[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 116512/2007

MARK HOTEL LLC

VS

MADISON SEVENTY-SEVENTH

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 decided per attached

FILED

DEC 05 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/25/08

J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

MARK HOTEL LLC,

Plaintiff,

-against-

Index No. 116512/07

MADISON SEVENTY-SEVENTH LLC,

Defendant.

----------X

Emily Jane Goodman, J.S.C.:

In this protracted litigation concerning plaintiff Mark Hotel LLC's (the Hotel) right to reconfigure its leased premises to include luxury cooperative units, the Hotel moves for summary judgment for a declaration that, basically, it has the right to continue with the project. Knowledge of the facts is presumed.

This is the second action brought concerning the renovation of the Hotel. The first action resulted in a grant of summary judgment dismissing all of the alleged defaults under the parties' lease brought into issue by defendant Madison Seventy-Seventh LLC (Madison). This is the second summary judgment motion that the Hotel has been compelled to make, as the action is based on a notice of default which differs from the notice of default in the prior action.[1]

The present action commenced with a request for a

---

[1]The former action is *Mark Hotel LLC v Madison Seventy-Seventh LLC* (Index No. 103824/07, Sup Ct, NY County).

Yellowstone injunction against Madison to compel it to cease its efforts to hamper the Hotel in the renovation process. While that motion was pending, the present motion was made. The *Yellowstone* injunction was granted in a decision dated July 14, 2008. As a result, the movants in the motion at bar did not have the benefit of the decision in the *Yellowstone* motion in making their submissions herein.

As noted in the previous *Yellowstone* decision, Madison's most recent notice of default, dated November 26, 2007 (the 2007 Notice of Default), contains four allegedly new defaults under the Lease (Notice of Motion, Ex. A), maintaining that the Hotel: (1) has failed to provide "plans, certificates or approvals for the alterations" from the DOB or the New York City Landmarks Preservation Commission (LC) under Article Thirty-Fourth, Section D of the Lease; (2) is performing alterations to the hotel without Madison's consent which are much larger in scope than those described to Madison in the Progress Print provided by the Hotel in December 2006; (3) is making alterations which deviate from the Progress Print, in derogation of Article Thirty-Fourth, Section (E)(I) of the Lease; (4) and is creating a premises which will no longer be a luxury hotel comparable to the Hotel Carlyle, as that hotel existed in 1981, which, according to Madison, is the only correct reading of the Lease.

It is well established that "[t]he proponent of a motion for

summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material issues of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment can be denied or held in abeyance if there are "facts essential to justify opposition" to the motion, but which "cannot then be stated," because they are in the exclusive control of the movant. CPLR 3212 (f); *see aslo Classic Moments Co. v Akata*, 176 AD2d 567 (1st Dept 1991).

To prevail on this motion, the Hotel must establish that there are no questions of fact as to the invalidity of the 2007 Notice of Default. As a first argument, the Hotel urges that the substantive issues litigated in the prior summary judgment motion bar Madison from pursuing each default set forth in the 2007 Notice of Default, by virtue of the doctrines of res judicata or collateral estoppel.

> Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists

> from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principal is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again. Additionally, under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy [interior quotation marks and citations omitted].

Matter of Hunter, 4 NY3d 260, 269 (2005); *see also Fabiano v Philip Morris Inc.*, 54 AD3d 146 (1st Dept 2008).

This court has already determined, in the summary judgment decision in the prior action, that "the Hotel is entitled to a declaration that it did not violate the Lease by proceeding with alterations for which it requested approval, even though Madison did not consent to the renovation plans" as set forth in the Progress Print. *Id.* at 10.

To the extent that the 2007 Notice of Default maintains that the Hotel has failed to comply with the plans as set forth in the Progress Print (which is the bulk of Madison's complaint), Madison is barred by res judicata from raising this issue, due to this court's previous finding that Madison unreasonably refused to consider the Progress Print in the first instance. In the July 14, 2008 *Yellowstone* decision, this court reiterated its findings in the prior action that "the Hotel was within its rights to consider itself in compliance with the Lease, and was

within its rights to proceed with its plans." July 14, 2008 *Yellowstone* decision, at 4. As such, Madison is deemed to have approved of the contents of the Progress Print, and cannot now protest inadequacies in that document, upon which it did not rely. The issue has already been determined in the previous action.

As a result of this finding, Madison cannot now argue that the extensive plans provided to it after the November 2007 Notice of Default cannot ever cure any alleged failure to provide plans at an earlier date. Madison had the opportunity to review the Progress Print, and refused to do so. Plaintiff is not required to go back in time to make the Progress Print comport with Madison's idea of sufficient plans. This court finds that Madison cannot continue to notice defaults which allegedly arise from the alleged inadequacies of the Progress Print.

This is not to say that Madison cannot ever object to the adequacy of plans provided to it after the Progress Print. This court specifically ruled, in response to an order to show cause brought by Madison in December 2007, that Madison was not enjoined from seeking to terminate the Lease based on any *new* violations found in the November 2007 Notice of Default. Braun Aff., Ex. E. Article Thirty-Fourth, Section D of the Lease provides that Madison be presented with "plans and all certificates and approvals with respect to work to be done and

installations made by Lessee that may be required from any governmental authorities in order to obtain the certificate of occupancy for the demised premises." As such, this court finds that Madison was entitled under the Lease to receive any new or expanded plans in response to its November 2007 Notice of Default. Under the Lease, Madison had the right to object to these plans, if such objection was reasonable. Therefore, since the Hotel did provide voluminous plans in December of 2007, there is a question of fact as to whether these plans adequately explain the project, and whether or not Madison has grounds to reasonably object to the plans on any basis other than the fact that they may deviate from the Progress Print.

As a result of the foregoing, summary judgment cannot be granted on the first alleged default, but can be granted as to the second and third defaults, which merely reiterate that the project does not accord with the Progress Print.

This court finds that there are several areas in which Madison's objections to the project are unreasonable, and upon which summary judgment may be granted. As noted in the July 2008 *Yellowstone* decision, it was not reasonable for Madison to bemoan the fact that certain fire safety staircases where absent during the gut demolition phase of the project. As therein discussed, the need for fire egress was a non-issue because the Hotel's plans included such egress as was required in a construction

site, and indicated that the final renovation would contain all necessary staircases. *See* 2008 *Yellowstone* Decision, at 10, n 6. There is no question of fact raised which would make the lack of certain fire stairways during the construction phase of the project a ground for default under the Lease.

There is also no reasonable objection on Madison's part to the gut renovation of the hotel merely on the grounds that the Hotel will allegedly leave Madison with an empty shell of a building. Buildings are not ordinarily left as empty shells when the purpose of the project, as here, is to conclude with a fully renovated structure.[2] As the project has continued throughout this litigation, it is highly likely that the renovations are near completion, and that the empty shell Madison fears no longer exists.

Madison has raised a question of fact concerning the number of cooperative units, or amount of cooperatively owned space, the Hotel plans to include in the hotel. Madison complains that the hotel, as contemplated, will contain more than one half of the hotel as cooperative space, intended for stays of unlimited duration, and that this does not accord with a hotel as contemplated by the Department of Buildings (DOB).

---

[2]In the *Yellowstone* motion in this action, Madison originally questioned the Hotel's financial ability to complete the project. Madison does not raise this issue in the present motion.

Madison explains that the Hotel appealed to the DOB to allow that "up to 42 of [the Hotel's] Use Group 5 hotel units, containing a maximum of 52,982 square feet area, may be occupied without limitation as to length of stay," and that the DOB agreed to this limitation. Goldman Aff., Ex. B. However, Madison maintains that, after review by its architect, the amount of square footage the Hotel intends to use for unlimited stays amounts to approximately 45% of the space, rather than the one-third square footage allowed by the DOB.

The Hotel has not satisfactorily accounted for this alleged discrepancy, creating a question of fact as to whether the Hotel is building viable, legal cooperative units in the hotel, or is exceeding the space allotted to it by the DOB for units of unlimited stays.

There is no question of fact concerning Madison's last noticed default, concerning the size of the cooperative units it believes the Hotel is building. This court has already conclusively found that the Hotel has the right to include cooperative hotel units in its overall plans under the Lease. Nothing in the Lease, or this court's prior decision, limits the size of the units which the Hotel may build. Madison's argument that, under the Lease, the Hotel may not build any cooperative units which exceed in size or style cooperative hotel units which existed in the Hotel Carlyle in 1981 is specious. The Lease only

uses the Carlyle as an example of a hotel containing luxury cooperative hotel units, and has no limitation at all as to what "luxury" might entail in the future. Madison's interpretation of the Lease, which would freeze any reconfiguration of the Hotel in the last century, is unreasonable, particularly in the context of a lease having more than 120 years yet to run.

As a result of the foregoing, it is apparent that there are questions of fact concerning whether the plans Madison received in December 2007 comport with the renovations actually in progress, and if Madison could have any reasonable objections to those plans. There is also a question of fact as to whether the Hotel is complying with the DOB's directive as to the amount of space the Hotel may allot for unlimited stay cooperative units. The other issues raised by Madison in its November 2007 Notice of Default are without merit. However, enough questions remain to deny the motion for summary judgment.

Accordingly, it is

ORDERED that the plaintiff Mark Hotel LLC's motion for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: November 25, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN