SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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BOOSTON LLC

Plaintiff,

- v -

35 WEST REALTY CO., LLC,

Defendant.

INDEX NO. 654308/2019

MOTION DATE 02/08/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this action arising out of the alleged default of plaintiff-tenant Booston LLC (plaintiff) under a commercial lease, defendant-landlord 35 West Realty Co., LLC (defendant) moves pursuant to CPLR 3212 (e) for an order (1) granting it partial summary judgment (i) dismissing the first and second causes of action in the complaint, (ii) declaring that plaintiff materially breached Article 9 of the lease rider by providing $1,000,000 in per occurrence insurance coverage rather than the required $2,000,000 per occurrence coverage, (iii) declaring that the lease was properly terminated and that plaintiff no longer has a right to possess the premises, (iv) granting judgment on its first counterclaim for ejectment, (v) dismissing the first through fifteenth affirmative defenses in plaintiff's verified reply to landlord's counterclaims, and (2) severing and continuing for disposition landlord's second and third counterclaims which seek use and occupancy and attorney's fees based on plaintiff's material breach of the lease. Plaintiff opposes the motion and cross moves for summary judgment for the relief sought in the complaint, including a declaratory judgment adjudging and declaring that plaintiff is not in default under the lease, and for a permanent injunction enjoining landlord from terminating the lease.

Background

Plaintiff leased the cellar, basement, and first floor of the building located at 35 West 57th Street (the Premises) from landlord's predecessor-in-interest Friedphil Realty Corp (Friedphil) pursuant to a lease agreement dated October 10, 2000 (the

Lease) (NYSCEF # 151 at 1-23). The Lease was originally for a 20-year term beginning on October 31, 2000, and was purportedly amended in 2005, to add an additional 20 years to the lease term, or until October 31, 2040[1] (NYSCEF # 168—Plaintiff's Rule 19-a Statement, ¶1; NYSCEF # 172).[2] Defendant became the lessor of the premises in or about 2008 (NYSCEF # 151 at 24-25). On July 10, 2019, defendant issued a 5-day Notice to Cure stating that plaintiff was in violation of Article 9 of the Rider to the Lease which requires plaintiff "to obtain public liability coverage against claims for bodily injury or death in the amount of $2,000,000 in a single limit or under an original policy with an umbrella" (NYSCEF # 151, Exh. A, Art. 9 at 11).[3]

Plaintiff, through its insurance broker, furnished defendant with certificates of insurance (COIs) annually for the policy years from 2014 to 2019. The COIs reflect that plaintiff maintained coverage in the amount of $1,000,000 "per occurrence" and "general aggregate" of $2,000,000, and named defendant as an additional insured (NYSCEF #147-Defendant rule 19-a Statement; NYSCEF # 153). Before July 2019, defendant did not object to the sufficiency of the insurance coverage or make any assertion that the coverage was not fully compliant with the Lease (NYSCEF # 167-Kohan Aff. ¶¶13-16). After receiving the Notice to Cure, plaintiff provided for an additional $1,000,000 of coverage, both per occurrence and in the aggregate, by way of an umbrella policy which brought the total coverage to $2,000,000 per occurrence and $3,000,000 aggregate (*id.*, ¶17; NYSCEF # 178).

Plaintiff commenced this action on July 29, 2019, seeking (i) a declaration that it did not violate any substantial obligation of its tenancy, and (ii) a

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[1] In a related action titled *35 West Realty Co., LLC v Booston LLC*; Index No. 653674/2015, landlord seeks a declaration that the purported lease extension is null and void.

[2] Landlord was identified as the lessor in a First Amendment to the Lease effective as of February 4, 2008.

[3] The insurance provision of the Lease provides, in relevant part that:

> 9. INSURANCE: Tenant shall furnish Landlord with and continue to keep in effect the following insurance coverage on the Demised Premises and any future improvements by recognized insurance carriers licensed to do business in New York and in all cases naming Landlord.
>
> (a) Public liability coverage against claims for bodily injury or death in amount of $2,000,000.00 in a single limit or under an original policy with an umbrella. Such amounts may be adjusted from time to time by Landlord upon reasonable notice to Tenant and to amounts which may be reasonably required in restaurants like the tenants in the City of New York....
>
> (c)...Tenant shall not obtain or carry separate insurance concurrent in form or contributing in an event of loss with that required under the Lease unless Landlord is named therein as an additional insured

(NYSCEF # 151, Exh. A, Art. 9, at 11-12).

Yellowstone injunction preventing defendant from terminating its tenancy pending a determination as to whether it violated any substantial obligations under the Lease (NYSCEF #1-Complaint). Plaintiff also moved by order to show cause for a Yellowstone injunction and sought a temporary restraining order (TRO) preventing defendant from taking any action to terminate the Lease (NYSCEF #'s 4-19). Defendant opposed the motion (NYSCEF #;'s 20-26); it also filed an answer and counterclaim for attorney's fees (NYSCEF # 20-27), and subsequently amended the answer to add counterclaims for ejectment and use and occupancy (NYSCEF #33).

In the meantime, by Decision and Order dated September 12, 2019, Hon. Andrew Borrok denied plaintiff's motion for a *Yellowstone* injunction and vacated the TRO, finding that a default in obtaining insurance was not capable of being cured, and therefore, there was no basis for granting *Yellowstone* relief (NYSCEF # 30). Plaintiff appealed Justice Borrok's decision and obtained an interim stay enjoining any termination of the Lease or eviction proceedings pending a decision on the appeal (NYSCEF # 36).[4] The Appellate Division, First Department affirmed Justice Borrok's decision, but noted that "denial of a *Yellowstone* injunction does not resolve the underlying merits of the dispute or whether the default requires termination of the lease" (*Booston LLC v 35 West Realty Co. LLC*, 185 AD3d 508, 508 [1st Dept 2020]).[5]

By decision dated November 18, 2020, Hon. O. Peter Sherwood (ret.) granted a motion by the defendant to draw down the bond posted by plaintiff to pay past and future use and occupancy (NYSCEF # 58), and subsequently issued an order consistent with the decision (NYSCEF #90). By Decision and Order dated May 25, 2021, the First Department reversed, writing that

> the order to draw down on the bond for the alleged arrears in the payment of use and occupancy following the lifting of the stay pending appeal is tantamount to a grant of summary judgment to defendant on the ultimate relief sought in its counterclaim, despite the absence of a request for such relief in the motion and the fact that the claim has not been finally resolved. Although CPLR 6315 permits a party to recover damages sustained by the improper issuance of an injunction, the damages, if any, must await a determination on the merits....

([*Booston LLC v 35 West Realty Co., LLC*, 194 AD3d 609, 609-610 [1st Dept 2021]).

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[4] The interim stay was granted "on condition that plaintiff-tenant pay use and occupancy in the amount of monthly rent" (NYSCEF # 36). Plaintiff was also required to maintain a bond in the amount of $1,000,000 (*id.*).

[5] Justice Borrok recused himself during the pendency of the appeal (NYSCEF # 40). Thereafter, Justice O. Peter Sherwood presided over the action until he retired and the matter was assigned to this court.

Defendant now moves for partial summary judgment, arguing that because plaintiff's incurable and material breach of the insurance requirements of Article 9 of the Lease rider are incontrovertible, it is entitled to a declaration that plaintiff is no longer entitled to continue to possess the Premises, a judgment of ejection restoring it to the Premises, and an order dismissing the plaintiff's first cause of action that it was not in default of insurance requirements, and the second cause of action for Yellowstone relief as moot.

In support of its motion, defendant submits an expert affidavit of Robert Sterling who, upon reviewing the Lease and COIs, opines that:

> By providing coverage on a "per occurrence" basis in the amount of only $1,000,000.00, Landlord is underinsured by $1,000,000 for any one occurrence. This stands in contrast to the $2,000,000 single limit coverage, which was required under the Lease, and which would provide coverage against each and every occurrence during a policy period for the full amount of $2,000,000. Landlord is entitled to the insurance coverage required under the Lease and the $1,000,000 short fall in required coverage leaves Landlord exposed to direct and uninsured liability.
>
> The $2,000,000 aggregate limitation on the coverage as reflected in the Certificates is also problematic. A policy aggregate, which is not permitted by the Lease, expressly limits coverage up to but not greater than the aggregate limitation during any one insured period. Once the aggregate limitation is reached, whether on one or multiple occurrences in any one insurance period, no further coverage is available.

(NYSCEF # 150-Sterling Aff., ¶¶ 8, 9).

Plaintiff opposes the motion and cross moves for summary judgment, asserting that the record establishes as a matter of law that it did not materially breach the Lease. Regarding the insurance requirements in the Lease, plaintiff maintains that it complied with the insurance provision which does not specify whether the $2,000,000 to be obtained for liability coverage is "per occurrence" or "aggregate," and that "single limit" does not mean "per occurrence." In support of this position, plaintiff relies on the expert affidavit of Chris O'Donnell who, upon reviewing the Lease, the CIOs, and plaintiff's liability policies for the period April 2014 through September 2019, and Sterling's affidavit, opines that "the insurance coverage obtained and maintained by [plaintiff] for the time period referenced ... fully complied with any reasonable interpretation of Article 9 of the Lease rider" (NYSCEF #166-O'Donnell Aff. ¶ 9).

Specifically, O'Donnell opines that contrary to Sterling's opinion, "'[s]ingle limit' does not mean 'per occurrence.' Whether a policy coverage limit is in a 'single limit' has absolutely nothing to do with whether it is 'per occurrence'" (*id.*, ¶ 13). In this regard, he states that "[t]he terms 'single limit' and 'split limit' are used in connection with automobile liability insurance policies. Neither of these terms are used in connection with commercial liability policies [and the Lease] insurance provisions are poorly drafted and ambiguous at best" (*id.*, ¶ 14). Moreover, according to O'Donnell, even in the context of automobile policies, "a 'single limit' policy, also known as a 'combined single limit' policy, means that the automobile policy will cover claims up to the total coverage limit, regardless of the breakdown of the total between components. If the coverage is 'single limit,' then the total coverage limit can be allocated any way between components of the claim as long as the total sum does not exceed the coverage limit" (*id*, ¶ 19).

Plaintiff alternatively argues that defendant waived any breach by accepting the COIs plaintiff provided to it annually for five years without ever objecting or stating that the coverage did not comply with the Lease and by continuing to accept rent during that period. Plaintiff further argues under these circumstances the no-waiver clauses in the Lease were waived (citing *TSS-Seedman's, Inc v Elota Realty Co.*, 72 NY2d 1024, 1027 [1988]).

In reply, defendant argues that plaintiff misconstrued the language of the insurance requirements in the Lease and submits a further affidavit from Sterling in which he opines that unlike the automobile insurance cases relied on by plaintiff's expert "in the context of Article 9 of the Rider the words 'single limit,' are not capitalized as a specified defined term" (NYSCEF # 184, ¶¶ 7, 8). In this context, Sterling opines that "the only commercially reasonable interpretation of the words 'in a single limit' and the additional words 'or under an original policy with an umbrella' is that [plaintiff] was required to provide $2,000,000 per occurrence coverage under its general liability policy without an umbrella, or [plaintiff] could combine coverage, providing coverage of $1,000,000 per occurrence under a general liability policy and another $1,000,000 per occurrence under a separate umbrella policy" (*id.*, ¶ 9). Sterling also opines that the "single limit" language in Article 9 of the Rider when considered with Article 8 of the pre-printed portion of the Lease eliminates any ambiguity as to the "single limit" based on its reference to the obligation to maintain "general public liability insurance in standard form"[6] (*id.*, ¶¶ 11,12)

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[6] Article 8 provides, in relevant part, that:

> Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demise premises, effective from the date Tenant enters into possession and during the term of this lease.

Defendant next argues that the "no waiver" provisions of the Lease preclude plaintiff's waiver argument, particularly as Judge Borrok rejected the waiver argument in his September 19, 2019 order which was affirmed by the Appellate Division. In any event, defendant asserts the service of the Notice to Cure which states the defendant's intent to enforce the insurance requirements permits it to strictly enforce such requirements.

Discussion

"The proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to summary judgment as a matter of law" (*Mazurke v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Once a movant makes such a showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to raise an issue of fact (*CitiFinancial Co (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

A failure to comply with insurance requirements constitutes an incurable and material breach of a lease (*Rui Qin Chen Juan v 213 West 28 LLC*, 149 AD3d 539 [1st Dept 2017]). At issue here, however, is whether plaintiff complied with the insurance requirements of the Lease, which depends on the interpretation of the relevant Lease provisions.

"It is settled that the interpretation of provisions of a lease are governed by the same rules of construction applicable to other agreements... and in those instances where the intent of the parties is clear and unambiguous from the language employed on the face of the agreement, the interpretation of the document is a matter of law solely for the court" (*Horwitz v 1025 Fifth Ave. Inc*, 34 AD3d 248, 249 [1st Dept 2006][internal citations omitted]). A Lease must be read as a whole to give effect to the intent of the parties as expressed therein (*Hook Superx, Inc. v Ciampa N. Co.*, 2 AD3d 587, 589 [2d Dept 2003]). Moreover, while an expert may be permitted to explain technical or scientific terms, the court will not consider expert opinion as to the meaning of contractual provisions (*Good Hill Master Fund L.P. v Deutsche Bank*, 146 AD3d 632, 637 [1st Dept 2017][finding that trial court properly precluded expert opinion to assist in interpreting section of default credit swap agreements]; *Colon v Rent-A-Car Center, Inc.*, 276 AD2d 58, 61 [1st Dept 2000] [noting that experts are not permitted "to offer opinion as to the legal obligations of parties under a contract"]).

"[W]here there is an ambiguity as to the meaning of a lease prepared by the defendant, the ambiguity should be resolved in favor of the lessee" (*Campos v 68 East 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014][internal citation

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(NYSCEF # 151. Art. 8, at 3).

omitted]). Moreover, "it is well settled that no additional liability or requirement will be imposed on a tenant by interpretation unless it is clearly within the provisions of the instrument under which it is claimed" (*112 West 34th St. Assocs., LLC v 112-1400 Trade Properties, LLC*, 95 AD3d 529, 531 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012][internal citation omitted]). Furthermore, when a lease is ambiguous and susceptible to different meanings, the court may look to surrounding circumstances to determine the intent of the parties (*67 Wall St. Co. v Franklin Nat. Bank*, 37 NY2d 245, 248 [1975]). In this regard, "the parties' course of performance under the contract is considered to be the "most persuasive evidence of the agreed intention of the parties" (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999]).

Here, with respect to insurance coverage, the Lease states that plaintiff shall provide "[p]ublic liability coverage[7] against claims for bodily injury or death in amount of $2,000,000.00 in a single limit or under an original policy with an umbrella" (NYSCEF #151, Lease Rider, Art. 9, at 11). It is undisputed that from 2014 to 2019, plaintiff provided general liability insurance coverage of $1,000,000 per occurrence and an aggregate coverage of $2,000,000 and named the defendant as an additional insured. The determination of whether the coverage furnished satisfies plaintiff's obligations under the Lease primarily turns on whether the term "single limit" as used in this provision means "per occurrence" as opposed to in aggregate. In this regard, the Lease does not contain any definition of "single limit," nor is it otherwise clear from other provisions of the Lease or the Rider what the term "single limit" means.

A review of New York case law indicates that "single limit," (or "combined single limit") is most often used in the context of automobile insurance where it means that the coverage limit applies to both bodily injury and property damage in contrast to "split limit," which means a separate limit for bodily injury and property damage (*Prudential Prop & Cas. Co. v Szeli,* 83 NY2d 681, 684 [1994]; *Jones v Peerless*, 281 AD2d 888, 888 [4th Dept 2001]). Thus, in this context, "single limit" refers to the type of losses covered by insurance as opposed to whether the insurance coverage is on per occurrence basis or for the aggregate of occurrences during a policy period. Moreover, in the general liability context, the term "single limit" has been used together with "per occurrence," which indicates that contrary to the defendant's position, "single limit" is not synonymous with "per occurrence" (*see e.g. Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 416 [2006][lease provision obligated tenant, "at its own expense, to maintain a comprehensive general liability insurance policy naming [defendant] as an additional insured with coverage to be no less than $5 million '**combined single limit per occurrence** for

[7] Public liability coverage, also known as general liability insurance, is a type of insurance which provides coverage for liability to third parties (*Gap, Inc. v Fireman's Fund Ins. Co.*, 11 AD3d 108, 111 [1st Dept 2004]; *Wallen v Polo Grounds Bar & Grill N.Y., Inc.*, 198 AD2d 19, 19 [1st Dept 1993]).

bodily injury and property damage liability"][emphasis added]). And, that the provision permits an alternative for coverage "under an original policy with an umbrella,"[8] does not support the defendant's interpretation. Thus, at the very least, the Lease's insurance provision is ambiguous as to whether the $2,000,000 coverage requirement refers to per occurrence or aggregate coverage.

To the extent the insurance requirements of the Lease are ambiguous as to whether $2,000,000 means aggregate or per occurrence, the provision must be interpreted in favor of finding that plaintiff complied with the insurance provision of the Lease by providing coverage of $1,000,000 per occurrence and $2,000,000 in aggregate coverage. And, a contrary interpretation which would require plaintiff to provide coverage of $2,000,000 per occurrence would impermissibly add to plaintiff's obligations under the Lease that were not clearly required by its terms (*see 151 W. Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 [1984][affirming court order denying landlord a judgment of ejectment based on the "uncertainty" regarding whether an agreement involving tenant's creditors fell within the meaning of term "arrangement" in the lease's bankruptcy clause]; *67 Wall St. Co. v Franklin Nat. Bank*, 37 NY2d at 249 [construing ambiguous article of lease in lessee's favor]).

And, significantly, the court's interpretation is consistent with the parties' intent based on their conduct under the Lease in that plaintiff provided insurance coverage in the amount of $1,000,000 per occurrence and $2,000,000 aggregate for five years before defendant objected (*see Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d at 44 ["Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence"];*Kalmon Dolgin Co. v Walnut Lanes, Inc.*, 27 AD2d 843, 843 [2d Dept 1967][when record indicates that tenant and its predecessor paid fire insurance premiums for seven years without objection "construction of the lease [consistent with this payment]...is entitled to great weight because it was made by the parties themselves"]).

Next, to the extent expert evidence may be considered in light of the ambiguity of the contract, the opinion of the defendant's expert is insufficient to raise a triable issue of fact as to the meaning of "single limit" since his opinion is conclusory and unsupported by any authority (*see Blonder & Co. Inc v Citibank, N.A.*, 28 AD2d 180, 183 [1st Dept 2006][the conclusory affidavit of plaintiff's expert

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[8] "An umbrella insurance policy provides the insured with final tier . . . coverage at a premium reduced to reflect the lesser risk to the insurer" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 148 [1st Dept 2008]).

was insufficient to raise an issue of fact as to the interpretation of a letter of credit]).

Accordingly, the defendant's motion for summary judgment is denied except that the second cause of action for a Yellowstone injunction is denied as moot, and plaintiff's cross motion for summary judgment is granted on the first cause of action to the extent of declaring that that plaintiff is not in violation of the insurance requirements of the Lease and that defendant is enjoined from terminating plaintiff's tenancy on this ground.

Settle order on notice.

6/27/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[x]	SETTLE ORDER		[ ]	SUBMIT ORDER		