

<b>Quik Park W. 57 LLC v Bridgewater Operating Corp.</b>
2015 NY Slip Op 30948(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 651524/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

----- X  
QUIK PARK WEST 57 LLC, QUIK PARK EAST 66 LLC,  
QUIK PARK EAST 72 LLC, and QUIK PARK EAST 87  
LLC,

Plaintiffs,

- against -

Index No. 651524/2013  
Motion Date: 2/9/2015  
Motion Seq. No. 003

BRIDGEWATER OPERATING CORPORATION,

Defendant.

----- X  
**BRANSTEN, J:**

Plaintiffs Quik Park West 57 LLC, Quik Park East 66 LLC, Quik Park East 72 LLC, and Quik Park East 87 LLC (collectively, “Quik Park” or “Manager”) manage four Manhattan-based parking garages (“Garages”) owned by defendant Bridgewater Operating Corporation (“Bridgewater” or “Owner”). Plaintiffs bring this action following Bridgewater’s attempt to terminate the parties’ management agreement.

Quik Park’s five-count complaint seeks: (1) a preliminary injunction; (2) a Yellowstone injunction; (3) a declaration that Quik Park is not in breach and/or default of the management agreement, that Bridgewater cannot remove Quik Park from the Garages and that the parties must continue to comply with the terms of the agreement; (4) damages for breach of the covenant of good faith and fair dealing; and, (5) attorneys’ fees and costs. Bridgewater asserts counterclaims for: (1) a declaration that the management agreement has been terminated and that Quik Park has no right to enter upon, use, operate

and/or manage the Garages; (2) breach of fiduciary duty; (3) breach of contract; (4) conversion; (5) an accounting; and, (6) attorneys' fees and costs.

Bridgewater now seeks partial summary judgment on its first counterclaim for declaratory judgment, as well as dismissal of Quik Park's first, second and third causes of action for legal insufficiency and mootness.

Quik Park initially filed a cross-motion for summary judgment as to Bridgewater's second counterclaim for breach of fiduciary duty. During oral argument on the instant motion, Quik Park withdrew its cross-motion. *See* 01/23/2015 Oral Arg. Tr. at 5.

#### I. **Background and Procedural History**

On August 28, 2009, Bridgewater and Quik Park executed a "Parking Garage Management Agreement" ("Management Agreement"), pursuant to which Quik Park "accept[ed] engagement by Owner, to manage the Garages on an independent contractor basis as a valet parking facility with the level of operation and management commensurate with the First Class Standard . . . and in accordance with the terms and conditions hereinafter set forth." Affirmation of Warren A. Estis ("Estis Affirm."), Ex. A ¶ 2(a). The agreement provided that, "[u]nless otherwise set forth herein, Manager shall have the right to decide all manners of policy pertaining to the management of the Garages, including, without limitation by specification, operating hours, rates, labor

schedules including number of personnel, and terms and conditions of monthly and daily space rentals.” *Id.*

The agreement was for a set term, which “commenc[ed] on September 1, 2009” and would expire “on August 31, 2019, unless terminated in accordance with [the] Agreement.” *Id.* ¶ 3. Bridgewater could “terminate [the Management Agreement] immediately” if the Garages were condemned or suffered a casualty, or if Quik Park lost its license to operate the Garages. *Id.* ¶ 6. Bridgewater could also terminate the agreement upon the occurrence of an “Event of Default.” *Id.* ¶ 5. In pertinent part, the Management Agreement provided that:

Upon the occurrence and during the continuance of an Event of Default, Owner may, at its option, deliver to Manager a notice of the occurrence of such Event of Default; and if Manager shall thereupon fail to cure such Event of Default within five (5) days after receipt of such notice, then Owner may, at its option, at any time during the continuance of such Event of Default, deliver to Manager a notice of election to terminate this Agreement as of the date that shall be five (5) days after the date of service of such notice (other than which shall not be curable), and upon the expiration of such five (5) day period, this Agreement and all right and interest of Manager hereunder, shall expire as fully and completely as if that day were the date herein definitely fixed for the expiration of this Agreement, and upon such termination of this Agreement, Manager shall vacate and surrender the Garages to Owner.

*Id.* ¶ 5(b)(1). “Events of Default” included, among other things:

- (1) Payment Default. Manager shall default in the payment when due of any Owner Disbursement and such default shall continue for a period of seven (7) days after

written notice specifying such default shall be received by Manager from Owner; or

...

(3) Insurance. Manager shall default in the payment of any insurance premium with respect to any insurance policy required hereunder, fail to carry the minimum insurance required hereunder or fail to timely renew any insurance policy required hereunder, which failure continues for ten (10) days after written notice specifying such default shall be received by Manger from Owner; or

...

(8) Covenant Default. Manager shall default in the performance of any other covenant or agreement on the part of Manager to be performed hereunder and such default shall continue for a period of thirty (30) days after a written notice specifying such default shall be received by Manager . . . .

*Id.* ¶ 5(a).

As part of the parties' rights and obligations, the Management Agreement required Quik Park to "deposit all cash receipts received by Manager in the operation of each Garage in a separate, segregated account for each Garage in the name of each Manager for the benefit of Owner . . . in which funds are not commingled with any other funds of Manager or Owner," *id.* ¶ 8(c)(1); defined certain expenditures as "Expenses of Manager" and "Costs of Operation," *id.* ¶ 4(a); required Quik Park to submit annual, audited financial statements, *id.* ¶ 4(f); permitted Bridgewater to conduct regular audits and to review Quik Park's books and records, and required Quik Park to fully cooperate with Bridgewater or its representatives, *id.* ¶ 8(b); and required Quik Park to "obtain,

secure, pay for and maintain” various types of insurance in “not less than the indicated amounts.” *Id.* ¶ 9(a).

Bridgewater hired Thacher Associates, LLC (“Thacher”), “a corporate intelligence, investigative and integrity risk-management firm” to examine Quik Park’s management of the Garages. *See* Affidavit of Daniel J. Kassa (“Kassa Aff.”) ¶ 2.

Thacher identified the following conduct as violating the Management Agreement: (1) daily transfers from the Garages’ segregated accounts into a single sweep account; (2) use of the sweep account funds to pay the personal expenses of Quik Park’s president and his family and the operating expenses of garages unrelated to the Management Agreement, while referring to these payments as “loans,” *id.* ¶ 23 n.1; and, (3) failure to maintain the required levels of insurance coverage for worker’s compensation and commercial general liability and failure to provide any evidence of crime insurance or business interruption insurance.

On April 24, 2013, Bridgewater sent Quik Park a “Notice of Termination” (“Termination Notice”), which stated that Bridgewater was terminating the Management Agreement and “any permission [Quik Park] ha[d] to enter upon, use, operate and manage the Garages . . . .” *Estis Affirm. Ex. B* at 1. The Termination Notice stated that Quik Park’s conduct “not only breache[d its] obligations under the Agreement[,] but also [was] totally contrary to [its] responsibilities as a fiduciary” and could not be cured. *Id.* at 3. The notice cited the following violations of the Management Agreement: commingling and diversion of funds, in violation of paragraph 8(a); failure to submit

annual, audited financial statements, in violation of paragraph 4(f); and failure to fully cooperate with Thacher during the course of its review, in violation of paragraph 8(b). It also mentioned Quik Park's "fail[ure] (according to the Certificates of Insurance provided to Thacher) to maintain levels of insurance coverage as required by paragraph 9 of the Agreement." *Id.* According to Thacher, around the time that the Termination Notice was sent, the amount of outstanding "loans" had grown to more than \$365,000. Kassa Aff. ¶ 23 n.1.

On April 29, 2013, Quik Park commenced the instant action and moved, by order to show cause, for a preliminary injunction or, in the alternative, a Yellowstone injunction. According to Quik Park, while a temporary restraining order was in effect during the pendency of that motion, it ceased its practice of commingling funds and deposited \$365,977.71 into the Garages' accounts. *See* Affidavit of Rafael Llopiz ¶¶ 49-50 & Ex. 15. By decision and order dated October 9, 2013 ("Decision"), this Court denied the motion, concluding that Quik Park was not entitled to a Yellowstone injunction, since the Management Agreement was not a commercial lease. The Court also denied the motion for injunctive relief, on the grounds that Quik Park failed to demonstrate irreparable harm. On October 17, 2013, Quik Park moved, by order to show cause, to reargue and/or renew the portion of the Decision that denied the motion for a Yellowstone injunction. This motion for reargument was denied. Quik Park has

withdrawn its notices of appeal from both orders and has continued to operate the Garages during the pendency of this action.

## II. Analysis

Bridgewater now seeks partial summary judgment, granting its first counterclaim for a declaratory judgment that the Management Agreement has been effectively terminated and that Plaintiffs have no further rights thereunder to, *inter alia*, enter upon, use, operate and manage the Garages. Bridgewater likewise seeks partial summary judgment dismissing the first three of Quik Park's five claims for: (1) preliminary injunction; (2) *Yellowstone* injunction; and, (3) a declaratory judgment that Quik Park has not breached the lease and that Bridgewater therefore cannot terminate the Lease.

### A. *Summary Judgment Standard*

Pursuant to CPLR 3212(b), “[t]o obtain summary judgment, the movant ‘must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” *Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez*, 68 N.Y.2d at 324. If the movant makes the necessary showing, the burden shifts to the opposing party “to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Madeline D'Anthony Enters., Inc.*, 101 A.D.3d at 607 (quoting *Alvarez*, 68 NY2d at 324).

B. *Bridgewater's First Counterclaim – Declaratory Judgment*

1. License vs. Lease

Bridgewater contends that it is entitled to partial summary judgement on its first counterclaim, declaring that the Management Agreement is terminated and ordering Quik Park to vacate the Garages, since: (1) the Management Agreement was a license, which could be revoked at will, leaving Quik Park with a claim for breach of contract only; (2) the Management Agreement created an agency relationship, which could be revoked at will, leaving Quik Park with a claim for breach of contract only; and, (3) Quik Park's breaches of the Management Agreement were incurable. Quik Park counters that the Management Agreement was a lease, that Quik Park was an independent contractor, and that, in any event, the agreement should be enforced according to its terms, which provided for an opportunity to cure. The parties also dispute whether Quik Park was ever in breach of the Management Agreement.

A contract's designation “as a license or lease is not determinative,” but rather, the court must examine “the rights and obligations set forth therein.” *Union Sq. Park Community Coalition, Inc. v. New York City Dep't of Parks & Recreation*, 22 N.Y.3d 648, 656 (2014). A lease conveys “absolute control and possession of property,” whereas

a license “is a revocable privilege given to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands.” *Id.* (internal quotation marks and citations omitted). A lessee “may be evicted only through lawful procedure,” whereas “a licensee . . . is subject to ouster by the [owner] without legal process . . . .” *P & A Bros., Inc. v. City of N.Y. Dep’t of Parks & Recreation*, 184 A.D.2d 267, 268-69 (1st Dep’t 1992). “[W]hile [a license] creates no right in the property itself which a court of equity will protect by injunction, where the parties have made a valid agreement for a license for a definite period, the revocation of that license will give rise to an action for breach of contract.” *United Merch. Realty & Improvement Co. v. Am. Billposting Co.*, 71 Misc. 457, 458-459 (App. Term 1911) (distinguishing cases stating that licenses are, as a matter of law, revocable at will, because such cases involved licenses that were “either for an indefinite term or expressly revocable”); *see also Melodies, Inc. v. Mirabile*, 7 A.D.2d 783, 783 (3d Dep’t 1958) (rejecting “the defense that the plaintiff had no cause of action for a breach of the agreement because it was merely a license,” where “there [was] nothing in the agreement which would lead to the conclusion that it was terminable at will”); *D’Aversa v. Guido*, 213 A.D. 355, 357 (2d Dep’t 1925) (noting that because a license was not for a definite period, its revocation would not give rise to a cause of action for breach of contract), *aff’d* 244 N.Y. 590 (1927).

An agency relationship creates a fiduciary relationship between the agent and the principal. *Pergament v. Roach*, 41 A.D.3d 569, 571 (2d Dep’t 2007); *see also Frank v. Sobel*, 38 A.D.3d 229, 230 (1st Dep’t 2007) (dismissing breach of fiduciary duty claim

because there was no agency). Agency “results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.” *Gulf Ins. Co. v. Transatl. Reins. Co.*, 69 A.D.3d 71, 97-98 (1st Dep’t 2009) (internal quotation marks and citations omitted). “[W]here the evidence on the issue of control presents no conflict,” the existence of an agency relationship “may properly be determined by the court as a matter of law.” *Melbourne v. N.Y. Life Ins. Co.*, 271 A.D.2d 296, 297 (1st Dep’t 2000) (internal citations omitted). The fact that the agreement disclaims agency, *see Gulf Ins. Co. v. Transatl. Reins. Co.*, 69 A.D.3d at 96, or “refers to [a party] as an ‘independent contractor’ does not defeat the existence of a fiduciary relationship where one would otherwise exist.” *Pergament*, 41 A.D.3d at 571. However, where the parties’ contract creates nothing beyond what is “normally present in the marketplace between those involved in arm’s length business transactions,” the court should not “fashion the stricter duty for them.” *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 20 (2005); *see also Surge Licensing v. Copyright Promotions*, 258 A.D.2d 257, 258 (1st Dep’t 1999) (affirming dismissal of breach of fiduciary duty claims premised on principal-agent relationship, where the parties’ agreement was “a conventional business relationship”). Where agency exists, the principal may terminate the relationship at will, subject to the agent’s claim for breach of contract. *G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 102 (2d Dep’t 2007), *aff’d* 10 N.Y.3d 941 (2008).

“Unless statutory language or public policy dictates otherwise, the terms of a written agreement define the rights and obligations of the parties.” *BDC Fin. L.L.C. v.*

*Barclays Bank PLC*, 25 N.Y.3d 37, 43 (2015) (internal quotation marks and citations omitted); *see also TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 512-513 (2008) (“when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms” (internal quotation marks and citations omitted)). “Generally, where parties agree on a termination procedure, the clause must be enforced as written,” but “[o]nce it becomes clear that one party will not live up to the contract, [then] the aggrieved party is relieved from the performance of futile acts, such as conditions precedent” found in a termination clause. *J. Petrocelli Constr., Inc. v. Realm Elec. Contrs., Inc.*, 15 A.D.3d 444, 446 (2d Dep’t 2005) (internal quotation marks and citations omitted); *see also Special Situations Fund III v. Versus Tech.*, 227 A.D.2d 321, 321 (1st Dep’t 1996).

Here, as previously explained in the Court’s October 9, 2013 Decision (“Decision”), “[t]he Management Agreement . . . [did] not grant exclusive possession of the [G]arages to Quik Park nor [did] it provide Quik Park with absolute control. To the contrary, the Agreement provide[d] that Quik Park ha[d] ‘no real property interest.’”

Decision at 4. Significantly, the Management Agreement expressly provided that:

This Agreement is not to be construed in any way to grant Manager any real property estate or interest in the Buildings and/or the Garages; it being intended that Owner is granting to Manager solely a license to enter upon and use, operate and manage the Garages in accordance with the terms hereof and

is not granting to Manager a leasehold or other real property interest in the Buildings and/or the Garages.

Estis Affirm. Ex. A ¶ 36.

As discussed in the Decision, while this “language is not dispositive, the remainder of the [Management] Agreement supports the view that the parties did not intend to enter into a lease.” Decision at 4. In particular, Bridgewater retained substantial control over the Garages, without giving Quik Park ““absolute control”” or ““exclusive possession,”” which are hallmarks that define a lease. *Id.* at 5 (quoting *Vazquez v. Diamondrock Hospitality Co.*, 100 A.D.3d 502, 502-503 (1st Dep’t 2012)). Accordingly, based on the unambiguous terms of the Management Agreement, the parties did not enter into a lease.

Quik Park now contends that discovery will allow it to demonstrate that the parties intended to enter into a lease. However, Quik Park fails to raise a factual issue or identify any ambiguity in the Management Agreement that would permit the court to examine extrinsic evidence. *See Savoy Mgmt. Corp. v. Leviev Fulton Club, LLC*, 51 A.D.3d 520, 521 (1st Dep’t 2008) (“extrinsic evidence may not be considered unless the document itself is ambiguous”). For the foregoing reasons, while the court is “not bound by the earlier temporary injunction ruling.” *Lipsztein v. Donovan*, 289 A.D.2d 51, 52 (1st Dep’t 2001), it finds no reason to depart from the reasoning underlying the Decision and now holds that the Management Agreement is a license, not a lease. *See Lordi v. Cnty. of Nassau*, 20 A.D.2d 658, 659 (2d Dep’t 1964) (“[g]enerally, contracts permitting a party to render services within an enterprise conducted on premises owned or operated by

another, who has supervisory power over the method of rendition of the services, are construed to be licenses”), *aff’d* 14 N.Y.2d 699 (1964).

Here, the Management Agreement was a license for a defined, 10-year term. *Estis Affirm. Ex. A* ¶ 3. As such, while the agreement did not convey any “right in the property itself which a court of equity will protect by injunction,” Bridgewater’s revocation of the license gives rise to a potential breach of contract claim. *United Merch. Realty & Improvement Co.*, 71 Misc. at 458.

## 2. Irrevocable Agreement

The court notes Quik Park’s reliance on cases stating that a license may become irrevocable through a licensee’s investment in the property. *See Saratoga State Waters Corp. v. Pratt*, 227 N.Y. 429, 442 (1920) (“[a] license is revocable and carries no interest in the land in or over which it is to be enjoyed. It may become irrevocable through the expenditure of money by the licensee”); *see also North Shore Mart v. Grand Union Co.*, 58 Misc.2d 640, 643-644 (Nassau Dist. Ct. 1968). However, Quik Park submits no evidence of improvements it made to the Garages. Instead, it claims that it incurred costs by: (1) decreasing rates early in the term of the Management Agreement to attract customers; and (2) paying a commercial real estate broker approximately \$400,000 in connection with the Management Agreement. *See Llopiz Aff.* ¶ 5.

These assertions neither demonstrate that, nor raise a factual issue as to whether, Quik Park was “invested . . . with an interest of some character in the [properties].”

*Saratoga State Waters Corp.*, 227 N.Y. at 442 (finding that agreement was not revocable where it “invested the plaintiff with an interest of some character in the lands” by virtue of obligating plaintiff “to appropriate and take away and sell the waters, to go upon, possess and use the lands as prescribed and to use and maintain and, if required, erect upon the land buildings and structures, throughout the fixed period”). Therefore, the Management Agreement was revocable.

For the foregoing reasons, to the extent that Bridgewater seeks partial summary judgement on its first counterclaim, the motion is granted, and Bridgewater is entitled to a declaration that the Management Agreement has been terminated and that Quik Park has no right to enter upon, use, operate and/or manage the Garages.

### 3. Books and Records

However, to the extent that Bridgewater seeks a supplemental order directing Quik Park to surrender all books and records necessary for Bridgewater to assume the management of the Garages, it has failed to demonstrate its right to such relief. None of Bridgewater’s causes of action seek inspection of the books and records as affirmative relief, nor is the accounting cause of action, which could arguably involve inspection of the books and records, presently before the Court.

In addition, nothing in the Management Agreement required Quik Park to physically turn over its books and records upon termination of the agreement, and Bridgewater fails to make a prima facie showing that its right to inspect books and

records survived termination of the agreement. To the extent the Management Agreement spoke on the issue, it provided that, while Bridgewater had a right to inspect such documents, they were the property of Quik Park. and that upon termination, “Manager shall vacate and surrender the Garages to Owner,” and “remove all of Manager’s property from therein.” Estis Affirm. Ex. A ¶¶ 3, 5(b)(1), 8.

Accordingly, to the extent Bridgewater seeks an order directing Quik Park to turn over all books and records, the motion is denied.

#### 4. Agent-Principal Relationship

With respect to Bridgewater’s additional arguments for why its motion should be granted, Bridgewater fails to make the necessary showing of entitlement to summary judgement. First, it contends that the Management Agreement created an agent-principal relationship that Bridgewater could revoke at will. It relies upon the statement in the October 2014 Decision that “Bridgewater retain[ed] substantial control over the Garages.” Decision at 4. While Bridgewater’s control over the Garages was such that Quik Park’s possession of the premises was not exclusive, nothing in the Management Agreement manifested Quik Park’s consent to “act on [Bridgewater’s] behalf and subject to [its] control . . . .” *Gulf Ins. Co. v. Transatl. Reins. Co.*, 69 A.D.3d at 97.

The Management Agreement was structured so that, while operating the Garages within the guidelines established by the agreement and subject to Bridgewater’s general supervision, Quik Park had “the right to decide all manners of policy pertaining to the

management of the Garage, including, without limitation by specification, operating hours, rates, labor schedules including number of personnel, and terms and conditions of monthly and daily space rentals.” Estis Affirm. Ex. A ¶ 2(a). Tellingly, while Bridgewater had the right to receive notice of, and to approve, Quik Park’s personnel changes, all such personnel were “employed, trained, disciplined, discharged, promoted and directed in the performance of their duties by Manager.” *Id.* ¶¶ 2(b)(2)(i) & (ii).

Therefore, the Management Agreement did not create an agency relationship. *Cf. Melbourne v. N.Y. Life Ins. Co.*, 271 A.D.2d 296, 297 (1st Dep’t 2000) (“the mere retention of general supervisory powers over independent contractors cannot form a basis for the imposition of liability against the principal”); *see also DeFeo v. Frank Lambie, Inc.*, 146 A.D.2d 521, 522 (1st Dep’t 1989) (finding no agency relationship existed where there was no “indication that the party availing himself of the [independent contractor’s] services ha[d] some control over the [contractor’s] employees and the manner in which they perform[ed] their duties”). Accordingly, Bridgewater fails to make a prima facie showing that a principal-agent relationship existed.

Bridgewater also contends that it was entitled to terminate the Management Agreement because Quik Park’s breaches, consisting of commingling and diverting funds, were incurable breaches of fiduciary duty. As there was no agency relationship, no fiduciary duty was created between a principal and an agent. *Pergament*, 41 A.D.3d at 571. Therefore, Bridgewater’s argument is without merit.

### 5. Incurable Conduct

In a similar manner, Bridgewater's argument, that this conduct is incurable, even in the absence of a fiduciary duty, is unpersuasive. The Management Agreement expressly provided that a "payment default," or a "default in the performance of any other covenant," would not constitute a "default event," allowing for termination of the agreement, unless the default continued for a specified period "after written notice specifying such default [was] received by Manager from Owner." Estis Affirm. Ex. A ¶¶ 5(a)(1) & (b)(1), (8). The Management Agreement even contemplated and created protections against the possibility that Quik Park might "understate[]" disbursements due to Bridgewater, "whether or not inadvertently." *Id.* ¶ 8(b). Therefore, Bridgewater fails to make a prima facie showing that Quik Park's conduct was incurable.

Moreover, the cases cited by Bridgewater are distinguishable. Some of these cases hold that an attorney's repayment of converted client funds does not excuse the misconduct. *See Matter of Ampel*, 208 A.D.2d 57, 61 (1st Dep't 1995); *Matter of Britton*, 232 A.D.2d 17, 19-20 (1st Dep't 1997); *Matter of Landau*, 180 A.D.2d 257, 258 (1st Dep't 1992). Other cases cited by Bridgewater hold that the loss of trust is not amenable to cure where one party bribes an employee of the other, breaching the covenant of good faith and fair dealing and causing such party to lose the loyalty of its employee. *See Black v. MTV Networks*, 172 A.D.2d 8, 11 (1st Dep't 1991); *American Assur. Underwriters Grp. v. MetLife Gen. Ins. Agency*, 154 A.D.2d 206, 209 (1st Dep't 1990). Here, the parties were not in an attorney-client relationship, which carries with it

fiduciary and ethical obligations not at play in the instant case. Nor does Bridgewater allege that Quik Park subverted the loyalty of its employees. Therefore, these cases are distinguishable on their facts. Accordingly, the cases cited by Bridgewater do not support its contention that Quik Park's alleged commingling and diversion of funds constituted incurable breaches under the parties' agreement. *See TAG 380, LLC*, 10 N.Y.3d at 512-513.

#### 6. Insurance

Bridgewater also fails to demonstrate that Quik Park's failure to maintain the requisite insurance constituted an incurable breach under the Management Agreement. Bridgewater again cites to cases that are distinguishable on their facts. In *Zona, Inc. v. Soho Centrale*, 270 A.D.2d 12, 14 (1st Dep't 2000), the Court concluded that the tenant's breach of a commercial lease was not curable, because it "failed to assert that it ha[d] the ability to cure its default." In this case, Quik Park not only asserts its ability to cure, but claims that it was never in breach. *See* Affidavit of Peter Genatt ¶¶ 13-16 & Exs. 1-4. Likewise, in *Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 A.D.3d 528, 529 (1st Dep't 2009), the court held that the tenants could not cure their failure to "continuously maintain[] insurance coverage as required by their commercial lease," because prospective insurance coverage would not protect the owner "against . . . claims arising during the period of no insurance coverage."

Unlike the facts in *Kyung Sik Kim*, the Management Agreement in this case anticipated that Quik Park could “fail[] to carry the minimum insurance required,” contemplated interruption of coverage due to Quik Park’s failure to pay the premium or to timely renew a policy, and provided that such failures would not constitute an “event of default” unless “the failure continue[d] for ten (10) days after written notice specifying such default [was] received by Manger from Owner.” Estis Affirm. Ex. A ¶ 5(a)(3). Therefore, pursuant to the unambiguous language of the Management Agreement, the parties intended for such defaults to be curable. *See TAG 380, LLC*, 10 N.Y.3d at 512-513.

For the foregoing reasons, Bridgewater fails to make a prima facie showing that Quik Park’s alleged defaults were incurable. *See J. Petrocelli Constr., Inc.*, 15 A.D.3d at 446 (“where parties agree on a termination procedure, the clause must be enforced as written”).

Bridgewater’s argument that Quik Park’s alleged defaults were incurable presumes that that Quik Park breached the Management Agreement, a point that Quik Park disputes. Quik Park contends that the Management Agreement did not prohibit its transfer of all funds into a single sweep account, after it placed the receipts for each Garage into the appropriate, segregated account, and that, while the Management Agreement defined certain expenditures as “Expenses of Manager” or “Costs of Operation,” *see* Estis Affirm. Ex. A, ¶ 4(a), it did not prohibit other types of expenditures.

Quik Park argues that, in any event, it cured any such defaults during the pendency of its motion for a preliminary injunction. *See* Llopiz Aff. ¶¶ 49-50 & Ex. 15. With respect to insurance coverage, Quik Park contends that it was never in default. It submits evidence that, prior to entering the Management Agreement, Bridgewater had the opportunity to review and approve Quik Park's insurance coverage. *Id.* ¶¶ 52-56 & Ex. 17, 18. In addition, Quik Park submits its insurance broker's affidavit, stating that Quik Park always maintained the required coverage, along with the declaration pages for the relevant policies. Genatt Aff. ¶¶ 13-16 & Ex. 1-4. Bridgewater disputes Quik Park's interpretation of the Management Agreement and argues that Quik Park's evidence of insurance coverage is insufficient to establish coverage. In particular, Thacher states that "it is essential to see the actual terms of the policies to assess whether the summary coverage descriptions on the certificates or the declaration pages would actually provide such coverage for the Garages because the certificates and the declaration pages relate to blanket coverage for a different entity, Marathon/Quik Park NYC, LLC." Kassa reply aff, ¶ 7.

Since Bridgewater failed to establish, *prima facie*, that the alleged breaches were incurable, the court need not determine, at this juncture, whether any breaches occurred or were cured. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Nonetheless, the court finds that an issue of fact exists with respect to Quik Park's failure to maintain insurance coverage. While Bridgewater challenges the evidentiary value of the declaration pages Quik Park submits on the instant motion, Thacher admits that it "cannot determine that

Plaintiffs have appropriate coverage” without examining the policies in their entirety. Kassa Aff. ¶ 36; Kassa Reply Aff. ¶ 7. This, in conjunction with Quik Park’s submissions on the instant motion, raises an issue of fact with respect to whether Quik Park maintained the requisite insurance coverage. *See Horn Maint. Corp. v Aetna Cas. & Sur. Co.*, 225 A.D.2d 443, 444 (1st Dep’t 1996) (stating that, while “[a] certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, . . . . [o]n summary judgment, a certificate may be sufficient to raise an issue of fact, especially where additional factors exist favoring coverage”).

C. *Quik Park’s First and Second Claims – Preliminary Injunction and Yellowstone Injunction*

In light of the foregoing, Bridgewater’s motion for summary judgment dismissing Quik Park’s first and second causes of action for a preliminary injunction and a Yellowstone injunction, respectively on the grounds of legal insufficiency and mootness is granted. Having found that the Management Agreement has been terminated, Quik Park’s claim for injunctive relief to stay such termination is moot. *See Matter of Citineighbors Coal. of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm’n*, 2 N.Y.3d 727, 728-729 (2004) (“the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy”) (internal quotation marks and citation omitted). In addition, having concluded that the instant action does not involve a commercial lease, Quik Park cannot show entitlement a Yellowstone injunction. *See Graubard Mollen*

*Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 N.Y.2d 508, 514 (1999)

(“the party requesting a Yellowstone injunction must demonstrate,” among other things, that “it holds a commercial lease”).

D. *Quik Park's Third Claim – Declaratory Judgment*

Bridgewater also seeks dismissal of Quik Park’s third cause of action for declaratory relief. Since the Management Agreement was a license (not a lease), to the extent the third cause of action seeks a declaration that Bridgewater cannot terminate the Management Agreement or remove Quik Park from the Garages, and that the parties must continue to comply with the terms of the Management Agreement, this cause of action is resolved consistent with Bridgewater’s first counterclaim. However, in light of the Court’s determination that an issue of fact exists with respect to whether Quik Park breached the Management Agreement’s insurance coverage provision, to the extent the third cause of action seeks a declaration that Quik Park is not in breach and/or default of the Management Agreement, Bridgewater’s motion is denied.

**III. Conclusion**

Accordingly, it is hereby

ORDERED that defendant's motion for partial summary judgment is granted to the extent that:

- (i) the first and second causes of action of the complaint are dismissed; and
- (ii) the branch of defendant's motion which seeks a declaratory judgment with respect to the subject matter of the complaint's third cause of action and defendant's first counterclaim is granted to the extent of declaring that the parking garage management agreement between Bridgewater Operating Corporation and plaintiffs Quik Park West 57 LLC, Quik Park East 66 LLC, Quik Park East 72 LLC, and Quik Park East 87 LLC, dated August 28, 2009, is terminated, and that plaintiffs no longer have any right or ability to enter upon, use, operate and/or manage the subject parking garages, and the request for declaratory relief is otherwise denied with respect to plaintiffs' third cause of action; and it is further

ADJUDGED and DECLARED that: (i) the parking garage management agreement between defendant Bridgewater Operating Corporation and plaintiffs Quik Park West 57 LLC, Quik Park East 66 LLC, Quik Park East 72 LLC, and Quik Park East 87 LLC, dated August 28, 2009, is terminated; and (ii) plaintiffs no longer have any right

or ability to enter upon, use, operate and/or manage the subject parking garages; and it is further

ORDERED that plaintiffs Quik Park West 57 LLC, Quik Park East 66 LLC, Quik Park East 72 LLC, and Quik Park East 87 LLC, within five (5) days of notice of entry of this order, vacate and surrender the subject parking garages to Bridgewater Operating Corporation; and it is further

ORDERED that the remaining causes of action and counterclaims are severed and the action shall continue; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on Tuesday, July 21, 2015 at 10:00 am.

Dated: New York, New York

June 2, 2015

ENTER



Hon. Eileen Bransten, J.S.C.