly forged documents and therefore they do not constitute a default under the lease. In addition, plaintiff contends that the Article 57 filing requirement in the lease is limited to instances where the plaintiff is undertaking actual alteration work and that here, the work done to cure the violation was purely administrative, and no actual alterations were done.

DISCUSSION

Summary Judgment

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by "affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." (CPLR 3212[b])

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v.*

Kenworth Truck Co., 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York*, supra at 560)

A. Insurance

Here, E.C. has made a prima facie showing that it is entitled to judgment by submitting a copies of the 2006-2007 and 2007-2008 insurance certificates and declarations pages establishing that it has (and had) in place a public liability insurance policy with the liability limits required by the lease. Thus, E.C. has fully complied with the decretal paragraph in the notice to cure regarding the steps it must take to cure the alleged violations regarding insurance. Defendant has failed to produce any evidence to demonstrate that there is a factual issue as to the public liability insurance coverage.

B. The "Brenner" Letter and Certificate of Correction

The Certificate of Correction and the October 12, 2005 "Brenner" letter filed in October, 2005, are the documents that informed the DOB that the violation had been cured. When the alleged forgery was discovered, Sir James Robinson, a registered architect, was engaged to ensure that the violation was cured. The architect filed the necessary plans and other documents which replaced the fraudulent ones. (Berenthal Aff., Ex. N) and, according to the architect, the violation was legalized and therefore removed in December, 2006. (Berenthal Aff., Ex. K, p. 164, ll. 19-22; Berenthal Aff., Ex. P) Thus, to the extent possible, plaintiff had cured the allegedly fraudulent filing, before the Notice issued.

In *Empire State Building Assoc. v. Trump Empire State Partners*, 245 A.D.2d 225, 229 (1st Dept. 1997), as in the case before the court, defendant sought to terminate plaintiff's lease based on the allegation that Empire had violated the "compliance with law" provision in the lease by filing false and fraudulent documentation with the DOB. In that case, Trump argued, in

opposition to a *Yellowstone* injunction, that the violation, which referred only to a past event that could not be changed, was not curable. There, the court stated:

> However, even assuming that an error in filing was committed and that it would give rise to a right of termination, the error could potentially be cured by resubmitting the correct information or altering the structure. While these cures cannot 'undo' the filing of purportedly inaccurate information, it is not necessary, in order to cure, that a tenant show that it is able to erase the past, as long as it can show that it is able to bring itself into compliance with the lease without vacating the premises. Particularly in light of the guiding principle that equity abhors a forfeiture. (Citations omitted)

In addition, it is well settled that to enforce a forfeiture, there must have been a material, not a trivial, breach of the lease. Indeed, the *Trump* court stated, "[t]here appears to be little likelihood that there will be a finding that the [allegedly false] application for the variance filed with the Department of Buildings in 1980 was a material violation of the lease." (*Id* at 230; see also, *Helsam Realty Co., Inc. v. H.J.A. Holding Corp.*, 4 Misc.3d 64 [App. Term 2nd Dept. 2004]; *City of New York v. Skyway-Dykman, Inc.*, 22 A.D.2d 506 [1st Dept. 1965] *app. dismissed* 16 N.Y.2d 706 [1965]

In *Fly High Music Corp. v. 645 Restaurant Corp.*, 64 Misc. 2d 302 (Civ. Ct. N.Y. City, 1970), *aff'd* 71 Misc.2d 302, 304 (App. Term 1st Dept 1972), the cooperative commenced a summary proceeding against a commercial lessee who allegedly violated the "compliance with law" section of the lease by failing to file plans and obtain a permit for renovation work that the lessee had completed three years before the DOB issued its violation. In that case, the court stated:

> The law abhors a forfeiture of a lease and where, as here, no substantial injury resulted to the cooperative for the failure to comply strictly, the tenant should not be unduly penalized. A forfeiture of the lease herein, . . . would be unduly harsh, especially in light of the fact that the condition complained of was not hazardous.
>
> Where the covenants of a lease are substantially performed and no substantial injury results to the cooperative from the failure to comply strictly, the tenant should not be subject to the severity of a forfeiture. (Citations omitted)

(*See also, Fergang Holding Co. v. 165 Front Street Restaurant Corp.*, 116 A.D.2d 455 [1st Dept 1986] *rev'd in part on other grounds* 119 A.D.2d 496 [1st Dept 1986][tenant's failure to deliver copies of the insurance policies to the landlord, as required by the lease, was deemed to be a non-material breach]

In this case, the forfeiture of plaintiff's lease would be a particularly harsh result for several reasons. First, it appears that the DOB violation that was issued in 1997 was an error because all the required paperwork for the ventilation stack and roof fan had been filed with the DOB when the work was originally undertaken in 1985. Second, although Brenner's signature on the cover letter and correction certificate were allegedly forged, the information contained in the correction certificate was correct. Third, the cooperative informed both DOB and the District Attorney about the allegedly forged signature, and both of these entities has declined to take any action. Fourth, the violation had been cured by filing corrected paperwork and paying the fine in October , 2005, three months before the cooperative issued the January, 2006 Notice and finally, the condition was not hazardous and the cooperative has not suffered any harm as a result of the alleged breach.

Failure to Submit Plans to Cooperative for Review

Article 57 of the lease states, in pertinent part:

> The tenant may use the leased premises as a restaurant *and erect a ventilation stack to and a blower on the roof provided that Tenant complies with the following:
>
> (a) Any proposed alteration is subject to review by Owner's architect or engineer to insure compliance with all applicable laws and regulations and to insure that residential use of the remaining portions of the Building at 788 Ninth Avenue, New York, New York will not be adversely affected.

(Smith Aff., Ex. A)

Here, it is undisputed that the ventilation stack and fan were erected on the roof more than 10 years ago and defendant does not allege that the ventilation stack and blower violate any federal, state or municipal laws or ordinances or that they interfere with the residential use of the building. The architect's efforts to remove the alleged "fraudulent filing" violation did not involve "alterations." Indeed, the DOB documents specify that no actual work was to be done. (Berenthal, Aff., Ex. N) Rather, the "work" done to cure the violation was purely administrative and thus, because the correction did not involve "alterations" it falls outside the ambit of Article 57 of the lease.

Moreover, the cooperative has failed to demonstrate how it has been harmed by the plaintiff's alleged failure to submit the plans for review when the ventilation stack and fan were originally installed on the roof or that such failure, if it occurred, constituted a material breach of the lease. (See, *Fly Hi Music Corp. v. 645 Restaurant Corp.*, 64 Misc.2d at 304)

Because the court finds that plaintiff has demonstrated, by admissible evidence, that it did

not breach Article 57 of the lease concerning plans for alterations or Articles 8 and 39B of the lease regarding insurance and that the alleged breaches of Article 6, the "compliance with law provision" and Articles 3 and 51 of the lease, if any, were not material or, alternatively, that those alleged breaches have been cured, that branch of plaintiff's cross motion for an order declaring that it is not in breach of its lease, or that the breaches if any, were not material and/or have been cured is granted and defendant's motion for summary judgment is denied.

Sanctions

22 N.Y.C.R.R. Section 130-1.1 (a) and (b) state that a court may impose sanctions and costs against a party or an attorney for engaging in frivolous conduct. The court rule further states that conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

In this case, plaintiff contends that defendant's failure to acknowledge that plaintiff had provided it with proof in February, 2006, that it had cured the defaults regarding Forms TT014, TR-1 and POC-1 constitutes frivolous conduct. Similarly, plaintiff asserts that defendant's refusal to acknowledge plaintiff's proof of insurance rises to the level of frivolous. Here, defendant's alleged refusal to acknowledge the receipt of forms that resolved some of the issues in this litigation, did not rise to the level of frivolous conduct. Defendant stated that it has no record of receiving, in February 2006, the amended TT-104; TR-1 and POC-1 and that it wasn't

until June, 2007 that it was able to confirm the all of the circumstances surrounding the amended documents.(Taylor Reply Aff., paras. 26 - 29) As to the insurance certificates, defendant's failure to accept the 2006-2007 declaration page as final proof of that proper insurance was in place during the relevant period does not rise to the level of frivolous. (*See, e.g. Hapworth Medical Services, P.C. v. Kress*, 218 A.d.2d 575 [1st Dept 1995])

Accordingly, it is ORDERED that plaintiff's cross motion for summary judgment is granted to the extent of declaring that plaintiff is not in default of the July 24, 1985 lease agreement; or alternatively, if plaintiff was in default, such default has been cured and/or is not material and does not warrant forfeiture of the lease; and it is further

ORDERED that the branch of plaintiff's cross motion seeking sanctions against defendant and its attorney is denied; and it is further

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

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this motion with notice of entry within twenty days of entry on counsel for defendant.

This constitutes the decision and order of this court.

DATE April 23, 2008

Carol Robinson Edmead, J.S.C.