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

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EXCELSIOR 57th CORP.,

Plaintiff,

-against-

EXCEL ASSOCIATES,

Defendant.

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Index No. 113665-2009

DECISION/ORDER

Motion Seq. #004

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affidavit(s), Affirmation & Exhibits Annexed, Memorandum of Law	1, 2, 3, 4, 5
Affidavit in Opposition & Exhibits Annexed, Memorandum of Law	5, 6
Affirmation in Further Support & Exhibits	7

By order dated October 17, 2013 this court granted plaintiff Excelsior 57th Corporation's (plaintiff) motion for summary judgment and declared that under the terms of a master commercial lease between plaintiff as lessor and defendant Excel Associates (defendant) as lessee, defendant was solely responsible for certain contemplated repairs to the parking garage located at 301-303 East 57th Street, New York, New York. In doing so, this court held that the contemplated repairs to the parking garage's concrete slab floors were structural in nature and that defendant failed to comply with its contractual duty under the master lease to maintain the parking garage by, *inter alia*, failing to install a waterproof traffic bearing membrane at the time certain other work was performed at the parking garage by Flag Waterproofing and Restoration (Flag) between 1997 and 1998, that this breach necessitated the contemplated work to the garage's concrete slab floors and that defendant was therefore responsible under the master lease, for the cost of contemplated garage work.. The October 17, 2013 order also denied defendant's cross-motion for summary judgment.

Defendant now moves by order to show cause dated February 26, 2014 for leave to renew the underlying motion and cross-motion based upon a new fact not previously offered which defendant contends will change the court's prior determination. The newly discovered fact is an

estoppel certificate issued by plaintiff in 1999 in connection with defendant's financing of an extension of its leasehold mortgage.

A motion for leave to renew shall be (1) identified specifically as such; (2) based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; (3) contain a reasonable justification for failure to present such facts on prior motion (CPLR § 2221 [e] [1], [2], [3]). An application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court (*Elson v Defren*, 283 AD2d 109 [1st Dept 2001]). This requirement, however, is a flexible one and the court, in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made (*Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260 [2d Dept 1997]; *Vayser v Waldbaum*, 225 AD2d 760 [2d Dept 1996]). The Appellate Division, First Department has held that even if the vigorous requirements for renewal are not met, such relief may be properly granted so as not to "'defeat substantive fairness'" (*Metcalfe v City of New York*, 223 AD2d 410, 411 [1st Dept 1996] *quoting Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]). While the estoppel certificate upon which Excel basis its motion to renew existed and was in Excel's possession at the time the underlying motion and cross-motion for summary judgment were made, under the flexible requirements of CPLR § 2221, the court, in the exercise of its discretion, grants Excel's motion to leave to renew (*Corporan v Dennis*, 2014 NY Slip Op 3755 [1st Dept]). Since Excelsior executed the estoppel certificate, it cannot now claim to be surprised by its existence.

The estoppel certificate at issue herein, issued to Republic National Bank of New York (Republic), states, in pertinent part, that plaintiff, as landlord, "has not given [defendant] or any other party any notice advising or declaring a default by [defendant] under the Lease, which default has not heretofore been timely cured. To the best of [plaintiff's] knowledge, [defendant] is not in default of any of its obligations under the Lease, nor has there occurred any event or condition, which with the passage of time, or the giving of notice, or both, would become a default under the Lease or entitle [plaintiff] to terminate the Lease, subject to Appendix A." The estoppel certificate further states that "[t]his instrument is executed and delivered by [plaintiff] for the benefit of the Lender, its successors and assigns, knowing that this instrument will be relief upon by the Lender it successors and assigns, in extending its mortgage on the subleasehold interest in the leased premises held by [defendant] to secure indebtedness and/or obligations owing or that may become owing to the Lender, it successors and assigns. Any statement contained herein shall be for the sole benefit of [defendant] or its assigns or for the Lender requiring same or its assigns and shall have no effect, as an estoppel or otherwise, with respect to any other third party." The estoppel certificate is dated April 13, 1999.

In support of the order to show cause, defendant argues that plaintiff was well aware in 1999 of the maintenance methods employed at the parking garage by defendant's subtenant, Select Parking, and the fact that the parking garage lacked a waterproof traffic bearing membrane. Defendant contends that the estoppel certificate conclusively demonstrates that the parties never understood, agreed nor intended that the installation of the waterproof membrane fell under defendant's maintenance obligations under the master lease and that even if plaintiff

believed it was defendant's duty under the lease to install such a membrane, plaintiff is estopped from asserting such a claim after April 13, 1999, the date plaintiff executed the estoppel certificate.

In opposition, plaintiff contends that when it executed the estoppel certificate in April 1999 it did not do so with the intention of waiving either party's clearly defined rights and obligations under the master lease. Rather, the estoppel certificate was issued for the limited purpose of facilitating the extension of the financing for defendant's mortgage and plaintiff only intended Republic or its assigns to rely upon the certificate. Plaintiff further contends that defendant has not established any of the elements necessary to support a finding of estoppel or waiver.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Upon renewal, the court adheres to the holding in its October 17, 2013 order that the

contemplated repairs to slab flooring of the parking are structural in nature and that said structural repairs were necessitated by defendant's negligent failure to install waterproof traffic bearing membrane. Defendant has not submitted any new evidence which would change these prior determinations.

In the context of a commercial lease, an estoppel certificate will be enforced unless the certifying party can show a defense to the making of the document, such as fraud or duress or that the assignee accepted the certificate with knowledge of the contrary, and true, state of facts (*JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392 [1st Dept 2006]; *Bush Realty Assocs. v A.m. Cosmetics, Inc.*, 2 AD3d 270 [1st Dept 2003]). Plaintiff has not established any equitable defenses to the estoppel certificate. Nevertheless, the estoppel certificate does not establish defendant's right to dismissal of plaintiff's complaint but is only sufficient to raise a triable issue of fact to in response to plaintiff's summary judgment motion. That is because subsequent to the execution of the estoppel certificate, the parties entered into a 2003 settlement agreement resolving an unrelated matter and agreed therein that the settlement was without prejudice to either party's rights under the master lease and the payment and performance of repairs to the parking garage. This provision raises a question of fact as to whether, as defendant contends, the estoppel certificate conclusively demonstrates that the parties never intended the installation of the waterproof membrane to fall under defendant's contractual maintenance obligations, or, as plaintiff contends, the estoppel certificate was issued solely for the purpose of facilitating the extension of the financing for defendant's mortgage. Moreover, plaintiff's managing agent avers that in 1999, prior to the execution of the estoppel certificate and after the Flag repairs had been substantially completed, issues regarding the installation of the waterproof membrane had not yet been resolved between the parties and the parties were in the process of scheduling the installation of the membrane. This claim conflicts with the averment of defendant's president that the issue of which party was responsible for the installation of the membrane was not raised by plaintiff until 2009. These varying claims raise issues of credibility and call into question whether the estoppel certificate "unmistakeably or unequivocally [establishes] [plaintiff's] intentional relinquishment of [a] known right" to seek to hold defendant responsible for the work to the concrete floors of the parking garage (*Padell Nadell Fine Weinberger & Co. v Midtown Realty Co.*, 245 AD2d 188 [1st Dept 1997]) and whether defendant accepted the estoppel certificate wit knowledge of contrary, and true, state of facts (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 44 AD3d 417 [1st Dept 2007]). Since questions of fact exist as to whether the estoppel certificate constitutes a waiver by plaintiff (*see generally Won's Cards, Inc. v Samsondale/Haverstraw Equities, Ltd.*, 165 AD2d 157 [3rd Dept 1991]) and, correspondingly, whether defendant can be held liable for the contemplated repairs to the parking garage, upon renewal the motion and cross-motion for summary judgment are denied. In accordance with the foregoing, it is hereby

ORDERED that defendant motion for leave to renew is granted and upon renewal plaintiff's motion and defendant's cross-motion for summary judgment are denied; and it is further

ORDERED that the parties are to appear for a status conference on August 5, 2014 at

9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that defendant movant is to serve a copy of this order, with notice of entry, upon plaintiff within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: July 9, 2014
New York County

GEORGE J. SILVER