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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 650358/2011
BOWERY RESIDENTS' COMMITTEE,
vs.
127 WEST 25TH STREET, LLC
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is/ and cross-motion are determined in accordance with the annexed decision, order and partial declaratory judgment.

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

Dated: November 2, 2011

HON. JOAN A. MADDEN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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BOWERY RESIDENTS' COMMITTEE, INC.,

Plaintiff,

INDEX NO. 650358/11

-against-

127 WEST 25TH LLC,

Defendant.

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JOAN A. MADDEN, J.:

This motion and cross-motion involve a dispute as to the commencement date for the payment of rent under a long-term commercial lease between plaintiff Bowery Residents' Committee, Inc. as tenant ("Bowery Residents"), and defendant 127 West 25th Street LLC, as landlord ("West 25th Street"). Defendant landlord moves for partial summary judgment on the first and fifth causes of action in the complaint to the extent of declaring that the "First Rent Commencement Date" at the latest is July 16, 2011, and that is the date on which rent is due under the terms of the lease. Defendant also moves for summary judgment dismissing the second, third and fourth causes of action as duplicative of the first cause of action, and for a declaration directing that the loan between plaintiff and its contractor J.T. Magen & Co., must be modified by separating it into two promissory notes.[1] Plaintiff tenant opposes the motion and

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[1]On September 16, 2011, the parties stipulated that the motion and cross-motion are not intended to address the issue of rent offsets, so the portion of defendant's motion seeking dismissal of the second and fourth causes of action for rent offsets, is deemed withdrawn without prejudice.

The portion of defendant's motion seeking to split the Magen promissory note is moot. In its October 11, 2011 Reply Affidavit, plaintiff states that the Magen note has been split, as a "note for $8,783,222 ($8,360,000 plus the expense provided for in Section 11.1(a)(ii)) has been issued to Magen, secured by a leasehold mortgage as provided in the Lease. The balance that

cross-moves for partial summary judgment on its first, third and fifth causes of action for a declaration that the "Initial Premises Abatement Period Termination Date," initially January 31, 2011, has been abated by a total of 541 days to July 26, 2012, and as a result the First Rent Commencement Date is July 27, 2012.

The following facts are not disputed unless otherwise noted. Plaintiff Bowery Residents is a not-for-profit corporation that provides housing and other services, including counseling and addiction treatment, to homeless persons in New York City. On February 18, 2010, plaintiff and defendant entered into a 33-year ground lease for the entire building located at 127 West 25th Street in Manhattan, for plaintiff to operate a facility to provide such services (the "original lease"). The original lease was amended by a First Amendment dated April 27, 2010 (the "first amendment"), and a Second Amendment dated October 4, 2010 (the "second amendment").

At the time the parties executed the original lease, the building required extensive renovations for the tenant's intended use, and several floors were still occupied. The parties agreed that the tenant would undertake the necessary renovation work, and the landlord would provide access to the occupied floors. The landlord agreed to fund the tenant's renovations with an outright contribution of $4,180,000, and a loan to the tenant in the amount of $8,360,000. The landlord was to deposit those funds into an escrow account maintained by a third-party escrow agent pursuant to a separate tri-party agreement. In the event the landlord did not provide the $8,360,000 loan, the tenant was permitted to secure financing from a third-party, and the landlord had the option of subsequently substituting its own financing for that of the third-party. It is

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BRC [Bowery Residents] owes to Magen has been segregated into a separate unsecured note." Plaintiff submits a copy of the $8,783,322.00 promissory note.

undisputed that the landlord failed to provide the $8,360,000 loan and the tenant secured alternative financing from its contractor, J.T. Magen & Co, on June 30, 2011.

The issue before the court is the date on which the tenant's obligation to pay rent commences. The parties agree that determination of this issue rests on the application of several provisions in the lease, which give the tenant the remedy of a rent abatement deferring or postponing the commencement date of its obligation to pay rent, upon the landlord's default in performing certain lease obligations.

Article I of the original lease defines the "First Rent Commencement Date"as having "the meaning provided in Section 3.8 hereof," and under Section 3.8 the "First Rent Commencement Date" is essentially the "day following the Initial Premises Abatement Period Termination Date." Article I defines the "Initial Premises Abatement Period Termination Date" as

> mean[ing] December 31, 2010, as the same may be extended in accordance with Section 12.7 and Section 36.4, each such day of adjournment pursuant to any provision to be sequential and not overlapping with any other day of adjournment pursuant to any other provision.

The foregoing definition of the Initial Premises Abatement Period Termination Date was amended by the second amendment to the lease, "to delete the date 'December 31, 2010' and to substitute 'January 31, 2011' therefor."

Section 12.7 of the lease is entitled "Tenant's Sole and Exclusive Remedies Regarding Certain of Landlord's Obligations," and states in relevant part as follows:

> (b) (i) In the event that Landlord fails to meet its funding obligations under Section 12.3(b) [landlord's $4,180,000 contribution] or (c) [landlord's $8,360,000 TI loan or "tenant investment" loan], then (x) the Initial Premises Abatement Period Termination Date shall be extended on a day for day basis for the total number of days it takes for Tenant to obtain alternative financing on terms satisfactory to Tenant for the Replacement Funding Amount . . .

* * *

> (d) In the event that Landlord fails to provide access to any of the Occupied Floors [defined in Section 36.1 as "all or portions of the 3rd, 10th, 11th and 12th floors"] as required under Section 12.3(e) hereof, Tenant shall be entitled . . . (ii) to extend the Initial Premises Abatement Period Termination Date on a day for day basis for the total number of days of such obstruction of access to the extent such obstruction continues after Tenant notifies Landlord that there has been such an obstruction.

Based upon the foregoing lease provisions, the First Rent Commencement Date must be determined by starting from February 1, 2011, which is one day after the January 31, 2011 Initial Premises Abatement Period Termination Date as provided in the second amendment to the lease, and adding to that February 1, 2011 date, any additional days of abatement to which the tenant is entitled for the landlord's defaults under Section 12.7.

The landlord argues that at the latest, the First Rent Commencement Date is July 17, 2011, which acknowledges that the tenant secured alternative financing for the $8,360,000 loan on June 30, 2011, and includes an additional 16-day abatement for what the landlord alleges is the number of days it delayed in providing access to the 11th floor. The tenant maintains that its obligation to pay rent does not commence until July 27, 2012, based upon a total of 541 abatement days for the landlord's alleged defaults in failing to fund the escrow account (230 days, based on the default from November 12, 2010 to June 30, 2011), failing to provide the $8,360,000 loan (209 days, based on the default from December 3, 2010 to June 30, 2011), and failing to provide access to the 11th floor (102 days, based on the default from October 27, 2011 to February 6, 2011).

The court concludes that pursuant section 12.7(b)(I), plaintiff is entitled to an abatement of 230 days for defendant's default in failing to meet its funding obligation under 12.3(c) to

provide plaintiff with "Landlord TI Loans"of up to $8,360,000. While defendant complied with its obligation under 12.3(b) to contribute $4,180,000 towards the cost of plaintiff's renovation work, defendant failed to comply with its subsequent obligation under section 12.3(c) to provide the $8,360,000 loan. Section 12.3(c) states in relevant part as follows:

> (c) Landlord TI Loans. Landlord covenants and agrees to make the Landlord TI Loans available to Tenant. The parties agree that the Landlord TI Loans are to be applied by Tenant for Tenant's Initial Improvements pursuant to the Tri-Party Agreement. In connection therewith, Landlord covenants and agrees that it shall:
>
> (i) deliver the Landlord TI Loans Evidence to Tenant not later than the Third Benchmark Date: and
>
> (ii) deposit or cause to be deposited, within ten (10) Business Days after a written notice is received from Escrowee that Landlord's funds in the Tri-Party Escrow are less than $2,500,000, such amount of the Landlord TI Loans as is required to increase Landlord's portion of the funds held in the Tri-Party Escrow to an amount equal to or greater than $4,000,000 . . .

Article I defines "Landlord TI Loans" as "loans of up to $8,360,000.00 to be provided by Landlord to Tenant in connection with Tenant's Initial Improvements in accordance with the provisions of Article 12 hereof and the Tri-Party Agreement."

By letter dated October 28, 2010, the escrow agent, First American Title Insurance Company, notified defendant that the balance in the "Deposit Account" was $2,237,086.36, and that pursuant to section 12.3(c)(ii) of the Lease, the tenant "has requested that within ten (10) Business Days of this notice you deposit by wire the amount of $1,762,913.64 into the Deposit Account (the amount required to bring the deposit account balance up to $4,000,000)." By letter dated November 29, 2010, plaintiff notified defendant that the 10 Business Day period referenced in the escrow agent's letter expired on November 12, 2010 "and Landlord failed to make the required deposit in to the Deposit Account." The letter advised that "[d]ue to Landlord's breach of its funding obligations . . . the rent commencement date under the Lease

shall be extended, as provided in Section 12.7(b) of the Lease, on a day for day basis for the total number of days it takes for Tenant to obtain alternative financing . . ."

Section 12.3(c) also required defendant to "deliver Landlord TI Loans Evidence to Tenant not later than the Third Benchmark Date." The lease defines "Landlord TI Loans Evidence" as either cash deposited in the escrow account, or a commitment from an institutional lender or the landlord's investors, as to the $8,360,000 loan amount. The third benchmark date was originally July 22, 2010, and it was extended by the second amendment to December 3, 2010. In a letter dated December 17, 2010, plaintiff advised defendant that "[s]ince the date of our Funding Default Notice [plaintiff's November 29, 2010 letter], another critical deadline has come and gone without your compliance with your obligations, namely the obligation to provide the Landlord TI Loans Evidence" by December 3, 2010, "which constitutes a further default on your part."

Based on the foregoing, defendant's default on its funding obligation under section 12.3(c) to fund the $8,360,000 loan, began on November 12, 2010, after the expiration of the ten-day notice period regarding the balance in the escrow deposit account. Such default continued day to day until plaintiff secured alternative financing from its contractor on June 30, 2011, resulting in a total of 230 days of default for which plaintiff is entitled to an abatement. Contrary to plaintiff's position, the obligation to maintain a minimum balance of $4,000,000 in the escrow account is not a separate "funding obligation" for which defendant can additionally be held in default pursuant to section 12.7(b)(ii). Rather, the escrow account is maintained solely as a mechanism through which the funds provided by the landlord, including the landlord's

outright contribution of $4,180,000, are made available to the tenant.[2] Thus, in accordance with section 12.7(b)(ii), plaintiff is entitled to an abatement of 230 days for defendant's default of its funding obligation under section 12.3(c).

Pursuant to section 12.7(d)(ii), plaintiff is also entitled to an additional abatement of 100 days for defendant's default of its obligation to provide access to the 11th floor under section 12.3(e) of the lease. Section 12.3(e) is entitled "Tenant's Access to Occupied Floors" and states as follows:

> Landlord covenants and agrees that it shall provide Tenant access, as required by Tenant for Tenant to perform Tenant's Penetration Work, to each of the Occupied Floors upon three (3) Business Days notice from Tenant to Landlord that Tenant requires such access for Tenant's Penetration Work. Landlord further agrees that it shall continue to provide such access to the applicable Occupied Floor for the entire period of time required by Tenant to perform such work on such Floor. Tenant covenants and agrees to perform Tenant's Penetration Work in a commercially reasonable manner.

"Occupied Floors" is defined in the lease as having "the meaning provided in Section 36.1," and section 36.1, entitled "Existing Leases," states in relevant part as follows:

> As of the date hereof, all or portions of the 3rd, 10th, 11th and 12th floors are subject to certain existing leases (each and all of the foregoing during all times until possession is delivered to Tenant as required under Section 12.2 hereof, an "Occupied Floor").

The original lease also defines "Tenant's Penetration Work," as

> mean[ing] that portion of the construction work of Tenant's Initial Improvements required for purposes of (a) altering the existing heating, ventilating, electrical

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[2]Plaintiff's Chief Financial Officer Christine Chisholm admits as much when she explains as follows: "To make sure the Landlord's funds were available to finance the renovations, an escrow agreement was entered into between the Landlord and BRC [Bowery Residents'], and First American Title Insurance Company . . . as the escrow agent, it being agreed that the Landlord's and BRC's funds would be deposited into the escrow account and BRC could draw down from it to pay the renovations costs."

> systems, air-conditioning or life-safety systems in the Building or (b) installing such new heating, ventilating, electrical systems, air-conditioning or life-safety systems in the Building as Tenant may require, each of (a) and (b) as substantially consistent with the plans attached as Exhibit K hereto.

The second amendment to the lease, dated October 4, 2010, expanded the definition of "Tenant's Penetration Work," as follows:

> The defined term "Penetration Work" is hereby amended to add the following at the end of such definition after the words "Exhibit K hereto": "together with any other work, whether or not shown in such plans, if such work is necessary in order for Tenant to obtain a temporary certificate of occupancy for the Building as altered by Tenant's Initial Improvements." For purposes of clarification, it is understood as of the date of this Amendment that the Eleventh Floor is the only remaining Occupied Floor and for so long as such floor remains occupied, Tenant shall not be permitted to perform its general build-out work on such floor, but only such work as is required in order for Tenant to obtain a temporary certificate of occupancy for the Building as altered by Tenant's build out of all other floors.

Pursuant to these lease provisions, defendant was not only obligated to provide plaintiff with access to the 11th floor for the purpose of performing "penetration work," but also "general build-out work," required for a temporary certificate of occupancy. By letter dated November 8, 2010, plaintiff advised defendant that "we have repeatedly requested access to the Eleventh Floor in order to perform Tenant's Penetration Work over the past few weeks to no avail," and "repeated our request to you on October 26, 2010 and were informed that your attorney would arrange for access. Notwithstanding your response, no access was granted. Finally, on October 28, 2010, we informed you that we could no longer wait to perform Tenant's Penetration Work on the Eleventh Floor and that access was required by November 2, 2010."

Plaintiff submits copies of e-mails sent to or received from defendant regarding access to the 11th floor, which date from October and November 2010. Essentially those emails show that while plaintiff continued to assert its contractual right to access, defendant was engaged in

negotiations with the tenant occupying the 11th floor. Defendant, however, merely succeeded in providing plaintiff with access on November 11, 2010 and thereafter, for the limited purpose of conducting surveys and taking measurements. Notably, plaintiff's December 17, 2010 letter regarding the funding default, also specifically advised that "the required access to the 11th floor has still not be provided as required under the Lease." The undisputed record establishes that not until the 11th floor tenant actually vacated the premises on January 31, 2011, and plaintiff accepted possession one week later, on February 7, 2011, was plaintiff finally given access in accordance with terms of the lease, i.e. to perform penetration and build-out work.

Based on the foregoing, the court finds that for the purpose of section 12.3(e) of the lease as quoted above, on Tuesday, October 26, 2010, plaintiff notified defendant that it needed access to the 11th floor. Since defendant was entitled to three business days' notice from October 27 - 29, defendant first defaulted when it failed to provide access the following day, October 30, 2010. Defendant's default continued each day thereafter from October 30, 2010 through February 6, 2011, for a total of 100 days of default.

As quoted above, the definition of "Initial Premises Abatement Period Termination Date" states that each day the abatement termination date is "adjourned" is "to be sequential and not overlapping." Thus, the 230 day abatement for defendant's default in providing the loan and the 100 day abatement for defendant's default in providing access to the 11th floor are to run consecutively for a total of 330 abatement days. As explained above, the First Rent Commencement Date is determined by starting from February 1, 2011 and adding the additional days of abatement for defendant's defaults under Section 12.7. Thus, starting from February 1, 2011 and adding 330 abatement days, December 28, 2011 is the last day of the abatement period,

and December 29, 2011 is the First Rent Commencement Date.

Accordingly, it is

ORDERED that the motion and cross-motion for partial summary judgment are granted to the extent of declaring that the First Rent Commencement Date is December 29, 2011; and it is further

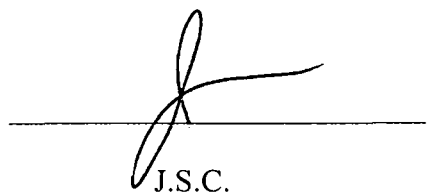
ADJUDGED AND DECLARED that the First Rent Commencement Date is December 29, 2011; and it is further

ORDERED that the balance of the action is severed and shall continue; and it is further

ORDERED that the parties are directed to appear for a status conference on November 10, 2011 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

DATED: November 2, 2011

ENTER:



J.S.C.