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

PRESENT: Hon. Melvin L. Schweitzer Justice PART 45

Jan Companies of NY Holdings LLC,
Plaintiff,

-v-

734-740 Broadway Realty LLC,
Defendant.

INDEX NO. 604098/2007

MOTION DATE

MOTION SEQ. NO. 004

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: X Yes No

Upon the foregoing papers, it is ordered that ~~this motion~~

Defendant's motion for summary judgment is granted; and Tenant's cross motion for summary judgment is denied, each as per the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: May 5, 2009

Melvin L. Schweitzer J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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JAN COMPANIES OF NY HOLDINGS LLC,

Plaintiff,

-against-

734-740 BROADWAY REALTY LLC,

Defendant.

----------x

Index No. 604098/2007

DECISION AND ORDER

Motion Sequence: 004

Melvin L. Schweitzer, J.:

In this dispute over the obligations under a commercial lease both plaintiff Jan Companies of NY Holdings LLC (Tenant) and defendant 734-740 Broadway Realty LLC (Landlord) move for summary judgment. The court grants Landlord's motion and denies Tenant's cross-motion.

On August 1, 2006, Tenant and Landlord entered into a lease of the premises located at 736 Broadway in Brooklyn (the Lease). The Lease, with renewal options, contemplates a duration of 45 years. The premises had been occupied by a jewelry store on a lease from the Landlord. Tenant negotiated with the prior occupant and bought out its lease, and then negotiated with Landlord to enter into the Lease. Tenant is a subsidiary or affiliate of entities that own and operate Burger King restaurant franchises throughout New England, New York and Florida, and Tenant contemplated using the premises covered by the Lease for a three-story

Burger King Restaurant. The Lease contemplated that Tenant would do renovations of the premises for this purpose.

On January 31, 2007, an engineering company retained by Tenant sent Tenant's architect a letter stating that "he had concluded that the building cannot accommodate the proposed modifications and that the only solution he envisioned was to 'raze' said building and replace the superstructure at a minimum." Tenant's architect determined that the premises would require a steel-beamed structure because the existing structure was wood-beamed with concrete reinforcements. While it is disputed as to when and to what extent Landlord was made aware of the problems Tenant was encountering with the building, it is not disputed that sometime in May 2007 Tenant had the existing structure razed such that only the party walls on each side of the structure were left standing. It was not until August 2007, a number of months after the building was razed, that representatives from Landlord and a representative from Tenant met to address the issue of what was needed to make the site capable of housing the Burger King Restaurant. At that meeting Tenant insisted Landlord was responsible for structural repairs and remedial work. Landlord refused to accept any responsibility noting that the existing building was no longer in existence and thus no work could be done to it. At that point, Tenant ceased paying rent and also stopped all construction work at the site. Landlord brought an action in Civil Court, Kings County, for unpaid rent. Tenant then initiated this action here, and on June 13, 2008, the court entered a Yellowstone Injunction.

On Tenant's summary judgment motion, Tenant asserts Landlord is obligated to make or fund structural repairs and do other remedial work on the building covered by the Lease; and Landlord, in turn, denies any responsibility and cross-moves for summary judgment

(a) dismissing Tenant's complaint and (b) directing Tenant to pay past rent which presently exceeds $200,000. The parties disagree regarding which provisions of the Lease apply to the issue of repairs and the meaning of the Lease provisions themselves.[1] Tenant further asserts that on March 22, 2007, a construction manager on behalf of Tenant sent Landlord a letter giving Landlord notice that there were defects in the existing structure of the building. Landlord asserts it did not receive the letter, and further suggests that the letter never actually was sent and is a recent fabrication.[2]

The court need not reach the issues of which provisions of the Lease apply, the meaning of any particular provision, or whether the March 22, 2007 letter was sent to Landlord, because, as indicated, Tenant proceeded to have the structure razed without Landlord ever having been informed that Tenant was going to do this. Landlord thus was not forewarned and afforded the chance to address any obligation it might have had in these circumstances.[3] *See* Restatement [Second] of Contracts § 263, Comment a, Illustration 3 ("A contracts with B to shingle the roof of B's house. When A has done part of the work, much of the house including the roof is destroyed by fire without his fault, so that he is unable to complete the work. A's duty to shingle the roof is discharged, and A is not liable to B for breach of contract"). Although the complaint

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[1] Landlord principally relies upon the "as is" provisions contained in paragraphs 20 and 42 of the Lease, while Tenant argues that paragraph 42 is qualified by additional language in that paragraph and further relies upon provisions contained in paragraph 58 of the Lease and paragraph 15 of Tenant's additional rider to the Lease relating to structural repairs and changes required by any law, ordinance, rule or regulation.

[2] The court has reason to suspect the letter never was sent to the Landlord because neither party cited it in the Yellowstone Injunction proceeding.

[3] Not even the disputed March 22 letter was written to provide such warning. Nowhere does it state it was Tenant's position that the Landlord was obligated under the Lease to make or fund the structural repairs, nor does it warn that if Landlord did not act to remedy the structural problem, Tenant would raze the structure and hold Landlord responsible for all consequent expense for this and for erecting a new structure.

is not precise, Tenant first alleges the "demolition" of the building covered by the Lease (paragraph 11), then alleges that "[p]laintiff's representatives attempted unsuccessfully to contact Landlord's principal," and that "[f]inally a meeting was held at the premises in August 2007" (paragraph 12). There is nothing in the record to support an allegation that Tenant put Landlord on notice it would seek to hold Landlord responsible for the structural work. Even if Tenant did have the right to invoke provisions of the Lease obligating Landlord to make repairs or modifications to the existing structure, Tenant waived that right by demolishing that structure which then prevented work on it. *See Dize v Inwood Hills Condo.*, 237 AD2d 403,404 (2d Dept 1997).

Tenant's assertion that it is entitled to the damages it incurred in razing the structure and the damages it will incur to construct a new one which would satisfy legal requirements so the building can be used for a three-story Burger King Restaurant is without merit. Even assuming the Lease obligated Landlord to entirely transform the structure to comply with legal requirements, Tenant's taking matters into its own hands in an act of 'self help' before Landlord was warned that this is what Tenant intended to do unless Landlord acknowledged its legal responsibility and effected repairs or modifications to what already existed, precludes Tenant's recovery now. Also, to the extent Tenant's claim seeks consequential damages, such a claim is barred by paragraph 69 of the Lease (Lease Rider at p 27) which provides that "[u]nder no circumstances will any party be entitled to indirect, consequential or punitive damages." *See Belfont Sales Corp. v Gruen Industries, Inc.*, 112 AD2d 96, 99 (1st Dept 1985); *Scott v Palermo*, 233 AD2d 869, 649 NYS2d 289 (4th Dept 1996).

Finally, Tenant asserts it had the right to stop paying rent under the terms of the Lease after Landlord denied responsibility for the repairs, modifications and/or reconstruction demanded by Tenant. Again, because Tenant demolished the existing structure before giving Landlord the opportunity to consider its legal exposure in light of Tenant's interpretation of the Lease, Tenant is not justified in withholding rent payments. Tenant remains liable to Landlord for all rent obligations under the Lease, plus interest.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

Settle judgment.

Dated: May 5, 2009

ENTER:

J. S. C.