Jay Goldman Master L.P. v 53rd St. & Madison Tower Dev., LLC

2009 NY Slip Op 32648(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 102305/09

Judge: Doris Ling-Cohan

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SCANNED ON 11/13/2009

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan, Justice — PART 36

JAY GOLDMAN MASTER LIMITED PARTNERSHIP

- v -

53RD STREET & MADISON TOWER DEVELOPMENT LLC

INDEX NO. 102305/09

MOTION DATE

MOTION SEQ. NO. 1

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 ...	1, 2
Answering Affidavits — Exhibits	5, 6, 7
Replying Affidavits	8, 9
	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for a yellowstone injunction & cross-motion to dismiss are decided in accordance with the attached memorandum decision.

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

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

Dated: Oct 19, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---X

THE JAY GOLDMAN MASTER LIMITED PARTNERSHIP,

Plaintiff,

Index No.: 102305/09
DECISION/ORDER

-against-

Motion Seq. No.: 001

53RD STREET and MADISON TOWER DEVELOPMENT, LLC,

Defendant.

---X

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN, J.S.C.:

In this commercial landlord/tenant action, plaintiff moves, via order to show cause, for a *Yellowstone* injunction, and defendant cross-moves for an order to dismiss the complaint (motion sequence number 001). For the following reasons, the motion is conditionally granted, and the cross motion is granted in part and denied in part.

BACKGROUND

Plaintiff, the Jay Goldman Master Limited Partnership (Goldman), is a Delaware limited partnership that is licensed to do business in New York, and engaged in the business of hedge fund management. *See* Complaint, ¶ 1. Defendant 53rd Street and Madison Tower Development, LLC (53rd), a Delaware limited liability corporation, is also licensed to do business in New York, and is the owner of a building located at 510 Madison Avenue in the County, City and State of New York (the building). *Id.*, ¶ 2.

On December 12, 2007, Goldman, as tenant, and 53rd, as landlord, executed a standard

form lease[1] for commercial space in the building (the lease). *Id.*, ¶ 4. The relevant provisions state as follows:

> Preamble ...
> B. Owner hereby leases to Tenant and Tenant hereby hires from owner one (1) full floor located between the 16th and 19th floors, inclusive (the "Floor Range") ... in the building ...
>
> The floor to be demised to Tenant shall be designated by Owner (in its sole discretion) in a written notice (the "Floor Designation Notice"); provided, that, the floor so designated by Owner shall be the highest available floor in the Floor Range ... Owner shall deliver the Floor Designation Notice to Tenant concurrently with the Substantial Completion Notice (as hereinafter defined) or the Floor Designation Notice may be contained within the Substantial Completion Notice.
>
> Upon receipt, Tenant shall countersign the Floor Designation Notice, confirming the floor on which the Demised Premises shall be located; provided, that, Tenant's failure to countersign the Floor Designation Notice shall not affect the establishment of the demised Premises as aforesaid. The term of this lease shall be ten (10) years and six (6) months ... to commence on the day set forth in Section 37 (a) below, and to end on the day set forth in Section 37 (a) below ... at the annual rental rates set forth in Section 37 (b) below, which Tenant agrees to pay ... on the first day of each month during said term ... except that Tenant shall pay the first monthly installment within fifteen (15) days after the giving of the Floor Designation Notice.
>
> ...
>
> 37. Term; Fixed Rent
>
> (a) (i) The term of this lease shall commence on the later to occur of (1) the earlier to occur of (i) the Owner's Initial Work Substantial Completion Date ... and (ii) the date on which Tenant takes possession of any portion of the Demised Premises for any purpose other than the performance of the Pre-Possession Work ... and (2) the date that is thirty (30) days after the delivery to the Tenant of the Floor Designation Notice ... and shall end at 11:59 p.m. on the last day of the month which is the tenth (10th) anniversary of the Rent Commencement Date ..., or on such earlier date upon which the term of this lease shall expire or be canceled or terminated pursuant to any of the terms, conditions or covenants of this lease or pursuant to law. ...
>
> (d) Promptly after the occurrence of the Commencement Date, Owner and

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[1] The lease also contained a series of "inserts," - i.e., additional paragraphs of text designed to customize the lease.

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> Tenant shall, at either party's option, confirm the Commencement Date, the Rent Commencement Date, the Rent Adjustment Date and the Expiration Date by executing an instrument reasonably satisfactory to Owner and Tenant; provided, that, the failure by Owner or Tenant to execute such an instrument shall not affect the determination of such dates pursuant to the provisions of this lease.
>
> ...
>
> 52. Owner's Contribution: Owner's Initial Work ...
>
> (e) (i) For purposes of this lease, the term "Owner's Initial Work Substantial Completion Date" shall mean the date on which Owner's Initial Work is substantially completed ... [i.e.,] on the date upon which Owner's Initial Work has been completed other than (A) minor details or adjustments, and (B) any part of Owner's Initial Work that is not completed due to Tenant's Delay.
>
> (ii) Owner shall provide Tenant with at least thirty (30) days' prior written notice of the date on which the Owner's Initial Work Substantial Completion Date has occurred or shall occur (the "Owner's Initial Work Substantial Completion Notice"). ...
>
> (iii) Tenant hereby acknowledges that the Commencement Date hereunder is indeterminate and shall occur as provided in Article 37 hereof and therefore ... Tenant waives any right to rescind this lease under any applicable law ...
>
> (f) Owner shall deliver the Floor Designation Notice and cause the Owner's Initial Work Substantial Completion Date to occur on or prior to January 1, 2009 (the "Delivery Outside Date").

See Order to Show Cause, Exhibit A.

As is evident from the foregoing text, at the time of contracting, the parties had neither chosen the floor of the building that Goldman was to occupy, nor completed the initial construction of such floor. Instead, the parties provided that Goldman's leasehold would commence on an indeterminate date, which was to be fixed at a time after 53rd had completed certain items of work that it was required to do, in order to render the premises ready to be built out. These items, which were designated in Exhibit G of the Lease as "Owner's Initial Work," consisted of: 1) constructing the core and shell of a 30-story office building; 2) providing

temporary electrical facilities; 3) installing a fire alarm panel that is connected to the building's fire alarm system and that has a location thereon for a tenant to tie on its own, separately maintained, fire alarm system; 4) installing the core and shell components of the restrooms; 5) installing a core sprinkler line and tap onto which a tenant can connect its own, separately maintained, sprinkler system; 6) installing a base mechanical system consisting of air conditioning and heating systems; 7) installing an elevator shaft and core walls; 8) applying spray fireproofing; and 9) providing temporary lighting in the toilet rooms and mechanical rooms. *Id.* Exhibit G-1 of the lease designated certain separate items of work as "Owner's Additional Work," including: 1) completing the building enclosure; 2) providing electrical service; 3) causing the building's HVAC system to be commissioned and operational; 4) causing the building's sprinkler system to be commissioned and operational; 5) causing the building's service elevator to be operational; 6) installing finishes and fixtures in the restrooms; 7) causing the building's fire alarm system to be commissioned and operational; 8) installing the enclosures for the perimeter fin tube; 9) installing fire-stopping at the curtain wall and completing the risers; 10) delivering the elevator shaft and core walls on tenant's floor taped, spackled and ready for finishing; 11) installing permanent lighting in the electrical closet and telephone closet located on the tenant's floor; and 12) delivering a core and shell temporary or permanent certificate of occupancy for the building. *Id.* 53rd has submitted two affidavits from its construction supervisor, William I. Unger (Unger), that state that 53rd did substantially complete the Owner's Initial Work before December 1, 2008. *See* Notice of Cross Motion, Unger Affidavit; Final Affirmation for Landlord, Unger Affidavit. However, Goldman disputes this claim, and has submitted affidavits from its own engineer, Vincent Riverso (Riverso), and architect, Ralph

Steinglass (Steinglass), to support its position.

53rd delivered a combined Floor Designation Notice and Owner's Initial Work Substantial Completion Notice to Goldman on October 29, 2008 (the combined notice). *See* Notice of Cross Motion, Kelly Affirmation, Exhibit 1. The combined notice designated the building's 19th floor as the premises to be rented to Goldman, and stated that the owner's initial work would be substantially complete (and the premises ready for Goldman to accept) by December 1, 2008. *Id.* On December 29, 2008, 53rd delivered another notice to Goldman (the lease term notice) that specified that: 1) the lease's Commencement Date was December 1, 2008; 2) the lease's Rent Commencement Date would be May 30, 2009; 3) the lease's Rent Adjustment Date would be May 1, 2014; and 4) the lease's Expiration Date would be May 31, 2019. *Id*; Exhibit 4. Goldman did not countersign or return either of the foregoing notices.

On January 20, 2009, 53rd served Goldman with a notice to cure certain purported defaults that alleged as follows:

> PLEASE TAKE NOTICE that you are violating a substantial obligation of your tenancy and are in default of the Preamble (Insert B) and Article "37 (d)" of the Lease, in that, you have, despite demand by Owner, failed and refused (i) to countersign the Floor Designation Notice ..., (ii) to countersign [the lease term notice] and (iii) ... to pay Owner the amount of ... ($132,729.17), representing the first monthly installment of rent due under the Lease, which was due and payable November 14, 2008 (i.e., fifteen (15) days after the giving of the Floor Designation Notice).

See Order to Show Cause, Exhibit B.

On or about February 9, 2009, there was a fire in the building which damaged a portion of the 19th floor. *Id.*; Ansell Affirmation, ¶ 4. Goldman alleges that 53rd has denied it access to the premises. *Id.*

Goldman commenced this proceeding *via* the within order to show cause, which seeks *Yellowstone* injunction. Annexed to Goldman's moving papers are a summons and complaint that set forth causes of action for: 1) a declaratory judgment; 2) a permanent injunction; 3) a *Yellowstone* injunction; 4) breach of contract; 5) constructive eviction; and 6) actual eviction. *Id.*; Exhibit F. 53rd has opposed the granting of a *Yellowstone* Injunction and has also cross-moved to dismiss the complaint, pursuant to CPLR 3211.

DISCUSSION

Goldman's Order to Show Cause

In *Empire State Bldg. Assocs. v Trump Empire State Partners* (245 AD2d 225, 227-228 [1st Dept 1997]), the Appellate Division, First Department, observed that:

> The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. In order to obtain a *Yellowstone* injunction, the commercial tenant must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the 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 (internal citations omitted).

Here, Goldman argues that it plainly fulfills all of the criteria for a *Yellowstone* injunction, and particularly, that it "is willing and able to cure the alleged defaults," and that it "can cure the alleged defaults without vacating the premises." *See* Plaintiff's Memorandum of Law, at 4. As previously mentioned, Goldman's alleged defaults consist of its failure to countersign the floor designation notice and the lease term notice, and to pay rent. Further, a review of the lease shows that, although Goldman is obligated to countersign the two subject notices, Goldman's failure to do so would have no effect upon either the floor designation or the commencement and

duration of the lease. In any event, in order to cure the alleged defaults, all Goldman would need to do is submit two signed documents and a check. From the foregoing, it is clear that Goldman has established all of the elements necessary for the court to grant a *Yellowstone* injunction.

In its opposition papers, 53rd argues that Goldman is not entitled to a *Yellowstone* injunction unless it can show some good faith as to why it is not in default. *See* Notice of Cross Motion, Claman Affirmation, ¶ 5. 53rd cites one unpublished trial court decision to support this proposition, and further cites a decision by the Appellate Division, First Department, as an endorsement thereof. *Id.* However, 53rd's argument mischaracterizes the law.

In *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.* (1 AD3d 65, 71 [1st Dept 2003]), the Appellate Division, First Department, merely held that the "Supreme Court ... erred in granting a *Yellowstone* injunction where there is no issue for future determination." Here, as will be discussed below, there are several open issues of fact. Thus, the court rejects 53rd's initial opposition argument.

In its reply papers, Goldman reiterates that "in the event [the] court finds that plaintiff is in default of its lease obligations, plaintiff is ready, willing and able to cure its defaults"; however, Goldman also argues that it is <u>not</u> obligated to countersign either of the instant notices or to pay rent. *See* Goldman Reply Affirmation, ¶¶ 1-5. Goldman first argues that 53rd did not complete its "Owner's Initial Work"; specifically, with respect to installing the fire alarm panel, the core and shell components of the rest rooms, the core sprinkler line and tap, and the mechanical (i.e., heating and air-conditioning) system. *Id.*, ¶¶ 5-14. As previously noted, both parties have submitted competing experts' affidavits that bear on the issue of the Owner's Initial Work. The court must review each of Goldman's allegations to determine which discloses an

issue of fact.

With respect to the building's fire alarm system, Schedule G of the lease specifically requires 53rd to:

> Install a fire alarm panel connected to the Building's fire alarm system in a location selected by Owner, with locations on said panel for Tenant to "tie in" the fire alarm system that Tenant installs in the Demised Premises as part of the Initial Tenant Work. The Owner's Initial Work does not require Owner to make the Building's fire alarm system operational.

See Order to Show Cause, Exhibit A. 53rd evidently chose to install fire alarm panels on every three floors, with the panels on the 17th and 20th floors being the ones closest to Goldman's 19th floor suite. Unger asserts that the spacing of fire alarm panels several floors apart is a normal commercial construction practice. *See* Final Affirmation for Landlord, Unger Affidavit, ¶¶ 36-40. He also opines that this issue is governed by the above lease language that affords 53rd the right to select the fire panel's location, and that Goldman could solve this problem by using "a little more cable." *Id.*, ¶ 41. Riverso responds that the normal construction practice is, instead, to install fire alarm panels on every floor in newly erected commercial buildings, and also asserts that the 17th floor fire alarm panel is not yet even connected to the building's fire alarm system, but merely consists, instead, of an empty box on a wall.[2] *See* Plaintiff's Affidavits and Affirmations with Exhibits, Riverso Affidavit, ¶¶ 10-23. Although 53rd was clearly <u>not</u> required to make the Building's fire alarm system operational as part of the Owner's Initial Work, there is a question of fact as to whether 53rd timely installed an acceptable fire alarm panel that Goldman could utilize.

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[2] If true, it would appear that such practice of installing an empty box on a wall, masquerading as a fire alarm, could potentially cause even more danger to life and property if there was in fact a fire.

With regards to the rest room components, Schedule G of the lease specifically requires 53rd to:

> Install the "core and shell" components of new restrooms in the Demised Premises in locations determined by Owner [and] consistent with Owner's design program for the location of the base-Building restrooms and in compliance with all applicable codes.

See Order to Show Cause, Exhibit A. Goldman argues that 53rd has failed to install "necessary plumbing connections and support steel for sink countertops," or "floor drain openings for toilet waste pipes." *See* Goldman Reply Affidavit, ¶ 11. Unger asserts that the toilets in the 19th floor restrooms are wall-mounted units, and that the metal fasteners and drain openings are located on the wall rather than on the floor. *See* Final Affirmation for Landlord, Unger Affidavit, ¶ 29. The court notes that Riverso failed to respond to this assertion in Goldman's reply papers. Thus, the court deems that Goldman has abandoned its argument regarding the core and shell restroom components, and that there is no issue of fact with respect to the sufficiency of this item of work.

As to the sprinkler line and tap, Schedule G of the lease specifically requires 53rd to:

> Provide a core sprinkler line and tap in a location selected by Owner for Tenant to connect its sprinkler distribution to the Building's sprinkler system. The standpipe for such system shall be active and tenant is responsible to connect its sprinkler system to the tap and sprinkler distribution.

See Order to Show Cause, Exhibit A. Goldman argues that the standpipe to which the sprinkler system was to be connected was not "active." *See* Goldman Reply Affidavit, ¶ 13. Unger responds that there is a difference between the standpipe being "active," as the term is used in the Owner's Initial Work portion of the lease, and in having it be "commissioned and operational," as those terms are used in the Owner's Additional Work portion of the lease. *See* Final Affirmation for Landlord, Unger Affidavit, ¶¶ 44-50. He specifically argues that the standpipe

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was "active" as a working, stand alone component, but not as part of an "operational" sprinkler system, and claims, as support, that the fire department was able to use the 19th floor standpipe while fighting the February 9, 2009 fire. *Id.* Riverso responds that the standpipe was not "active," but "passive," with the generally accepted distinction being that the former type of standpipe is supplied with water pumped from a building's own water source, while the latter is supplied with water from an outside source. *See* Plaintiff's Affidavits and Affirmations with Exhibits, Riverso Affidavit, ¶¶ 24-32. Riverso further asserts that the fact that the fire department had to supply the subject standpipe with water from a hydrant on the street proves that the standpipe was "passive." *Id.* Because there appears to be no case law ruling on the purported distinction between "active" and "passive" standpipes, there is a question of fact as to whether the instant standpipe was or would shortly be "active" - as that term may generally be defined in the construction business - at the time that 53rd sent Goldman the Owner's Initial Work Substantial Completion Notice.

Finally, with regards the HVAC system, Schedule G of the lease specifically requires 53rd to:

> Provide a base-Building mechanical system comprised of (i) one or more independent water-cooled air-conditioning package unit(s) on the floor on which the Demised Premises is located, to provide air-conditioning to the Demised Premises, such unit(s) having an aggregate capacity of not less than 35 tons and controlled by integrated digital controls and a keypad display and (ii) a perimeter hot water fin-tube system to provide heat to the demised Premises (but the enclosure for such fin-tube system shall not be part of Owner's Initial Work and may be installed as part of Owner's Additional Work). The mechanical system will be designed to accommodate a variable air-volume system (VAV) and have a main trunk duct branching out of the mechanical room on the floor on which the demised Premises are located.

See Order to Show Cause, Exhibit A. Goldman initially argued that 53rd had not demonstrated

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that it had timely provided the above-described mechanical system. *See* Goldman Reply Affidavit, ¶ 12. Riverso supports this argument by stating that the integrated digital controls and keypad display for the air-conditioning system had not yet been installed in the 19th floor's mechanical room when he inspected it. *See* Plaintiff's Affidavits and Affirmations with Exhibits, Riverso Affidavit, ¶¶ 33-37. Unger replies that those controls were present, but were locked inside the housing of the 35-ton air-conditioning unit that 53rd had delivered to said mechanical room, and that normal construction practice is not to install such controls until the final HVAC build out is completed (in this case, by Goldman) so that they will not be damaged beforehand. *See* Final Affirmation for Landlord, Unger Affidavit, ¶¶ 51-55. Although Unger's argument is certainly plausible, in the absence of any guiding precedent, there is an issue of fact as to whether the base-Building mechanical system had been timely provided.

Thus, because the court accepts Goldman's argument that there are open questions of fact as to whether 53rd had timely completed - or had reason to believe that it would shortly complete - the Owner's Initial Work at the time that it sent Goldman the Owner's Initial Work Substantial Completion Notice, the court must reject 53rd's argument that Goldman is not entitled to *Yellowstone* relief pursuant to the holding of *Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C.* (1 AD3d 65, *supra*)

Goldman's second reply argument is that the combined notice and the lease term notice were also legally ineffective because: 1) both were improperly served; and 2) both contained date calculations that were based on potentially erroneous information regarding 53rd's completion of the Owner's Initial Work. *See* Goldman Reply Affidavit, ¶¶ 15-25. However, for the reasons discussed below, the court rejects these arguments, in whole or in part.

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With respect to Goldman's service argument, Article 51 of lease provides that:

> All notices ... that are given pursuant to the terms of this lease shall be in writing and shall be delivered (including delivery by commercial delivery services), or sent by the United States mail, certified or registered (return receipt requested), postage prepaid, or sent via nationally recognized overnight courier. ... All notices ... shall be addressed as follows:
>
> If to tenant:
> Prior to the Commencement Date:
>
> The Jay Goldman Master Limited Partnership
> [address]
>
> After the Commencement Date:
>
> The Jay Goldman Master Limited Partnership
> [address]
>
> With a copy of notices to tenant to:
> Greenberg Traurig, LLP
> [address]

See Order to Show Cause, Exhibit A. Here, Goldman objects that a copy of one of the notices - the October 29, 2008 combined notice - was incorrectly sent to its attorneys at Greenberg Traurig, LLP via regular mail. *See* Goldman Reply Affidavit, ¶ 18. In response, 53rd submits the affirmation of its counsel, with proof of mailing attached, to show that - in addition to this one notice - the combined notice, the lease term notice and the notice to cure were all sent to both Goldman and Greenberg Traurig, LLP via either FedEx or certified mail, return receipt requested. *See* Kelly Affirmation in Opposition to Order to Show Cause, ¶¶ 1-7; Exhibits 1-10. 53rd also points out that it sent the combined notice "prior to the commencement date" of the lease, and was, thus, only required to send it to Goldman via certified mail, and not required to send it to Greenberg Traurig, LLP at all. *See* Final Affirmation for Landlord, Claman

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Affirmation, ¶¶ 7-10. Because the terms of the lease are therefore abundantly clear, the court rejects Goldman's improper service argument in its entirety.

Goldman's final reply argument is that it was not obligated to countersign either the combined notice or the lease term notice because they were legally defective. *See* Goldman Reply Affidavit, ¶¶ 22-25. Goldman reiterates its claim that 53rd did not complete the Owner's Initial Work within the time set forth in the combined notice, and argues that, because the dates that were calculated in the lease term notice were based on this preceding error, it was not bound to accept them by countersigning the document. *Id.* In its sur-reply papers, 53rd does not directly address the "defectiveness" argument, but rather asserts that Goldman is seeking excuses to walk away from the lease, and asks that the court appoint a "neutral expert" to determine whether it has substantially completed its initial work. *See* Final Affirmation for Landlord, Claman Affirmation, ¶¶ 31-43. The court disagrees with these arguments.

Although the court has accepted, at this juncture, that there are factual issues as to whether 53rd substantially completed its Owner's Initial Work within the time set forth in the combined notice, this only affords Goldman a limited basis upon which to grants its request for *Yellowstone* relief. If the December 1, 2008 substantial completion date was, in fact, erroneous, then the lease's commencement date, rent commencement date, rent adjustment date and expiration date, all of which were calculated from that date (pursuant to Article 37 of the lease) would also be incorrect. However, none of this has any bearing on the matter set forth in the floor designation notice (i.e., that 53rd had made the 19th floor available for Goldman's tenancy) or upon Goldman's obligation to pay the first monthly rent installment within 15 days of receiving said floor designation notice.

After reviewing all of the governing documents and the relevant case law, the court concludes that Goldman has failed to establish that it is entitled to *Yellowstone* injunctive relief from these two items of default that are set forth in the notice to cure. As the Court of Appeals noted in *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.* (93 NY2d 508, 515 [1999])

> Conditions placed upon the grant of a *Yellowstone* injunction do not ... alter the rights and obligations of the parties. The point of reference for defining the rights of the parties is not the court order; rather, it is the lease itself. The *Yellowstone* injunction ... did not supersede the lease provision calling for interest on rent arrears in the event of a default. The *Yellowstone* injunction protected the [plaintiff] from eviction; it did not rewrite the lease.

Here, it is clear that the preamble to the lease directed Goldman to countersign the floor designation notice and to pay the first month's rental installment of $132,729.17 within 15 days after receiving said notice. Goldman has not yet done so. However, as previously discussed, Goldman is otherwise entitled to a *Yellowstone* injunction. Therefore, the court is willing to grant Goldman's request for *Yellowstone* relief upon the condition that Goldman immediately cure the first and third defaults complained of in the January 20, 2009 notice to cure - i.e., that Goldman immediately countersign a floor designation notice and pay 53rd the amount of $132,729.17. Accordingly, Goldman's order to show cause is conditionally granted, in accordance with the foregoing.

53rd's Cross Motion

53rd's cross motion seeks to dismiss the complaint pursuant to several provisions of CPLR 3211. As previously mentioned, the complaint sets forth causes of action for: 1) a declaratory judgment; 2) a permanent injunction; 3) a *Yellowstone* injunction; 4) breach of

contract; 5) constructive eviction; and 6) actual eviction. *See* Order to Show Cause, Exhibit F. Because the preceding section of this decision has dealt with Goldman's third cause of action, the court need not address it further here. Accordingly, this portion of the decision will deal with Goldman's remaining five causes of action.

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "'is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained'." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *See e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). It has been held, however, that "where the documentary evidence submitted flatly contradicts the [plaintiff's] factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted". *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001) *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994).

Here, Goldman's first cause of action seeks a declaratory judgment that "it is not in default of its obligations under the lease as alleged in the cure notice and that the cure notice is legally defective, null and void." *See* Order to Show Cause, Exhibit F, ¶ 25. A declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be

claimed." CPLR 3001; *see e.g. Jenkins v State of New York Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for a declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch System*, 241 NY 489 (1926). The Appellate Division, First Department, has held that "[i]f a right to a declaration is shown but depends on contested facts, the case should go to trial even though a particular declaration sought would not be warranted." *Plaza Management Co. v City Rent Agency*, 31 AD2d 347, 350 (1st Dept), *affd* 25 NY2d 630 (1969), citing *Rockland Light and Power Co. v City of New York*, 289 NY 45 (1942). Here, the court has already determined that Goldman is in default of two of the obligations set forth in the notice to cure, and that there are factual issues as to the third obligation. Thus, the documentary evidence contradicts several of Goldman's factual claims with respect to its first cause of action, and the law does not, therefore, accord that cause of action any favorable inferences. Accordingly, Goldman's first cause of action is dismissed except with respect to Goldman's claim that it is not in default of those portions of the lease that are impacted by its dispute with 53rd over the alleged substantial completion (or not) of the Owner's Initial Work.

With respect to Goldman's permanent injunction claim, the complaint requests an order restraining 53rd "from: (a) taking any steps to terminate the lease based upon the cure notice or the allegations contained therein; (b) commencing any action or proceeding to obtain possession of the premises based upon the cure notice or the allegations contained therein; or (c) otherwise attempting to gain possession of the premises based upon the cure notice or the allegations contained therein." *See* Order to Show Cause, Exhibit F, ¶ 28. The Court of Appeals holds that

an injunction "may be granted ... when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, however, the court has determined that Goldman will not succeed on the merits of its claim that two of the three items of default set forth in the notice to cure should not be enforced. The court has also determined that the third item of default should be the subject of a trial. Thus, the documentary evidence again contradicts several of Goldman's factual claims with respect to its second cause of action, and the law does not, therefore, accord that cause of action any favorable inferences. Accordingly, Goldman's permanent injunction claim is dismissed except with respect to Goldman's claim that it is not in default of those portions of the lease that are impacted by its dispute with 53rd over the alleged substantial completion (or not) of the Owner's Initial Work.

With respect to Goldman's breach of contract claim, the complaint alleges that 53rd "has breached the covenant of quiet enjoyment contained in the lease," and that Goldman "has been damaged by [53rd]'s ... failure to complete Owner's Initial Work and [by 53rd]'s breach of the implied covenant of good faith and fair dealing in the lease." *See* Order to Show Cause, Exhibit F, ¶¶ 38-39. Pursuant to New York law, the proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, Goldman has unquestionably done so. 53rd's only argument in support of this portion of its cross motion is that "any other claim that [Goldman] may now have for breach of some other lease provision, whether express or implied, is independent of, and not an excuse for, [Goldman]'s failure to have

[* 19]

made the rent payment." *See* Notice of Cross Motion, Claman Affirmation, at 12. However, this argument clearly goes to the merits of Goldman's claim, and not to the sufficiency of its pleading. Accordingly, 53rd's cross motion is denied with respect to Goldman's fourth cause of action.

Goldman's fifth and sixth causes of action allege, respectively, that 53rd's failure to complete the Owner's Initial Work amounted to both a constructive and an actual eviction. *See* Order to Show Cause, Exhibit F, ¶¶ 42, 45, 48, 51. With respect to the former claim, 53rd noted that Article 9 of the lease provides that "Tenant hereby waives the provisions of Section 227 of the Real Property Actions and Proceedings Law and agrees that the provisions of this article shall govern and control in lieu thereof." *Id.*; Exhibit A. 53rd also correctly asserts that the Appellate Division, First Department, has plainly held that a commercial tenant who waives the protections of RPAPL § 227 is precluded from asserting a constructive eviction claim against its landlord. *See Schwartz, Karlan & Gutstein v 271 Venture*, 172 AD2d 226 (1st Dept 1991). The Court of Appeals has held that a "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence ... may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, the lease language plainly bars Goldman's fifth cause of action. Accordingly, the court finds that 53rd's cross motion should be granted with respect to that claim.

With respect to Goldman's actual eviction claim, New York law requires a proponent to allege that the "landlord wrongfully oust[ed] a tenant from physical possession of the leased

premises." *Sapp v Propeller Co. LLC*, 5 AD3d 181 (1st Dept 2004). Here, 53rd argues that Goldman's claim must fail, as a matter of law, because Goldman cannot allege that 53rd committed any wrongful act inasmuch as 53rd was not responsible for the fire on February 20, 2009. *See* Notice of Cross Motion, Claman Affirmation, at 10. Goldman responds that the allegations in the complaint do not refer to the fire, but to 53rd's failure to complete the Owner's Initial Work, the Owner's Additional Work, and several other items of undesignated work. *See* Plaintiff's Memorandum of Law in Further Support, at 18-19. 53rd replies that Goldman's claim still must fail because Goldman never actually took possession of the premises. *See* Final Affirmation for Landlord, Claman Affirmation, ¶¶ 27-32. However, this last argument clearly turns on a factual determination and is not directed to the sufficiency of Goldman's pleadings. Further, Goldman has stated that it pled its two eviction claims "in the alternative if it is ultimately determined that Tenant has possession." *See* Plaintiff's Second Memorandum of Law in Further Support, at 17. The Court of Appeals observed long ago in *Plant City Steel Corp. v National Machinery Exchange* (23 NY2d 472, 477 [1969]) that:

> CPLR 3014 explicitly provides for pleading alternatively and hypothetically in setting forth causes of action. Though this type of pleading may occasionally result in confusion to the defendant, he is protected from any prejudice by the court's power to sever causes of action and order separate trials or to require an orderly presentation of issues at trial. The spirit of the pleading provisions contained in the CPLR clearly indicates that procedural niceties are not ends in themselves, but only means to substantive justice. There is no need to force a plaintiff to elect between hypothetical or alternative causes of actions at the pleading stage.

Bearing this in mind, the court finds that 53rd's arguments to dismiss Goldman's actual eviction claim are unavailing. Accordingly, the 53rd's motion is denied with respect to Goldman's sixth cause of action.

[* 21]

CONCLUSION

Accordingly, based upon the above, it is

ORDERED that plaintiff's motion for a *Yellowstone* injunction is conditionally granted, *provided that within 15 days of service of a copy of this order with notice of entry*, Goldman cures the first and third defaults complained of in the January 20, 2009 notice to cure - i.e., that Goldman countersign a floor designation notice and pay 53rd the amount of $132,729.17; and it is further

ORDERED that defendant's motion to dismiss is granted *only to the extent that* plaintiff's first and second causes of action are dismissed except with respect to Goldman's claim that it is not in default of those portions of the lease that are impacted by its dispute with 53rd over the alleged substantial completion (or not) of the Owner's Initial Work, and plaintiff's fifth cause of action is dismissed in its entirety; it is further

ORDERED that within 20 days of entry of this order, defendant shall serve and file and answer to the complaint; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: New York, New York
October 19 , 2009

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Doris Ling-Cohan, J.S.C.

J:\Preliminary Injunctions\yellowstone injunction\goldmanv53rd.lane.wpd