Robert Marson Testamentary Trust v 4 W. 16 St. Corp.
2026 NY Slip Op 32120(U)
April 30, 2026
Supreme Court, New York County
Docket Number: Index No. 652942/2022
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

---X

ROBERT MARSON TESTAMENTARY TRUST,

Plaintiff,

- v -

4 W. 16 STREET CORP.,

Defendant.

---X

INDEX NO. 652942/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion for SUMMARY JUDGMENT.

Goldberg Weprin Finkel Goldstein LLP, New York, NY (Matthew Hearle of counsel), for plaintiff.
Schwartz Sladkus Reich Greenberg Atlas LLP, New York, NY (Steven D. Sladkus, Matthew N. Tobias, and Jonathan R. Jeremias of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiff-tenant, Robert Marson Testamentary Trust, and defendant-landlord, 4 W.16 Street Corp., entered into a commercial lease on July 15, 1979. (*See* NYSCEF No. 106 at 1 [lease].) The original lease term ran from 1979 to 1989. (*See id.*) The lease provided for six automatic extensions set to end in September 2049. (*Id.* at ¶ 39.) In 2011, tenant subleased the premises to subtenant, Drybar Flatiron LLLC.

The master lease requires tenant to maintain insurance coverage on the premises for the landlord's benefit. (*See* NYSCEF No. 2, ¶ 6 [lease].) Tenant required subtenant to maintain insurance for landlord's benefit. On July 29, 2022, landlord sent tenant a notice of default for failure to maintain liability insurance. (*See* NYSCEF No. 11 at 1 [notice of default].)

Landlord now moves for summary judgment dismissing tenant's complaint. The complaint has two causes of action. The first is for a declaratory judgment that tenant did not default under the lease. The second is for a permanent injunction enjoining landlord from terminating the lease. (*See* NYSCEF No. 1 [complaint].) Landlord also seeks summary judgment on its counterclaim for attorney fees. (See NYSCEF No. 92 [answer].) The motion is denied.

DISCUSSION

I. First Department's Decision on Motion Sequence 001

Landlord argues that it is entitled to summary judgment dismissing the complaint. According to landlord, it could not have waived its right to declare a default, given the no-waiver clause in the lease. (*See* NYSCEF No. 106.) Landlord further argues that the First Department's decision on motion sequence 001 held that tenant incurably defaulted on the lease, and that this decision disposes of the action.

This court disagrees. In that decision, the First Department reversed this court's determination that tenant was not entitled to a *Yellowstone* injunction. It concluded that tenant's alleged default—failing to procure liability insurance in its own right—is an incurable lease default and therefore may not serve as the basis for a *Yellowstone* Injunction. (*See Robert Marson Testamentary Tr. v 4 W. 16 St. Corp.*, 233 AD3d 516, 516 [1st Dept 2024], *reversing Robert Marson Testamentary Tr. v 4 W. 16 St. Corp.*, 2023 Slip Op 50516 [U] [Sup Ct, NY County 2023].) The First Department referred to tenant's argument—that landlord had "waived its right to declare a default based on the tenant's failure to provide insurance coverage." (*Id.*) But it found that the waiver argument provided no "independent basis" for *Yellowstone* relief. (*Id.*) The First Department specifically did not weigh in on whether landlord actually waived its right to declare a default, because it did not pertain to the *Yellowstone* analysis. (*See id.* at 17 ["The issue of waiver does not implicate the tenant's ability to cure its default because its failure to maintain insurance coverage as required by the lease is an incurable defect."].)

II. No-Waiver Clause

Landlord argues that no basis in fact or law exists to substantiate tenant's assertion that landlord waived tenant's default or waived the non-waiver provision in the master lease. (*See* NYSCEF No. 122 at 15.) Landlord points to Article 24 of the lease, which contains a clear and unambiguous non-waiver clause. (*Id.* at 16.) Landlord also asserts that sublease-consent agreements from 2011and 2018 (between landlord, tenant, and subtenant) did not absolve tenant of its insurance obligations or substitute subtenant as the party obligated to procure insurance. (*See* NYSCEF No. 122 at 18.)

Tenant contends that landlord has waived the default by (1) accepting rent from tenant despite knowing that tenant was in default of its insurance obligations and (2) agreeing to accept insurance from the subtenant pursuant to the sublease consent agreements from 2011. (*See* NYSCEF No. 118 at 6.) Landlord asserts that tenant's acceptance of rent and the sublease consent agreements are insufficient to waive tenant's insurance obligations under the lease. (*See* NYSCEF No. 122 at 16.)

Waiver is considered to be an issue of fact and is fundamentally a matter of intent, which must be proven through evidence of conduct. (*See generally Park Holding Co. v Power,* 161 AD2d 143, 144 [1st Dept 1990].) A "no waiver" clause in a lease bars a landlord's waiver of an incurable defect. (*See Jefpaul Garage Corp v Presbyterian Hosp. in City of New York,* 61 NY2d 442, 460 [1984], [asserting that a clear and unambiguous non-waiver clause in a lease precludes a finding of waiver and additionally asserting that the intent to waive cannot be inferred from the acceptance of rent during the period of the *Yellowstone* injunction].) But a no-waiver clause may be waived implicitly through conduct. (*See Simon & Son Upholstery, Inc. v 601 W. Assoc., LLC*, 268 AD2d 359, 360 [1st Dept 2000] [noting that landlord's "active involvement" modifying the premises to be used for alternative purpose overrode no-waiver clause in lease that otherwise would have prohibited that use].) This conduct must be substantial, not just a simple passive receipt of rent payments. (*See id.*)

Landlord seeks to terminate the 1979 master lease. (*See* NYSCEF No. 5 at 1.) Tenant subleased the premises to the subtenant in 2011. (*See* NYSCEF No. 16 at ¶ 10.) Landlord consented to the 2011 sublease in a letter agreement. (*See* NYSCEF No. 37.) Section 6 of that agreement requires subtenant to name landlord and any managing agent "as additional insureds on all of [s]ubtenant's insurance coverage required to be carried pursuant to the terms of the [s]ublease." (*Id.* at 3.)

In 2018, landlord, tenant, and subtenant executed an amendment to the 2011 sublease consent agreement. (*See* NYSCEF No. 13.) That amendment strengthened subtenant's insurance-related obligations toward landlord. Under the amendment, subtenant is required to "take out and maintain in force at all times . . . for the benefit of Co-op Corporate Owner as an additional named insured and Subtenant, as their respective interests may appear, commercial general liability insurance and/or umbrella insurance. . . ." (NYSCEF No. 13 at 4 [2018 amendment].) In addition, the 2018 amendment gives landlord the right to enforce these insurance requirements against subtenant. (*See id.*; *cf. Federated Retail Holdings, Inc. v Weatherly 39th St., LLC,* 77 AD3d 573, 574 [1st Dept 2010] [holding that "landlord is not required to accept subtenant's performance in lieu of tenant's" with respect to insurance coverage, because landlord "is not in privity with subtenant" and thus could not require subtenant to continue to name landlord on subtenant's insurance policy].)

Landlord's insistence that only tenant may procure the insurance required by the master lease would render the insurance provision in the 2018 amendment a nullity. Further, Alexander Marson, tenant's trustee, represents—and landlord does not dispute—that "[s]ince at least the inception of the Drybar sublease in 2011, the Corporation has accepted a certificate of insurance provided by Drybar listing the Corporation as an additional insured as full compliance." (NYSCEF No. 16 at ¶ 11 [Alexander Marson affidavit].)

Similarly, in early 2020, landlord was a defendant in a personal injury action brought by a former employee of subtenant. (*See LaPaglia v 4 W. 16th St. Corp.*, Index No. 503845/2020 [Sup Ct, Kings County].) Landlord sought and obtained additional-insured coverage directly from the subtenant.[1] (*See* NYSCEF No. 50 at 3; *id.* at 57-60.) Landlord does not contend that it objected between July 2020 and July 2022 to tenant's relying on subtenant to provide the insurance coverage for landlord that is required by the lease. At most, landlord points to two 2020 requests made by its management company to tenant for proof of insurance. (*See* NYSCEF

[1] That coverage was limited to $1,000,000—which is assertedly below the $3,000,000 limit required by the 2018 amendment. (*See* NYSCEF No. 50 at 3; NYSCEF No. 13 [2018 amendment].)

No. 22 at ¶¶ 23-24 [affirmation of counsel].) But none of those requests, as this court noted in 2023, "singl[ed] out tenant, in particular, for insurance-related scrutiny" or "suggest[ed], that it would be impermissible for tenant to provide proof of an insurance policy maintained by subtenant for landlord's benefit, rather than by tenant directly." (*Robert Marson Testamentary Tr.*, 2023 Slip Op 50516[U], at *5, *revd on other grounds* 233 AD3d 516 [1st Dept 2024].) Moreover, landlord decided only in 2022 to serve a notice of material default on tenant.

Tenant has therefore shown that issues of fact exist about whether the landlord waived the no-waiver clause.

Accordingly, it is:

ORDERED that the branch of landlord's motion for summary judgment dismissing the complaint is denied.

ORDERED that the branch of landlord's motion for summary judgment on its counterclaim for attorney fees is denied.

4/30/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

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