Gettinger Assoc., LLC v Abraham Kamber & Co. LLC
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April 12, 2012
Supreme Court, New York County
Docket Number: 111166/2006
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES Justice — PART 59

GETTINGER ASSOCIATES, LLC and
1407 BROADWAY REAL ESTATE, LLC,
Plaintiffs,

- v -

ABRAHAM KAMBER & COMPANY LLC,
Defendant.

Index No.: 111166/2006

DECISION and ORDER

The trial of this action seeking a declaratory judgment and permanent injunction took place before the undersigned on June 6, 8, 9 and 13, 2012. The parties submitted post trial memoranda of law on October 24, 2011.

FINDINGS of FACT

The court adopts many of the undisputed facts to which the parties stipulated before the trial, and makes further findings that are based upon the evidence introduced at trial.

The Overlease, the Sub-Lease and the Parties

1. On January 14, 1954, The Prudential Insurance Company of America, as landlord and Webb & Knapp, Inc., as tenant, entered into a lease (the "Overlease") with respect to a then recently completed 43-story office building located at 1407 Broadway, New York, New York (the "Building").

2. On February 1, 1954, Webb & Knapp, Inc., as landlord, and Gettinger Associates, as tenant, entered into a Sub-Lease (the "Sublease") with respect to the Building.

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

3. Plaintiff Gettinger Associates was the tenant under the Sublease from its inception in 1954 until January 4, 2007, when it assigned all of its rights, title and interest in the Sub-Lease to plaintiff 1407 Broadway LLC (Gettinger Associates is also referred to as "Tenant" with respect to the period of February 1, 1954 until January 4, 2007; 1407 Broadway LLC is also referred to as "Tenant" with respect to the period since January 4, 2007.)

4. Defendant Kamber became, and at all times relevant to this action has been, the successor to the rights and obligations of Webb & Knapp, Inc. (a) as tenant under the Overlease, and (b) as landlord under the Sub-lease. (Kamber is also referred to as "Landlord" with respect to the Sub-Lease.)

Terms of the Sub-Lease

5. The Term of the Sub-Lease, including renewals at Tenant's option, runs for 94 years, with an initial term of 15 years and four renewal terms, as follows:

(a) Initial term:	1954 to 1969	(15 years)
(b) First renewal:	1969 to 1979	(10 years)
© Second renewal	1979 to 2004	(25 years)
(d) Third renewal	2004 to 2030	(26 years)
(e) Fourth renewal	2030 to 2048	(18 years)

The Building

6. The Building is a 43-story office building located in Manhattan's garment center. Its main entrance is on Broadway between 38th and 39th Streets, and it has a second entrance on Seventh Avenue just south of 39th Street.

7. The Building is a multi-tenanted building, subdivided into hundreds of spaces occupied by sub-sub-tenants, where Tenant subleases space to approximately 300 sub- sub-tenants, most of which are involved in the apparel business. Historically and through the present, Tenant has sub-leased most of the space in the Building to companies in the garment industry with a particular focus on ladies' sportswear. The companies use the spaces subleased primarily as showroom spaces.

8. Under the Sub-Lease, the Tenant is responsible for maintaining and operating the Building, which includes leasing of space to tenants. The tenant is also responsible for all costs of operating the Building and receives the profits or bears the losses derived from such operation.

The 1999-2000 Rent Re-Set Arbitration

9. Gettinger Associates exercised its option under the first and second renewals, and the parties agreed on the annual rent payable to Kamber during those terms without the need for arbitration. The process for setting the rent under the Sub-Lease for the third renewal period, 2004 to 2030, began in 1999 (five years before the commencement of that term). The parties were unable to agree on the amount of the rent, and they proceeded to arbitration.

10. Under the terms of the Sub-Lease, the rent for the 26-year period from 2004 to 2030 was to be fixed, five years in advance, at 5% of the value of the Premises as of 1999.

11. The arbitration hearing was held over five days in the spring of 2000.

12. In the arbitration, both sides submitted to the arbitrators, *inter alia*, estimates of

the Building's value based on their respective appraisers' appraisal reports, which included projections of future income, as well as consideration of comparable sales.

13. For the arbitration, Gettinger Associates retained Lev Zetlin Associates ("LZA), an architectural and engineering firm, in order to assess the condition of the Building and identify and provide cost estimates of future repairs, improvements or upgrades that might be desirable during the upcoming 26-year renewal period in order to keep the Building competitive in the market.

14. LZA set forth its findings in a Condition Assessment Report (the "LZA Report"), which Gettinger Associates provided to Kamber, as part of the rental arbitration.

15. On June 8, 2000, the arbitration panel reported that the Building's value (as of 1999) was $150 million

16. Based on such valuation, the annual rent during the third renewal period, 2004 to 2030, was set at $7.5 million.

17. By decision and order dated February 28, 2002, the court (Gans, J.) granted Gettinger Associates' motion and denied Kamber's cross motion to vacate the award and confirmed the arbitration award.

Kamber's Representations as to Defaults under the Sub-Lease

18. On January 31, 2005, Kamber entered into an Absolute Assignment of Lease and Rents (the "2005 Assignment") with North Fork Bank ("Bank") wherein as consideration for the grant of the 2005 Assignment, the Bank made an $85 million loan.

19. Under the 2005 Assignment, Kamber assigned to the Bank all of Kamber's rights under the Sub-Lease, except for such rights as were expressly licensed back to Kamber under a limited license to take certain specific actions. The right to terminate or declare

a default under the Sub-Lease was not one licensed back to Kamber. Thus, by that assignment, Kamber expressly gave up the right to declare such defaults or take any actions to terminate the Sub-Lease.

20. Kamber's principal Steven Levey signed the 2005 Assignment and acknowledged having done so before a notary public. In the 2005 Assignment, Kamber made the following representation to the Bank

> 7.3 No Tenant Defaults
>
> To the Assignor's best knowledge as a duly diligent property owner, no default exists under the Prime Sublease [the Sublease].

21. About five years later, in August 2010, Kamber entered into a First Amendment to Absolute Assignment of Leases and Rents ("2010 Assignment") with the successor Bank. Kamber provided the 2010 Assignment in connection with an amended loan from the Bank to Kamber in the reduced amount of $65 million.

22. Kamber's principal Steven Levey signed the 2010 Assignment and acknowledged having done so before a notary public. In the 201o Assignment, Kamber made the following representation to the Bank

> The representations and warranties made by the Assignor in the Assignment of Leases and Rents [the 2005 Assignment] are true and complete on and as fo the date hereof as if made on and as of the date hereof and as if each reference therein to this "Assignment" included reference to the Assignment as amended by this Amendment.

Notice to Cure dated July 20, 2006 ("July 20, 2006 Notice"); Notice of Default dated July 21, 2006 ("July 21, 2006 Notice") ; Notice of Default dated February 16, 2007 (February 16, 2007 Notice"); Notice of Default (undated) issued in April 2009 ("April 2009 Notice"; and Notice of Default dated August 5, 2009 ("August 5, 2009 Notice)

23. By order dated September 26, 2006, the Court granted Gettinger Associates a Yellowstone injunction with respect to the July 20, 2006 Notice, which injunction is still

in effect ("2006 Yellowstone Injunction". By subsequent stipulation of the parties, the 2006 Yellowstone Injunction was extended to the July 21, 2006 Notice, the February 16, 2007 Notice, the April 2009 Notice and the August 5, 2009 Notice.

24. The July 20, 2006 Notice claimed that Gettinger Associates was in default because it had undertaken alleged alterations to the Building at a cost of more than $50,000, and more particularly commenced "exterior repair work performed under DOB Permit No. 104393747-01-EW-05, issued July 5, 2006" without providing Kamber with plans for the work or a completion bond and without obtaining Kamber's prior written approval.

25. The July 21, 2006 Notice stated that the Tenant had until August 21, 2006, "a date which is not less than 30 days after service of this Notice," in which to commence to remedy the alleged defects stated in the notice; and threatened termination of the Sub-Lease if Tenant failed to so cure.

26. The work at issue was repairs to the Building's facade (exterior walls), mandated by New York City Local Law 11 for the year 1998 ("Local Law 11"). Between 2004 and 2007, work was performed to repair certain parts of the Building's facade.

27. Tenant could not perform work under the July 5, 2006 Permit until after DOB issued that permit, thereby finally approving the proposed plans and specification for such work.

28. On July 25, 2006, Gettinger Associates provided Kamber with the contract, plans, and specifications for the above exterior repair work.

29. On August 4, 2006, Gettinger Associates provided Kamber with a performance and completion bond cover such work.

30. The July 21, 2006 Notice stated that Tenant has until August 14, 2006, a "date which is not less than 30 days after service of this Notice", in which to commence to remedy alleged defects stated in the notice, and threatened termination of the Sub-Lease if Tenant failed to do so. The July 21, 2006 notice contains a list of more than 150 items that, Kamber claimed, Gettinger had failed to maintain in proper repair.

31. At the time of the July 21, 2006 Notice, Gettinger had already embarked on a project to replace each of the Building's more than 4,000 windows.

32. On October 4, 2006, Tenant sent Kamber a letter enclosing a performance bond for the elevator modernization that Gettinger intended to perform in the Building.

33. Kamber filed the Notice of Pendency dated October 6, 2006 with the County Clerk, New York County, and served a copy on Gettinger Associates. The Notice of Pendency was premised on counterclaims alleged by Kamber in the action at bar, by which Kamber seeks to terminate the Sub-Lease.

34. Tenant provided Kamber with copies of the plans, specifications and bond for the window replacement project on or about November 3, 2006.

35. The February 16, 2007 Notice demanded cure by February 27, 2007, a date that is 10 days after the date of the notice and threatened termination of the Sub-Lease if Tenant failed to so cure.

36. The February 16, 2007 Notice claimed that Gettinger Associates and 1407 Broadway LLC were in default by reason of Gettinger Associates' assignment of the Sub-Lease to Lightstone while Gettinger Associates allegedly was in default as Kamber alleged in the July 20, 2006 Notice and the July 21, 2006 Notice.

37. On May 14, 2007, Tenant sent Kamber a letter enclosing a proposal and price estimate for elevator cab interior work to be performed in the Building's elevators' interiors.

38. On June 15, 2007 Tenant sent Kamber a letter enclosing the executed agreement for work to be performed on the Building's elevator cab interiors.

39. On June 15, 2007, Tenant sent Kamber a letter enclosing the plans and specifications for the work to be done in Suite 302 (XOXO, a division of Kellwood.)

40. On July 9, 2007, Tenant sent Kamber a letter enclosing the performance bond for the elevator cab interior work to be performed in the Building's elevators' interiors.

41. On June 16, 2008, Tenant sent Kamber a letter enclosing plans and specifications for work to be done in Suite 2201.

42. On June 23, 2008, Tenant sent Kamber a letter enclosing a proposal for demotion and abatement work to be done in Suite 400.

43. On June 25, 2008, Tenant sent Kamber a letter enclosing regarding work to be performed in the Building's lobby.

44. On July 8, 2008, Tenant sent Kamber a letter asking if Kamber would accept a letter of credit in lieu of a performance bond with regard to work to be done in Suite 2201.

45. On July 8, 2008, Tenant sent Kamber a letter enclosing a performance bond for work to be done in Suite 400.

46. On July 23, 2008, Tenant sent Kamber a letter enclosing a letter of credit for work to be done in Suite 2201.

47. On July 23, 2008, Tenant sent Kamber a letter enclosing a letter of credit for work to be performed on the 22nd Floor

48. On December 10, 2008, Tenant sent Kamber a letter enclosing the plans and specifications for electric work to be done on the 4th floor..

49. On February 2, 2009, Tenant sent Kamber a letter enclosing the plans and specifications for electric work to be done in the 4th floor corridors

50. On February 2, 2009, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done to build out the 4th floor tenant space.

51. On March 3, 2009, Tenant sent Kamber a letter enclosing an additional set of plans and specifications for work to be done on the 4th floor.

52. On March 11, 2009, Tenant sent Kamber a letter enclosing a performance bond for the 4th floor corridor and electrical projects. .

53. On March 17, 2009, Tenant sent Kamber a letter asking Kamber to waive the performance bond requirement for Geneva Watch (4th floor tenant build-out).

54. The April 2009 Notice demanded that by May 8, 2009, "a date which is not less than 30 days after service of this Notice", Gettinger Associates commence to remedy the alleged defects stated in the notice, and threatened termination of the Sub-Lease if Tenant failed to cure the listed 47 items of work that were done in the Building, each allegedly at a cost of more than $50,000, without Kamber's approval.

55. On April 16, 2009, Tenant sent Kamber an e-mail enclosing a performance bond for the work to be done on the 4th floor.

56. On May 7, 2009, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done to the 4th floor setback roof.

57. *On May 20, 2009,* Tenant sent Kamber a letter requesting permission to provide a letter of credit in lieu of performance bond for work to be done in Suite 2107.

58. On May 29, 2009, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in Suite 2107.

59. On June 8, 2009, Tenant sent Kamber an e-mail enclosing the performance bond for the work to be done to the 4th floor setback roof.

60. The August 5, 2009 Notice demanded that by September 8, 2009, "a date which is not less than 30 days after service of this Notice," Tenant commence to remedy the alleged defects stated in the notice, and threatened termination of the Sublease if Tenant failed to so cure.

61. The August 5, 2009 Notice complained of 8 items of work that were done in the Building, allegedly at a cost of more than $50,000, without Kamber's approval.

62. On October 23, 2009, Tenant sent Kamber a letter requesting permission to provide a letter of credit in lieu of a performance bond for work to be done on the 30th floor.

63. On November 12, 2009, Tenant sent Kamber a letter enclosing a letter of credit for work to be done on the 30th floor.

64. On April 9, 2010, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done to the 1st floor retail space.

65. On June 15, 2010, Tenant sent Kamber a letter enclosing plans and specifications for work to be done in Suite 2208-11 and asking to use a letter of credit in lieu of a performance bond.

66. On June 16, 2010, Tenant sent Kamber an e-mail enclosing a second set of plans and specifications for work to be done in Suite 2208.

67. On June 21, 2010, Tenant sent Kamber an e-mail enclosing plans and specifications for the first floor retail space.

68. On July 20, 2010, Tenant sent Kamber a letter requesting to use a letter of credit in lieu of a performance bond for work to be done in the first floor tenant space.

69. On July 22, 2010, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in Suites 908-924, Suite 1008, Suite 1412-14, Suite 1805-1805A, and Suite 3706.

70. On August 2, 2010, Tenant sent Kamber a letter enclosing a letter of credit for work to be done on the 1st floor retail space.

71. On August 5, 2010, Tenant sent Kamber a letter enclosing a letter of credit for work to be done in Suite 2208-11.

72. On August 10, 2010, Tenant sent Kamber a letter enclosing a performance bond for work to be done in the 1st floor retail space.

73. On August 12, 2010, Tenant sent Kamber a letter enclosing a performance bond for work to be done in Suite 3706, 1805, 1009, and 1412/14.

74. On October 4, 2010, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in Suite 405.

75. On October 18, 2010, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in Suite 1204.

76. On November 4, 2010, Tenant sent Kamber a letter enclosing plans and specifications for work to be done in Suite 1702.

77. On November 10, 2010, Tenant sent Kamber a letter enclosing a performance bond for work to be done in Suite 405.

78. On January 27, 2011, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in Suite 900.

79. On February 3, 2011, Tenant sent Kamber a letter enclosing the plans and specifications for work to be done in the Wachovia space.

CONCLUSIONS OF LAW

Article 7 of the Sub-Lease provides in relevant part that

> (a) ...Tenant may at any time or times during the term, and at its own cost and expense, make any alterations, rebuildings, replacements, changes, additions and improvements in and to the demised premises and to the buildings thereon, provided:
>
> ***
>
> (2) that the same shall be made according to plans and specifications therefor, which, provided the estimated cost thereof shall exceed Fifty Thousand Dollars ($50,000),shall be first submitted to and approved in writing by the Landlord:
>
> ***
>
> (4) that before commencing any such work Tenant shall, at Tenant's expense, ...if the estimated cost of such work shall exceed Fifty Thousand Dollars ($50,000), at Tenant's expense, give to Landlord (unless waived by Landlord in writing) a surety company performance bond or bonds in a company or companies and in form satisfactory to the Landlord, in an aggregate amount equal to the estimated cost of the work, guaranteeing the completion of such work, free and clear of all liens, encumbrances, chattel mortgages and conditional bills of sale, according to plans and specifications therefor which shall be first submitted to and approved in writing by the Landlord, or in lieu of such bond or bonds other security satisfactory to Landlord.

Article 24 of the Sub-Lease states that

> The failure of the Landlord to insist upon a strict performance of any of the agreements, terms, covenants and conditions hereof shall not be deemed a waiver of any rights or remedies that Landlord may have and shall not be

deemed a waiver of any subsequent breach or default in any of such agreements, terms, covenants and conditions.

Finally, Article 48 of the Sub-Leaser provides "The lease contains the entire agreement between the parties and shall not be modified in any manner except by an instrument in writing executed by the parties."

The July 20, 2006 Notice states that Tenant is in default of the Sub-Lease Article 7(a)(2) and (4) in that Tenant carried out exterior repair work costing in excess of $50,000 without submitting plans and specifications and without obtaining Landlord's prior written approval to such work and without providing Landlord with a surety company performance bond. In the April 2009 Notice, Kamber listed 47 items of work as to each of which, Kamber asserted, Tenant had not complied with Article 7(a)(2) and (4). Similarly, the August 5, 2009 Notice cited eight instances of internal tenant space work which, Kamber asserted, Tenant had not complied with such same provisions, which instances were the subject of a March 26, 2007 Notice of Default that was invalidated by this Court in an Order dated May 28, 2010. Not counting duplication among the three notices, Kamber has issued default notices concerning a total of 48 separate items of work as to which, Kamber alleges, Tenant failed to comply with the requirements of Article 7.

The vive voce and documentary evidence admitted at trial established by a fair preponderance of the credible that Gettinger Associates complied with Article 7 requirements. Pursuant to that Article, the Tenant provided Kamber with plans and specifications and a performance bonds before undertaking the work with respect to the

three most significant and costly of the 48 items, i.e., the facade work, the elevator modernization and the replacement of windows.[1]

In addition, since June 2006 when Kamber first served Tenant with notices claiming violations of Article 7, Tenant has provided Kamber with plans and specifications and performance bonds (or letters of credits in lieu of bonds, with Kamber's approval) with respect to numerous other items of work expected to cost more than $50,000.

As for the 45 items, to which the parties have stipulated that Tenant did not comply with Article 7, the court determines that Kamber waived the requirements of Article 7 and that Kamber is equitably estopped from asserting that the Tenant did not comply with Article 7 prior to June 2006. Kamber, by its conduct over the course of 52 years (from 1954 to 2006), clearly waived its right to declare the defaults under Article 7 of the Sub-Lease that are at issue in this case. Furthermore Kamber is estopped from terminating the Sub-Lease based upon such declarations, since Gettinger Associates, in carrying out millions of dollars of improvements to the Building, relied to its detriment upon Kamber's complete failure to object to the prosecution of such work for more than five decades.

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[1]The court finds that Article 7 is applicable to such work, but that Gettinger Associates strictly complied with Article 7, when it provided Kamber with the plans, specifications, and performance bonds relative to the work that was commencing at the time of service of the Notices at issue here. The court concurs with defendant that the law of the case is the holding in Gettinger Assoc, LP v Kamber Co, 83 AD3d 412, 415 (1st Dept 2011) that the relevant sublease sections do not exempt mandated regulatory work and routine maintenance from the strictures of Article 7. On that basis, the line of cases such as Juleah Co, LP v Greenpoint-Goldman Corp, 49 AD3d 282 (1st Dept 2008) and South Ferry Bldg v Schroder Bank & Trust, 91 AD2d 963 (1st Dept 1983) is inapposite.

In Excel Graphics Tech v CFG/AG 75 B 75 Ninth Ave, 1 AD3d 65 (1st Dept 2003), the appellate division unanimously reversed the trial court's grant to tenant Excel Graphics of a Yellowstone injunction that tolled the time to cure a violation of subletting without landlord's consent and dismissed the tenant's declaratory judgment action, finding no waiver on the part of the landlord. However, the facts at bar are distinguishable from those in Excel Graphics.

In Excel Graphics, the lease expressly stated that neither the listing of subtenants on the building directory nor the landlord's acceptance of rent with the knowledge of such breach of lease by the tenant would constitute a waiver by the landlord of the lease requirement that tenant obtain prior consent for any sublets. In contrast, the Sub-Lease in this action contains no such provision with respect to any of the requirements of Article 7.

Moreover, the merger clause of the lease in Excel Graphics required that the waiver of a lease provision must "be in writing signed by the party against whom enforcement of the waiver was sought". Excel Graphics, 1 AD3d at 68. There is no such provision, i.e. reference to "waiver" in Article 48, the merger clause of the Sub-Lease here. The language of Article 48 is limited to requiring signed writings with respect to modifications only. The law is clear that waiver and modification are terms with different and distinct meanings. [see Nassau Trust v Montrose Concrete Products Corp, 56 NY2d 175 183-184 (1982)(unlike modification, neither waiver nor estoppel rests upon consideration or agreement)] and each term of a contract must be given meaning. Nor in interpreting the Sub-Lease may the court add the term "waiver" to Article 48. Vermont Teddy Bear Co v 538 Madison Realty Co, 1 NY3d 470, 475 (2004).

A further distinction is that unlike the landlord in Excel Graphics who was not involved with the improper sublets, Kamber had active involvement in the activity prohibited here, i.e. the work costing in excess of $50,000 that tenant performed without compliance with Article 7. As more specifically detailed below, years before Kamber ever claimed that Gettinger Associates was in default of Article 7, it demanded that Kamber carry out facade and other work whose costs exceeded $50,000, without requesting any plans, specifications and performance bonds under Article 7. Excel Graphics does not upend long and enduring precedent that "[t]he inclusion of a merger clause in an instrument is no bar to waiver because a contractual provision against oral modification may itself be waived.. [parties may waive a 'no-waiver' clause])." Madison Avenue Leasehold, LLC v Madison Bentley Assoc, LLC, 30 AD3d 1, 4 (1st Dept 2006) aff'd 8 NY3d 59 (2006) (internal quotation marks and citations omitted).

As the First Department stated in Madison Ave Leasehold),supra, at 5, "Waiver is certainly employed by the courts as a tool of equity to prevent forfeiture".

> Out of simple fairness, a party that has repeatedly waived a condition of performance,., is required to give notice that its waiver has been withdrawn before demanding strict compliance with the condition (see *Bank Leumi Trust Co.*, 180 AD2d at 590; *Calamari and Perillo, Contracts* § 111.32, at 447-448 [4th ed]). The requirement simply recognizes the reasonable expectations that arise from a course of conduct." Madison Ave Leasehold, at 7.

Accordingly, Haberman v Hawkins, 170 AD2d 377 (1st Dept 1991) controls in this action.[2] In Haberman, the Appellate Division, First Department, unanimously reversed

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[2]This court notes that in reversing this court's denial of defendant's motion for summary dismissal of tortious interference with prospective contract and other claims in Gettinger Associates, LP v Kamber, 83 AD3d 412 (1st Dept 2011), the First Department cited Haberman for the principle that the violation of an express covenant not to make any alterations without the landlord's permission is a violation of a substantial obligation of the tenancy, thus acknowledging Haberman as viable precedent.

the Appellate Term order reversing the trial court's dismissal of the hold-over petition, and reinstated the trial term's dismissal. The Appellate Division held that the tenant presented sufficient evidence to establish that the landlord waived its right to require that tenant obtain its permission before making any alterations to the premises. Such evidence consisted of: the tenant's replacement of a window after a discussion with the landlord about the defective windows, and the replacement of the remaining windows four years later and the landlord's forbearance in alleging a violation of the lease during that four year and until after all of the windows were changed at the tenant's expense.

Here, the record is replete with evidence of Kamber's course of conduct establishing that it waived or exercised a "voluntary abandonment or relinquishment of a known right" (Excel Graphics, supra, 1 AD3d at 69) with respect to Lease Article 7. It is likewise clear that the July 20, 2006 Default Notice, the first notice in which Kamber asserted a default of Article 7 of the Sub-Lease in the 52 years since the commencement of the Sub-Lease constituted Kamber's withdrawal of the waiver, triggering strict compliance by Gettinger Associates with the requirements of that provision.

By a fair preponderance of the credible evidence, which was not refuted by Kamber, Gettinger Associates established that by its course of conduct Kamber Associates waived Gettinger Associates compliance with Article 7 as follows:

- For 45 years, from 1954 until 1999, there were no disputes between the parties, and Gettinger Associates operated the Building without one singe default notice from Kamber. During that period, the parties agreed on the new rental amounts for the first two renewal periods (1969 to 1979, and 1979 to 2004) without resort to arbitration. It

was not until 1999 that they were unable to agree on the new rental for the third period (2005 to 2030), leading to their 2000 arbitration.

- While the rent arbitration was pending, Kamber issued the February 2000 Notice, its first ever, which relied upon the LZA Report projecting improvements over the next 25 year period. Gettinger Associates obtained a Yellowstone injunction tolling the cure period under such notice. Ultimately, by order dated March 4, 2002, the court (Gans, J.) granted Gessinger Associates motion for summary judgment vacating such notice on the grounds that it was "too vague and ambiguous to effectively appraise (sic) plaintiff of the precise conditions and priority in which they are to be cured."

- During the pendency of the Yellowstone proceeding, the arbitrators fixed the value of the Building at $150 million, resulting in a new annual rent of $7.5 million for the period 2005 to 2030. Kamber sought to vacate the arbitration award on the basis of fraud, but by order of February 28, 2002, the court (Gans, J.) denied Kamber's cross motion and confirmed the award. The Appellate Division dismissed Kamber's appeal of such order.

- Thereafter by a March 3, 2004 Notice of Default that made no reference to plans, specifications, performance bonds or Article 7 of the Sub-Lease, Kamber asserted that Gettinger Associates failed to provide Kamber with a copy of the Building's insurance policies. Gettinger Associates, responding that it had previously supplied such copies, provided an additional set. Only after Gettinger Associates filed a Yellowstone injunction did Kamber withdraw that notice.

- More than four full years after the conclusion of the arbitration, by the July

20, 2006 Notice, which was the first time in over five decades since the Sub-Lease commenced, Kamber sought to enforce Article 7 with respect to repair work of the building's exterior facade. It was Kamber's first claim of entitlement to the plans, specifications and performance bond for such work despite the fact that the Tenant had performed facade work from 2004 to 2006, as required pursuant to Local Law 11, in accordance with articles 8 and 10 of the Sub-Lease. In fact, five decades passed before Kamber claimed it was entitled to receive plans, specifications and a completion bond for *any* kind of work at the Building.

- New York City's Local Law 11 requires facade inspection, repair and certification on a regular cyclical basis for virtually every major building in the City of New York. Scaffolding had been erected each time to permit the work to be performed. Kamber had demanded that Gettinger Associates perform the facade work at issue (among other work) in the February 2000 Notice, yet took six more years to seek plans, specifications and a performance bond for such work.

- In 1999 and 2000, Kamber received abstracts and financial statements showing that Gettinger Associates had spent well in excess of $50,000 on each of a number of tenant spaces, and totaling nearly $2 million in a single year. Yet, it waited until April 3, 2009 to serve yet another Notice of Default ("April 2009 Notice of Default), this one claiming that on 47 occasions- and in some instances as much as nine years before the notice- Gettinger Associates had performed work costing more than $50,000 without giving Kamber plans, specifications or a completion bond. In fact, the April 2009 Notice included items listed in a March 26, 2007 Notice of Default ("March 2007

Notice"), which itself became the subject of a Yellowstone injunction, which was dismissed on Kamber's consent since it failed to provide the requisite cure period.

As of 2005 and 2010, Kamber's principal Levey signed representations on a loan and amended loan application to North Fork Bank and the successor Bank, each acknowledged before a notary public, that no defaults existed under the Sub-Lease. Such representations constitute admissions consistent with Kamber's waiver of the Tenant's non-compliance with Article 7 and other provisions of the Sub-Lease. While the court concurs with Kamber that such representations do not constitute formal judicial admissions, they are informal judicial admissions. Such representations constitute evidence of the fact or facts admitted and are relevant to Levey's credibility as a witness. Baje Realty Corp v Cutler, 32 AD3d 307, 310 (1st Dept 2006). Gettinger Associates is correct that Kamber's principal's explanation at trial that he made such representations because there had been no judicial determination that any defaults occurred is fatal to Kamber's position that any such defaults occurred.

Furthermore, Kamber is equitably estopped from asserting defaults with respect to work prosecuted by the Tenant during the five decades before Kamber finally determined to serve its first default notice with respect to Article 7. In merely consenting to, adopting and acquiescing in the interior and exterior improvements made by Gettinger Associates over five decades, admittedly without its consent and possession of the plans, specifications and performance bonds pursuant to Article 7 of the Sub-Lease, while adopting the full benefits which flowed therefrom, Kamber is estopped from asserting that the work, in question violates such Article. El Reda v Love Taxi, Inc,

202 AD2d 275 (1st Dept 1994); Nassau Trust Company v Montrose Concrete Products Corp, 56 NY2d 175, 184 (1982).

As to Kamber's February 16, 2007 Notice, which asserts that Tenant had violated the Sub-Lease by making the assignment to Lighthouse at a time when Tenant was in default under the Sub-Lease, by a fair preponderance of credible evidence Gettinger Associates established that with respect to the plans, specifications and performance bonds for the work on the building's facade and build- out of tenant spaces, either Kamber waived the Tenant's compliance with such provision, or the Tenant complied with such provision contemporaneously with such notice, or upon Kamber's withdrawal of such waiver with the issuance of such notice, Kamber so complied. In addition, the evidence established that at all times, Gettinger maintained the Building in thorough repair. This court concurs with Gettinger Associates that to the extent that Kamber asserts for the first time at trial other non-performance of obligations under the Sub-Lease for which no notices to cure were issued, such did not ripen into any default. Madison Avenue Leasehold, LLC v Madison Bentley Associates, LLC, supra, 8 NY3d at 68. See also Spinale v 10 West 66th Street Corp, 210 AD2d 85 (1st Dept 1994). Therefore, the February 2007 Notice is unfounded.

Accordingly, it is hereby

DECLARED and ADJUDGED that Gettinger Associates, LLC and 1407 Broadway Real Estate, LLC were not in default under the Sub-Lease at all times relevant to this action; and it is further

DECLARED and ADJUDGED that Gettinger Associates, LLC's assignment of its Sub-Lease interest to 1407 Broadway LLC did not constitute a default under the Sub-Lease; and it is further

DECLARED and ADJUDGED that Gettinger Associates, LLC and 1407 Broadway Real Estate, LLC is not in default under the Sub-Lease; and it is further

ORDERED and ADJUDGED that the fourth counterclaim interposed in the Answer of Abraham Kamber & Company, LLC is dismiss, and the notice of pendency filed on October 10, 2006 is stricken; and it is further

ORDERED and ADJUDGED that the other counterclaims and affirmative defenses asserted in the Answer of Abraham Kamber & Company, LLC are dismissed; and it is further

ORDERED and ADJUDGED that Abraham Kamber & Company is hereby permanently enjoined from taking any action to cancel or terminate the Sub-Lease, or from otherwise interfering with and/or disrupting Gettinger Associates, LLC's, 1407 Broadway Real Estate, LLC's or any entity to which the Sub-Lease is currently assigned. possession and beneficial use and enjoyment of the Building based upon any and all of the July 20, 2006, July 21, 2006, February 16, 2007, April 2009, August 5, 2009 or March 26, 2011 Notices.

This is the decision and order of the court.

Dated: April 12, 2012

ENTER:

J.S.C.

DEBRA A. JAMES

Norman Goodman

CLERK