SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **04**

Justice

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JP 48 MANAGEMENT LLC,

Plaintiff,

- v -

GALLIVANT HOTEL HOLDING LLC,

Defendant.

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INDEX NO. 651695/2025

MOTION DATE 06/11/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107

were read on this motion for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant's motion for summary judgment is granted in part and plaintiff's cross-motion for summary judgment is denied in its entirety.

Defendant Gallivant Hotel Holding LLC owns the building located at 234 West 48th Street, New York, New York (the "Building"). Plaintiff and defendant's predecessor-in-interest executed a ten-year lease (the "Lease") in which plaintiff leased two separate spaces for "dining facilities" on the left and right side of the Building's ground floor (NYSCEF Doc No. 6, lease). The Lease expires on September 30, 2025, with an option to renew for another five-year term upon notice from plaintiff on or before September 30, 2024 (id. at §47.1). It is undisputed that defendant did not timely renew the Lease.

On January 14, 2025, defendant notified plaintiff that plaintiff had failed to timely exercise its renewal option and that the Lease would therefore expire on September 30, 2025 (NYSCEF Doc No. 9). In response, plaintiff sent a letter to defendant, dated January 16, 2025, purporting to

renew the Lease (NYSCEF Doc No. 10). Defendant rejected this renewal as untimely by letter dated January 23, 2025 (NYSCEF Doc No. 11).

On or about March 27, 2025, defendant sent plaintiff a "Notice of Material Default Under Lease" (the "Notice of Default") alleging that plaintiff had defaulted under the Lease by, inter alia, proceeding with alterations to the Premises without defendant's prior written consent and approval of the plans for such alterations and by failing to pay the fines incurred for noise violations and directing plaintiff to cure these defaults within thirty days (NYSCEF Doc No. 33, notice of default).

Plaintiff commenced this action on March 27, 2025. Plaintiff's complaint, as subsequently amended, asserts five cases of action seeking, in sum and substance: (1) a declaratory judgment deeming its Lease renewal timely nunc pro tunc, (2) a declaratory judgment that the Notice of Default sent by defendant on March 27, 2025, which set forth various defaults by plaintiff under the Lease, is defective inasmuch as the cited defaults do not exist, or have been waived or cured; (3) an order directing defendant to consent to plaintiff's alterations to its space on the left side of the Building's lobby (the "Premises"); and (4) attorney's fees (NYSCEF Doc No. 55).

Defendant's answer asserts counterclaims for: (1) a declaratory judgment that plaintiff's late renewal is untimely and ineffective; and (2) breach of contract, based upon plaintiff's alleged breaches of the Lease in: making alterations to the Premises without prior written consent; failing to cure violations and pay the fines resulting from those violations; and failing to obtain defendant's consent prior to subletting the Premises.

On March 31, 2025, plaintiff moved, by order to show cause, for a preliminary injunction for the same injunctive relief sought in its complaint (NYSCEF Doc No. 13). On April 24, 2025, plaintiff moved, by order to show cause, for a Yellowstone injunction enjoining defendant from

terminating the Lease or otherwise interfering with plaintiff's right of possession based upon the defaults set forth in the Notice of Default and tolling and extending plaintiff's time to cure these alleged defaults (NYSCEF Doc No. 29). In a decision and order dated June 25, 2025, the Court granted the preliminary injunction and *Yellowstone* injunction (NYSCEF Doc No. 74).

The Instant Motions

Defendant now moves for summary judgment on its counterclaims. Plaintiff opposes defendant's motion and cross-moves for summary judgment on its complaint.

In support of its motion, defendant argues that the invoice submitted by plaintiff establishes that plaintiff incurred these renovation costs on February 16, 2025, well after its renewal was rejected as untimely, and that these renovations were therefore performed in a bad faith effort to obtain equitable relief here. Defendant also asserts that An'nam subleases its space from plaintiff and argues that, as a result, An'nam's customer goodwill does not accrue to plaintiff as a matter of law. Finally, defendant argues that it would be prejudiced by plaintiff's renewal of the Lease, as it has found new prospective tenants who would be willing to pay substantially more in rent than the amounts plaintiff would pay under the renewed Lease.

In opposition and in support of its cross-motion, plaintiff submits the affidavits of Jay Zhao and Jia Hui Guo, (a member of Balycafe LLC, an entity that intends to operate a coffee shop out of the Premises), and an invoice purportedly reflecting plaintiff's expenditures on renovation work on the Premises. Plaintiff argues that these submissions establish that its belated renewal should be excused as a matter of equity because if it was unable to renew the Lease it would forfeit its recent expenditures on renovations to the Premises and lose the goodwill associated with An'nam, the Vietnamese restaurant that has occupied the space on the right side of the Lobby for fifteen years.

DISCUSSION

"The proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]).

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff has not established its entitlement to summary judgment on its first and second causes of action, which seek declaratory judgments permitting it to renew the Lease. Preliminarily, plaintiff's observation that the Lease does not include a "time is of the essence" clause does not excuse plaintiff's untimely renewal—it is well-settled that "an election to renew must be timely, definite, unequivocal and strictly in compliance with the lease term" (*Am. Realty Co. v 64 B Venture*, 176 AD2d 226, 227 [1st Dept 1991] citing *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 NY2d 392, 396 [1977]). However, "[e]quity will intervene to relieve a commercial tenant's failure to timely exercise an option to renew a lease where (1) such failure was the result of "inadvertence," "negligence" or "honest mistake"; (2) the nonrenewal would result in a "forfeiture" by the tenant; and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice" (*Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 19 NY3d 223, 225 [2012]). While plaintiff's satisfaction of the first of these

conditions is undisputed, issues of fact remain to be resolved before the Court can determine whether the second and third conditions have been satisfied.

As to the second condition, a forfeiture results when a tenant either: (1) has made substantial improvements in the premises on the assumption that it would renew and will sustain a substantial loss as a result of non-renewal; or (2) would lose a long-standing location for its retail business and its associated customer goodwill (*Baygold Assoc., Inc. v Congregation Yetev Lev of Monsey, Inc.*, 19 NY3d 223, 227 [2012]). Plaintiff maintains that both of these circumstances apply here. The Court is not persuaded.

Plaintiff asserts that it has made substantial improvements to the Premises between January 2, 2025, and March 27, 2025 (at which point it stopped work, after receiving defendant's Notice of Default) spending $275,000.00 in the process. However, the Court concludes that amounts plaintiff spent after January 14, 2025, when defendant informed it that the Lease would expire on September 30, 2025, cannot be considered in the forfeiture analysis. Equity protects a tenant who has invested money in improving space based on a good faith belief that it would benefit from this investment for a long time to come; any expenditures by plaintiff after it was informed of defendant's intent to terminate the Lease in nine months could not be predicated on such a good faith belief. At the moment, it is unclear how much money plaintiff spent on improvements during this limited period, from January 2, 2025 to January 14, 2025. While plaintiff relies upon an itemized invoice, dated February 16, 2025, billing "Andy" of 234 West 48th Street $275,000 for renovation work by G. Li Construction Inc (NYSCEF Doc No. 90, invoice), the invoice fails to establish when this work was performed, let alone that this work was performed during the relevant period.

Finally, even if a substantial portion of the $275,000.00 in renovations was spent prior to defendant's notice that the Lease would terminate on September 30, 2025, it is not clear that this money was spent by plaintiff. While Jay Zhou asserts that plaintiff paid for the recent renovations to the Premises, the affidavit of non-party Jia Hui Guo suggests that he paid for these renovations (NYSCEF Doc No. 88, Guo aff at 6-7). If Guo did, in fact, pay for these renovations, plaintiff would not have any improvements to the premises to forfeit if the Lease was not renewed. Accordingly, issues of fact remain as to whether plaintiff made substantial improvements to the Premises such that it would suffer a forfeiture should it be unable to renew the Lease.

Neither has plaintiff established that it would suffer a forfeiture based on the loss of the customer goodwill that has accrued to An'nam, the Vietnamese restaurant operating in the right side of the Building's lobby. Such customer goodwill accrues to a tenant operating the business in the premises, but not to an out-of-possession sublessor (*SVC W. Babylon LLC v 204 Great E. Neck Rd. LLC*, 70 Misc 3d 365, 369 [Sup Ct, Suffolk County 2020]) and it is unclear which of these roles plaintiff fulfills. At oral argument, plaintiff's counsel represented that An'nam does not sublease its space from plaintiff but is operated through another entity which shares members with plaintiff. At this juncture, with no clear understanding of the relationship between plaintiff and An'nam, the Court cannot determine whether plaintiff is operating An'nam such that it has a property interest in its customer goodwill. Accordingly, plaintiff's motion for summary judgment on its first and second causes of action is denied.

The remainder of plaintiff's motion is also denied. That branch of plaintiff's motion for summary judgment on its third cause of action—permanently enjoining defendants from serving a notice of cancellation based on the defaults set forth in its Notice of Default and tolling plaintiff's time to cure any alleged defaults—is denied because, as discussed in greater detail below, one of

these breaches is undisputed while issues of fact remain as to the other two breaches. That branch of plaintiff's motion for summary judgment on its fourth cause of action, seeking an order compelling defendant to grant permission for plaintiff to make alterations to the Premises, is denied as premature—whether defendant reasonably withheld approval for such alterations is contingent on whether plaintiff's lease renewal is effective. Finally, in light of the foregoing, plaintiff's motion for summary judgment on its fifth cause of action, for attorneys' fees, is denied.

Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment on its first cause of action, seeking a declaratory judgment that plaintiff's untimely renewal was ineffective, is denied. Defendant argues that the invoice submitted by plaintiff establishes that all of its renovation expenses were incurred on February 16, 2025, well after defendant's notice on January 14, 2025 that the Lease would terminate at the end of September 2025. In fact, February 16, 2025 is simply the date of the invoice and does not establish when these renovation costs were incurred, i.e., when the work was performed.

Defendant has also failed to establish, at this juncture, that it would be prejudiced if plaintiff was allowed to renew the Lease. "A landlord suffers prejudice when, after the tenant's default, the landlord, in relying on the agreement, in good faith, makes other commitments for the premises" but cannot "consummate a valuable lease because of the unavailability of the premises" (*Dan's Supreme Supermarkets, Inc. v Redmont Realty Co.*, 240 AD2d 460, 461 [2d Dept 1997] [internal citations omitted]). However, where a landlord's negotiations with a replacement tenant occur after the landlord is aware of tenant's intent to renew, such negotiations are not in "good faith" (*see 5 E. 41 Check Cashing Corp. v Park & Fifth Owner, LLC*, 44 AD3d 373, 374 [1st Dept 2007] ["Defendant landlord demonstrated prejudice by producing evidence that it had hired an architect

to construct an interior staircase on the premises, such plans having been drawn during the period when plaintiff could have exercised its option to renew until when it belatedly attempted to exercise the option"]; *see also Madangsui, Inc. v Crystal Properties LLP*, 55 Misc 3d 1201(A) [Sup Ct, NY County 2017] ["Although Crystal asserts that it would be prejudiced if it were not permitted to proceed with the lease it entered into with its new tenant since it now owes its broker a fee of $245,000 in connection with the new tenancy, any such prejudice arose from Crystal's own actions in entering into a lease with a new tenant after it was aware that plaintiff wished to extend its term"]). Here, defendant submits two (heavily redacted) letters of intent, dated June 25, 2025, indicating that unidentified entities are willing to pay dramatically higher rents than what plaintiff is currently paying. It is unclear if defendant's negotiations with these anonymous replacement tenants took place between plaintiff's failure to timely renew on September 30, 2024, and its belated effort to do so on January 16, 2025, such that the Court could conclude that defendant's commitments to these prospective new tenants was made in good faith.

Defendant's motion for summary judgment on its second counterclaim, for breach of the Lease, is granted in part. Defendant asserts that plaintiff breached the Lease by: (1) failing to cure violations and pay fines resulting from these violations; (2) making alterations to the Premises without consent; and (3) failing to obtain defendant's prior consent for subletting.

Summary judgment is granted on this cause of action only as to defendant's claim that plaintiff has defaulted by failing to pay fines incurred by the most recent occupant of the Premises. It is undisputed that this occupant, a restaurant called La Macarena, received multiple noise violations from the Environmental Control Board and that the fines resulting from these violations have not been paid. Plaintiff's central argument in opposition, that it is not obligated to pay these fines, is contradicted by section 6.1 and 11.2.B of the Lease. Accordingly, the *Yellowstone*

injunction imposed pursuant to this Court's June 25, 2025 order is modified to the extent that the toll on plaintiff's time to cure its default in failing to pay these fines will be lifted upon entry of judgment, after which plaintiff shall cure this default in the time remaining under Article 16.1(b) of the Lease.

The remainder of this branch of defendant's motion is denied, however. As to defendant's claims that plaintiff renovated the Premises without prior written approval from defendant as required under the Lease, the affidavits submitted by each party create an issue of fact as to whether defendant has, through its course of conduct, waived this requirement or consented orally to these renovations (*see 106 & 108 Charles LLC v Hohn*, 2011 NY Slip Op 31641[U] [Sup Ct, New York County 2011] ["a landlord waives its right to enforce a lease provision prohibiting alterations without its prior written consent where the landlord consented to the alterations"] *affd*, 2012 NY Slip Op 04688 [1st Dept 2012]). As to defendant's claim that plaintiff sublet the Premises to Balycafe without prior approval, plaintiff represents that it has not "finalized" its subleasing arrangement with Balycafe and, therefore, the time to seek defendant's approval for the sublease has not arrived. Accordingly, whether the negotiations between plaintiff and Guo as to the Lease of the Premises reached a point that plaintiff should have sought permission to sublet the Premises remains an issue to be explored in discovery.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted as to its second counterclaim, in part, to the limited extent that the *Yellowstone* injunction currently in place is modified such that, upon entry of judgment on this claim, the toll on plaintiff's time to cure its

default in failing to pay fines incurred by La Macarena shall be lifted, and is otherwise denied; and it is further

ORDERED that any motion for an additional undertaking pursuant to CPLR 2508 shall be filed on or before October 9, 2025; and it is further

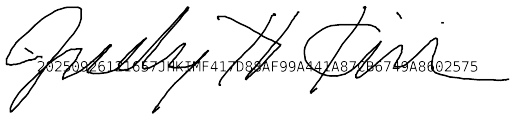
ORDERED that defendant shall, within ten days of the date of this decision and order, serve a copy of same, with notice of entry, on plaintiff and the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the parties are to appear for a preliminary conference on October 30, 2025, at 9:30 a.m.

This constitutes the decision and order of the Court.



9/26/2025
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**