

New York City Economic Dev. Corp. v Corn Exch., LLC
2009 NY Slip Op 30225(U)
January 29, 2009
Supreme Court, New York County
Docket Number: 405031/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
JUDITH J. GISCHE, J.S.C. Justice

PART 10

NYC ECONOMIC DEVELOPMENT
- v - COOP
COOP EXCHANGE

INDEX NO. 405031/07
MOTION DATE _____
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 1/29/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION,

Plaintiff,

-against-

CORN EXCHANGE, LLC,

Defendant.
-----X

Decision/Order

Index No.: 405031/07

Seq. No. : 003

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's OSC [SJ], TI affirm, exhs	1
Def's JKW affirm in opp, exhs	2
Def's EB affid, exhs	3
Pltf's JB reply affid, exhs	4
Transcript 10/23/08	5

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff commenced this action to obtain title to 81 East 125th Street, New York, New York (the "premises"), which it previously conveyed to defendant. Plaintiff is a public corporation which now moves for summary judgment pursuant to CPLR § 3212. Plaintiff was organized to, *inter alia*, provide assistance in relieving and reducing unemployment, promoting and providing for additional and maximum employment, and bettering and maintaining job opportunities for residents of the City of New York by encouraging industry to locate and remain in the city. Defendant was organized to acquire and rehabilitate the premises and the landmark building located thereon. Defendant opposes the motion. Hi-

Tech Bridging, Inc. ("Hi-Tech") has moved by Order to Show Cause, and S.N.A. Construction, Corp. ("SNA") and Antal Construction Corporation ("Antal") have cross-moved, to intervene in this proceeding (motion sequence number 004). Hi-Tech, SNA and Antal are contractors who have filed liens against the premises. Motion sequence number 004 has been resolved by the court in a separate decision and order made on the record at oral argument held on January 29, 2009. The extent to which the court's decision on the motion and cross-motions to intervene impacts the court's decision on plaintiff's motion for summary judgment will be addressed herein.

The motion for summary judgment is timely brought because issue has been joined, but no note of issue has yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). It will, therefore, be decided on the merits.

The undisputed facts are as follows. The premises contain a landmark building known as the former Corn Exchange Bank Building which was built in the 19th century. It is one of the few remaining examples of Queen Anne and Romanesque Revival Style in New York City. The Corn Exchange Bank Building was abandoned in the 1970s and by the late 1990s, became extensively deteriorated due to several fires, vandalism and general neglect. On December 1, 2000, plaintiff and defendant entered into a contract of sale, whereby defendant agreed to purchase the premises for the sum of ten thousand dollars. In accordance with New York City Charter § 384 (b) (4), the Manhattan Borough Board adopted a resolution approving the sale of the premises to Defendant to operate a culinary school, offices and retail uses. Thereafter, plaintiff conveyed the premises to defendant by deed dated February 5, 2003 (the "Deed"). The parties originally intended to make productive use of the premises and thereby benefit the local neighborhood with an

affordable educational culinary institution and other commercial space that would provide money and jobs. Notwithstanding these salutary goals, the premises remain unusable. Moreover, there is no foreseeable time when the premises will be put into productive use.

Under the terms of the Deed, defendant committed to rehabilitate the building and restore the exterior facade of the building to its original state. Defendant was required to complete the rehabilitation and obtain the certificate of occupancy within thirty-six months of the date of the Deed. Defendant further agreed to establish a non-profit culinary institute in part of the renovated space, and to continue this educational use of the premises for five years. The Deed further provides:

If(1) [defendant] shall fail to perform, commence or complete the Construction on the premises within the time and in the manner required by this deed or (2) [defendant] shall fail to use, or cause to be used, the premises for five (5) years in the manner required by this deed ... then [plaintiff] may notify [defendant] of such failure or violation. If, within 30 days after receive such notice, [defendant] fails to cure the failure or violation (1) in the case of a failure specified in subdivision (1) above, by commencing or resuming the Construction until completion ... then, in addition to any remedies available to [plaintiff] by law or by [the Deed] or under the contract of sale pursuant to which [defendant] purchased the premises, [plaintiff], without paying [defendant] ... any consideration, *shall have the right to re-enter and take possession of the premises (together with any improvements thereon), and the estate conveyed hereby to [defendant] shall thereupon terminate, and fee simple title to the premises, and any improvements thereon, shall revert in [plaintiff] forever in the same manner and to the same extent as if the conveyance made by this deed had not been made ...* Upon [plaintiff's] exercise of such option to re-enter and re-quire, [defendant] (and/or any subsequent owner of the premises (or any improvements thereon) or any interest therein), upon demand by [plaintiff], shall execute and deliver to [plaintiff] a deed for the premises (and any improvements thereon) in form and substance satisfactory to [plaintiff].

(Emphasis added).

...

The execution and delivery of the foregoing deed(s) shall not, however, be construed as a condition precedent to [plaintiff's]

[* 5]
acquisition, as aforesaid, of the premises... (this provision of the Deed, in its entirety, is hereinafter referred to as the "construction/use provision").

On April 13, 2007, plaintiff served a notice of default on defendant notifying defendant that it was in violation of its obligations to complete the rehabilitation and to operate a culinary and educational institution for a period of five years.

Arguments of the Parties

There is no dispute that defendant did not complete the rehabilitation nor obtain a certificate of occupancy within thirty-six months of the date of the Deed. Plaintiff argues that the defendant's failure to timely complete the rehabilitation permits it to re-enter and take fee title to the property (first cause of action). Plaintiff also seeks an order and judgment ejecting defendant based on defendant's breach of the condition subsequent (second cause of action) and awarding plaintiff its legal fees and costs incurred in connection with exercising its rights under the Deed (third cause of action). Plaintiff additionally contends that the defendant has failed to comply with its obligation contained in the Deed to operate a culinary school within five years after the conveyance of the premises.

Defendant argues that summary judgment is inappropriate because plaintiff has failed to meet its burden on this motion, there has been no discovery and there are material issues of fact with respect to its affirmative defenses. Specifically, defendant maintains that although it did not complete its renovation of the premises within 36 months of the date of the deed, it cured this default by continuing renovations. Defendant also maintains that plaintiff has engaged in conduct which substantially hindered defendant's acquisition and renovation of the premises and

therefore, it should not be allowed to retake title to the premises.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept

2003).

At the outset, the court rejects defendant's procedural arguments in opposition to the motion. Defendant argues that plaintiff's motion should be denied because it is not supported by an affidavit of someone with personal knowledge of the underlying facts. A verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment (Travis v. Allstate Ins. Co., 280 AD2d 394 [1st Dept 2001]). Plaintiff has submitted a copy of its verified complaint, sworn to by Brian Murphy, Executive Vice President of Plaintiff, which contains the factual allegations referred to in the memorandum of law and relied on in support of the motion. Therefore, summary judgment may be properly granted provided plaintiff otherwise meets its burden with respect thereto.

Defendant's argument that summary judgment is premature because there has been no discovery is also unavailing. CPLR § 3212 (f) broadly provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006). Defendant has not shown that there

may be any information not already known to it which is material and relevant and within plaintiff's sole possession. Therefore, this argument fails.

Turning to the substantive aspects of the motion, the court's analysis follows:

Under the terms of the Deed, plaintiff must prove three essential elements to enforce the condition subsequent contained in the construction/use provision: [1] that defendant defaulted on its obligations under the Deed; [2] that plaintiff notified defendant of the default; and [3] that defendant failed to cure the default. For the reasons that follow, plaintiff has met this burden and defendant has not come forward with sufficient opposition to prevent the granting of summary judgment. Plaintiff has shown that defendant failed to comply with the requirement that the premises be rehabilitated. Indeed this is conceded by defendant. Plaintiff has shown that it sent a Notice of Default. Again this is also a conceded fact. As for the absence of cure, plaintiff has shown that the premises is still not rehabilitated at this time, nor is there any reasonably completion date.

Defendant claims that since getting the notice they have undertaken steps to cure. Ethel Bates, President of the Defendant, has provided an affidavit to the court in which she makes factual statements regarding defendant's efforts to renovate the premises and secure financing. Although, Ethel Bates generally maintains that defendant took various steps cure this default and comply with the construction/use provision of the Deed, she does not describe, in any detail, defendant's actions taken to comply with these obligations. Ms. Bates states that construction is currently progressing, that "debris has been removed to a safe level

and floor sections shored up including removal of huge iron gates lying across the vault areas in the basement.” Ms. Bates also claims that defendant has found “the right financial partner” to serve as co-developer, yet does not otherwise identify this entity. There is no information about when and under what conditions this new “financial partner” will provide funds necessary to bring the project to completion. There is no calendar of proposed construction. Without financing, there can be no such definite plan.

Defendant has also provided the affidavit of Trevor Salmon, P.E., defendant’s engineer. Mr. Salmon states that based upon a walk-through of the premises conducted on August 26, 2008, he believes that the premises are structurally sound. Specifically, Mr. Salmon states:

My overall conclusion is that the building remains structurally sound. The main columns are listed to have a weight-bearing capacity of 300± kips (a kip = 1,000 lbs.), amply [sic] strength to support the present structure and the rehabilitation work. The shoring remains in place. The interior debris had been removed so that there is a clean shell in which to continue the work once steel bracing is properly installed. I also want to call the court’s attention to the scaffolding and bridge work that remains in place on the exterior in order to protect the public.

Defendant has also provided the affidavit of David Danois, a licenced architect retained by defendant in connection with the rehabilitation project at the premises, who opines that he has “not seen any marked deterioration in the exterior over the pas few years.”

In May 2007, defendant claims that it retained S&P Contractors LLC as Construction Managers to continue renovations. To date, defendant claims that it has incurred over \$375,000 in construction and demolition costs and \$450,000 in

expenses for architectural and engineering services. Plaintiff, however, contends that the only work commissioned by the defendant has been "in connection with notices of violations, unsafe building and emergency declarations placed on the building by the Department of Buildings and/or possibly other City agencies."

Plaintiff maintains that the premises remain vacant, deteriorated and unsafe.

Despite the affidavits of Ms. Bates, Mr. Danois and Mr. Salmon, defendant has failed to raise a triable issue of fact as to whether it cured its default under the Deed. Mr. Danois and Mr. Salmon's affidavits do not really address issues of rehabilitation. They simply express opinions on the current condition of the premises. Ms. Bates' affidavit is insufficient because she has made only bare and conclusory allegations about construction contracts defendant has entered into and that the defendant has finally found an entity which can finance the rehabilitation. Defendant has not submitted copies of any construction contracts, bills or invoices for construction work at the premises or any other proof of the work it claims would demonstrate that it has cured its default under the Deed. Perhaps most significantly, any cure carries with it an obligation to see the construction through to completion. Even accepting defendant's contention, that it did some work on the premises post-Notice of Violation, there are no facts presented from which a trier of fact could reasonably conclude that the defendant's have any ability to complete the construction. The Deed itself speaks of the cure in terms of commencing or resuming the construction "until completion." It does not recognize doing some work as a cure.

Today, the Corn Exchange Bank Building has still not been restored to its

former glory and the promise of an affordable educational opportunity and other financial opportunities for the local community remains out of reach. There is another case pending before this court wherein the City of New York and the Landmarks Preservation Commission wherein those plaintiffs allege that the Corn Exchange Bank Building is significantly deteriorated, to wit: the roof is missing, some floors are structurally unsound or have collapsed, portions of the exterior walls are missing, windows are missing or damaged and there is extensive water damage (The City of New York *et al.* v. Corn Exchange LLC *et al.*, Index No. 401846/08). Defendant has not even shown that it has the ability to bring the premises to productive use, let alone comply with its specific use obligations contained in the Deed. The court, therefore, holds that the defendant has defaulted under the Deed by failing to rehabilitate the premises by February 5, 2006, that Notice of Default was given on April 13, 2007, and that defendant has not cured its default to date.

As for the affirmative defenses, defendant has failed to establish any genuine issue of material fact with respect thereto which would defeat plaintiff's *prima facie* case. Defendant has asserted several affirmative defenses to the instant action, to wit: [1] prevention or hindrance; [2] unclean hands; [3] equitable estoppel; [4] laches; and [5] waiver. In her affidavit, Ethel Bates chronicles numerous events which transpired before defendant acquired the premises, from 1997 through the transfer of the Deed and title to the premises, which she claims made it more difficult for defendant to complete the rehabilitation of the premises within thirty-six months. Defendant's arguments based upon plaintiff's purported

bad faith conduct during this period of time must be rejected because, even assuming defendant's claims are true, these acts took place before the Deed was executed and defendant obligated itself thereunder. The prevention doctrine rests on the implied obligation not to frustrate or prevent performance of a contract by the other party (HGCD Retail Svcs. . 44-45 Broadway Realty Co., 37 AD3d 43 [1st Dept 2006]). Conduct undertaken at a time when there was no contract in existence cannot qualify under this paradigm.

Ethel Bates also maintains that the defendant "took the Deed even though the three-year renovation clause of the Deed was unreasonable and would not provide adequate time before the time period became a liability." Defendant essentially claims that the construction/use provision is unconscionable and, therefore, unenforceable. Even though this defense is not asserted in its answer, assuming *arguendo* that it was, defendant has not otherwise established that the contract was both procedurally and substantively unconscionable when made. As previously stated by the Court of Appeals, defendant must demonstrate an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (Gillman v. Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]). Defendant has not alleged any procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over the terms in the Deed. Nor has defendant demonstrated that enforcement of the construction/use provision would produce an unreasonable result that was not anticipated by the parties during the bargaining process. Therefore, defendant's argument that the construction/use provision is

unconscionable is unavailing because defendant freely chose to obligate itself thereunder.

Defendant argues that plaintiff cannot enforce the construction/use provision because plaintiff frustrated or prevented defendant's performance of the rehabilitation work. While it is true that a party to a contract cannot rely on the failure of another to perform when he or she has frustrated or prevented the obligor's performance (see Kooleraire Svc. & Installation Corp. v. Bd. of Ed. Of City of New York, 28 NY2d 101 [1971]), Ms. Bates' affidavit does not support defendant's contention that plaintiff prevented or hindered defendant from rehabilitating the premises.

Ms Bates does claim in her affidavit that "[o]ut of the blue, in April 2006, the New York City Department of Buildings ("DOB") asserted that the building was unsafe because, among other reasons, the roof had been removed and the windows were not sealed." Defendant implies that the DOB and/or plaintiff did something improper because, it claims, although these violations had existed for years while the City owned the building, the violations were not raised until this time. Ms. Bates states that defendant thereafter retained Mazzochi Wrecking Co. ("Mazzochi") to complete the stabilization work at the premises to remedy the violations. Defendant claims this work was completed in 2007, at a cost of \$100,000.

Ms. Bates' testimony about being "inundated with notices of violation with the DOB" is unavailing. There is no reason why defendant, a property owner, should not have been subject to the same rules and regulations set forth by the

DOB as any other property owner. Even if defendant could show that there was a conspiracy between the DOB and plaintiff to stymie defendant's efforts to rehabilitate the premises by issuing these notices of violation,¹ defendant has not otherwise challenged the legitimacy of the corresponding violations nor claimed that the city, plaintiff, or any other entity should be responsible for remedying these violations. Moreover, when plaintiff closed on the contract for the sale of the premises it could have reasonably known about any violations then existing with respect to the premises. Having to remedy violations issued by the DOB is one aspect of owning land in New York City, and should have reasonably been contemplated by defendant and cannot support a claim that plaintiff somehow prevented or hindered defendant's ability to comply with the Deed.

In May 2006, defendant began negotiating a co-developing agreement with Integrated Holdings, LLC ("Integrated"). Ms. Bates claims that plaintiff "pressured" defendant to reach an agreement with Integrated and "insinuat[ed] itself into [defendant's] negotiations with Integrated." Assuming *arguendo* that plaintiff did meet with Integrated for forty-five minutes before a meeting subsequently held between plaintiff, defendant and Integrated, this act also does not rise to the sort of behavior that would allow defendant to avail itself of the prevention doctrine (see generally HGCD Retail Services, LLC v. 44-45 Broadway Realty Co., 37 AD3d 43 [1st Dept 2006]). If defendant's claim is that plaintiff pressured it to breach an agreement with Integrated, the argument fails because no agreement was actually reached. Defendant admits that its negotiations with Integrated fell through

¹ At this point, mere contention is innuendo.

because defendant chose to “walk away from the usurious terms offered by Integrated.” Similarly, defendant’s negotiations with two other potential co-developers were not fruitful. Defendant has not submitted any evidence from which a trier of fact could conclude that anything more than market considerations played a role in defendant’s inability to find a partner to finance this project.

Defendant’s argument with respect to the affirmative defense of unclean hands is premised on the same claims that plaintiff acted in bad faith by hindering defendant’s renovation of the premises. To charge a party with unclean hands, it must be shown that said party was “guilty of immoral or unconscionable conduct directly related to the subject matter.” Frymer v. Bell, 99 AD2d 91 [1984]; Citibank, N.A. v. American Banana Co., Inc., 50 AD3d 593 [1st Dept 2008]. Defendant has failed to come forward with any facts to support its contention that plaintiff acted in bad faith and should be precluded from enforcing the construction/use provision contained in the Deed.

Defendant also contends that the plaintiff should not be permitted to maintain this action because it unreasonably delayed in seeking to enforce the construction/use provision. By March 2006, after the thirty-six month renovation period had ended, defendant had still failed to find a co-developer necessary to provide the financial backing to complete the renovation work. At that time, Ethel Bates claims that Judy Barr, then Assistant Vice President of plaintiff, “indicated” to Ms. Bates that plaintiff “would work with the [defendant], rather than seeking to enforce the three-year renovation period.” Despite this pledge, Ms. Bates maintains that plaintiff held up the defendant in meeting its obligations. Ms. Bates

has provided a copy of a letter dated March 29, 2006 she wrote to Ms. Barr wherein she states, in pertinent part:

On March 8, 2006, I and a principal of MDG, Paul Moore, met with you and your team at [plaintiff]. The thrust of the meeting was to inform you of the status of our project. We left the meeting with a feeling of accomplishment and a promise from you of a letter within a week, which would state the needs of [plaintiff] from MDG our development partner. To date, three weeks have past and I called you because we were anxious to get on with the project. The school is desperately needed in our community for both economic and educational reasons as the Harlem Community is over 51% unemployed.

This morning you informed me that the delay was due to the fact that senior management was treating this as a new, I repeat, new project; therefore, everything had to be sent to the Mayor's office. [Defendant] begs to differ; the only thing that's changed is the name of the co-developer because MDG is willing to do the project under the same terms as Full Spectrum our previous co-developer which you agency had approved.

...

We all know that this has been a difficult project to bring to completion and has been trouble from the beginning; first, its only 33 thousand square feet and cost over \$11 million dollars which means no profit making entity was interested; second, the non-profit entity of the project had to get government monies which we all know is a time consuming process; third, the first co-developer was unable to bring the project forward due to their financial problems. We now have a co-developer that is able to start the project today; therefore, we think that [plaintiff] should respond as they did in our meeting of March 8, 2006 and let us get on with completing a project that will benefit all concerned and be a feather in the cap of the community.

Ms. Bates also claims that after February 2006, plaintiff still "encouraged [defendant] to incur expense renovating and stabilizing the building." Defendant maintains that it had to put up new bridges and scaffolding as a result of numerous notices of violation from the Department of Buildings ("DOB")

Plaintiff has provided copies of letters dated May 11, June 15, September

21, and November 15, 2006, from Susan Goldfinger, Senior Vice President of Plaintiff, to defendant, in which plaintiff acknowledged defendant's default under the Deed, but would grant defendant more time to enter into an agreement with Integrated. The November 15, 2006 letter specifically states that:

[Plaintiff] does not waive any right to enforce the terms of the Deed, including, but not limited to, commencing a judicial proceeding and reserves the right to seek whatever remedies at law or in equity are available to it to enforce its rights under the Deed, including, but not limited to, recovering possession of the Premises and title thereof.

The other letters sent to defendant from Ms. Goldfinger all contain similar language indicating that plaintiff was not waiving its rights to pursue its remedies under the Deed by granting defendant additional time to cure its default.

"[W]aiver is an intentional relinquishment of a known right and should not be presumed" (Inter-Power of New York, Inc. v. Niagara Mohawk Power Corp., 213 AD2d 110 [3d Dept 1995]; see also Machinery Funding Corp. v. Stan Loman Enterprises, Inc., 91 AD2d 528 [1st Dept 1982]). The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party (Skrodelis v. Norbergs, 272 AD2d 316 [2d Dept 2000]).

Defendant's waiver and laches arguments are both premised upon the fact that plaintiff gave defendant additional time beyond the initial thirty-six month period to comply with the Deed, and didn't serve a Notice of Default on defendant until April 2007. Nonetheless, the letters submitted by plaintiff and indisputably received by defendant clearly and unequivocally state that plaintiff was not waiving its rights under the Deed and restated that defendant had defaulted thereunder. Therefore,

defendant cannot possibly claim prejudice as a result of any delay by plaintiff to enforce the construction/use clause when it knowingly accepted the extensions of time in order to cure its default under the Deed.

The doctrine of equitable estoppel should not be applied in this case either. The purpose of invoking the doctrine is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another (3 Williston, Contracts [3d ed], § 533A, at p. 798; Imperator Realty Co. v. Tull, 228 NY 447 [1920]). Moreover, the doctrine of equitable estoppel should be applied with great caution when dealing with realty. Huggins v. Castle Estates, Inc., 36 NY2d 427 (1975).

Here, it cannot be said that plaintiff's exercise of its right to reenter and take possession of the premises is unconscionable when this right was clearly intended by the parties when the Deed was executed. Indeed the right is perfectly consistent with the parties' intention to make the premises productive. If defendant could not do so within the time period agreed to, it was contemplated that plaintiff would retake the property to pursue other avenues. Moreover, defendant's reliance upon plaintiff's extensions of time and the incursion of expenses in connection with emergency repairs trying to cure their default under the Deed does not produce an unconscionable result. Defendant was aware of its default, and rather than give up the premises, it chose to hold onto it and try to cure the default. Defendant could reasonably anticipate that a failure to cure its default would give rise to plaintiff's right to retake the premises under the construction/use provision in the Deed.

Accordingly, the court has considered the defendant's affirmative defenses

and finds them unavailing; plaintiff is entitled to summary judgment on its first and second cause of action.

Having granted plaintiff's motion for summary judgment, the court next addresses that branch of plaintiff's motion for costs, disbursements and legal fees to be paid by defendant. There is no dispute that the Deed expressly provides plaintiff a right to collect such costs and attorneys fees. Expenses, costs and disbursements can include an award of reasonable attorneys' fees albeit "in a limited amount." Walter Concrete Const. Corp. v. Lederle Laboratories, 288 AD2d 377 (2d Dept 2006). Since plaintiff's attorney has failed to provide a detailed affidavit of the services it provided, the court cannot evaluate the reasonableness of the fees sought without a hearing. The court, therefore, permits a motion for legal fees to be made within 60 days of the date of this decision.

The Motion and Cross-Motions to Intervene

By decision and order made in open court on January 29, 2009, the court granted Hi-Tech's motion to intervene only to the limited extent of allowing Hi-Tech to dispute whether the title that defendant is herein compelled to convey to plaintiff is encumbered by Hi-Tech's mechanics liens filed during the period in which defendant owned the premises. The court otherwise denied Hi-Tech's motion to intervene. The court also denied the cross-motions to intervene, due to procedural deficiencies identified by the court in its decision. However, the parties to this action consented to allow SNA and Antal to intervene in this action to the same limited extent that Hi-Tech was permitted to intervene.

Despite the court's determination that plaintiff is entitled to a declaration that it is vested with title to the premises, the court reserves its decision on the collateral issue of what title defendant should convey and plaintiff is entitled to receive, to wit, whether the intervenors' mechanics liens encumber plaintiff's title or not. Consequently, the court stays its order directing defendant to execute and deliver a deed for the premises to plaintiff pending the court's determination of the aforementioned issue.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment is hereby granted to the following extent:

[1] plaintiff is entitled to a declaration that plaintiff is vested with title to the premises located at 81 East 125th Street, New York, New York designated as Block 1750, Lot 34;

[2] although plaintiff is entitled to a judgment that defendant convey the premises located at 81 East 125th Street, New York, New York designated as Block 1750, Lot 34 to plaintiff and defendant must execute and deliver a deed for same to plaintiff, the court stays this provision of its order pending the court's determination of the collateral issue of what title defendant should convey and plaintiff is entitled to receive, to wit, whether the intervenors' mechanics liens encumber plaintiff's title or not;

[3] plaintiff is entitled to a judgment ejecting defendant and its respective employees, agents and invitees from possession of the premises located at 81

East 125th Street, New York, New York designated as Block 1750, Lot 34;

[5] plaintiff may make a motion for an order awarding it reimbursement from defendant for its reasonable legal fees, costs and disbursements within sixty days of the date of this decision. Any such motion shall include not only factual justification for the amount of the fees sought, but also legal justification for permitting such an award in their favor. Failure to make such a motion within the time provided herein shall be deemed an abandonment of this claim; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further


ORDERED that plaintiff shall settle judgment on notice.

Any requested relief not expressly addressed herein has nonetheless considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
January 29, 2009

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.