SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 111692/2010
100 WOOSTER STORE
vs.
WOOSTER 100 REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 111692/10
MOTION DATE 12/2/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 32, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of LAW | No(s). 1 - 12

Answering Affidavits — Exhibits X Motion + Memo of LAW | No(s). 13 - 21

Replying Affidavits + Memo of LAW | No(s). 22 - 32

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Feb. 1, 2012

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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100 WOOSTER STORE CORP.,

Plaintiff,

-against-

WOOSTER 100 REALTY LTD.,

Defendant.

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DECISION & ORDER

Index No. 111692/10

JOAN M. KENNEY, J.:

Defendant moves, pursuant to CPLR 3212, 3211 (a) (2) and (a) (10), for summary judgment dismissing the complaint and ordering plaintiff to obtain Co-op Board approval for the proposed work to the HVAC system in the rear of the building that is the subject of this litigation (Building).

Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment: (1) on its first cause of action declaring that it is entitled to continue to maintain the rear yard of the Building and the condensers used to air condition defendant's premises; (2) declaring that defendant's use of the back yard of the Building as ripened into an appurtenance; (3) declaring that defendant is allowed to reconfigure the condensers located in the back yard of the Building in accordance with the plans provided to the Co-op; (4) declaring that the Co-op Board's approval is not required in order for defendant to reconfigure the condenser; (5) declaring that, if Co-op Board approval is necessary, that either the court mandate Co-op Board approval or declare that PJ Casey (Casey), the Co-Op's co-president, can approve the plans; and (6) on its second cause of action, issuing an injunction compelling the Co-op Board

to allow defendant to reconfigure or replace the condensers as provided in the plan and connect them to the defendant's air conditioning units as provided in the plan.

FACTUAL BACKGROUND

This declaratory judgment action was commenced by plaintiff, defendant's commercial tenant, seeking a declaration that it is entitled to permit its subtenant, SJB Retail d/b/a Yellow Corner (Yellow) to install three air condensers with support structures upon common property located in the rear yard of the Building, thereby permitting plaintiff to make necessary improvements which affect utility services, plumbing and electric lines in and to the Building and areas outside of the interior of the leased premises. Defendant asserts that the Board of Directors (Board) has not taken any formal action to deny plaintiff's submitted plans and, therefore, defendant contends that the matter is not justiciable since plaintiff has not suffered any injury in fact and any alleged injury is speculative and abstract, contingent upon events which may not come to pass.

Defendant is the owner of the Building, and the ground level store and basement were leased to plaintiff for a term of 25 years on February 15, 1982. By court order, dated April 17, 2009, it was determined that plaintiff validly exercised its option to renew this lease for a period ending on March 31, 2017.

In the spring of 2010, Susan Inglett (Inglett) was presented,

in her official capacity as co-president of the Board, with a set of building plans from plaintiff, which identified improvements that Yellow wished to make and which Casey, plaintiff's owner, wished to have approved. These improvements were to be made to the common areas of the Building, not part of the leased premises. According to Inglett's affidavit, she informed Casey that she could not unilaterally approve the plans. Inglett averred that she told Casey that any approval would have to await a meeting of the Board.

In reviewing the plans, Inglett felt that the improvements would affect Building services that were not part of the leased premises, which would require written Board approval.

According to section 3 of the lease, since Board approval was required, plaintiff had to submit, among other things, documents and approvals by government agencies before the Board could consider the plan. Motion, Ex, D. Specifically, section 3 of the lease states, in pertinent part:

> "Tenant shall make changes in or to the demised premises of any nature without Owner's prior written consent. Subject to the provisions of this article, Tenant at Tenant's expense, may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services or plumbing and electrical lines, in or to the interior of the demised premises by using contractors or mechanics first approved by Owner. Tenant shall, before making any alterations, additions, installations or improvements, at its expense, obtain all permits, approvals and certificates required by any governmental or quasi-governmental bodies and (upon completion) certificates of final approval thereof and shall deliver duplicates ... to Owner ... ."

Paragraph 6 of the rules and regulations attached to the lease specify that no tenant could mark, paint, drill into, or in any way deface any part of the demised premises or the Building and that no boring, cutting or stringing of wires is permitted without the prior written consent of the Board. Motion, Ex. D.

Defendants state that, to date, the Board has not made a final vote or determination, nor has it issued a written denial or approval, of plaintiff's plan. Further, defendant avers that, to date, the Board has not received any permits, approvals or certificates issued by any governmental or quasi-governmental board or agency regarding the proposed plans, as required by the lease. Hence, claims defendant, the Board has yet to receive a full application for the work for Board consideration from plaintiff.

In addition to the foregoing, defendant says that it has not stopped or interfered with Yellow's attempts to install, amend or alter the HVAC system in the rear yard, nor has Yellow attempted such work.

In opposition to defendant's motion and in support of its cross motion, plaintiff states that an air conditioning system with condensers located in the Building's rear yard have been in place since 1992 and that, on December 29, 2009, in settlement of then-existing litigation, defendant issued an estoppel certificate to plaintiff, which stated that it was in full compliance with all of the terms, conditions and covenants of the lease. Cross Motion,

Ex. 6. Plaintiff maintains that, based on this estoppel certificate, it has the right to maintain air conditioning condensers in the Building's rear yard.

When Yellow proposed to replace the air conditioning system in the store, its plans called for the addition of a third condenser and to replace one of the pre-existing condensers that had been removed by a prior sublessee. Prior to any work being done, Casey submitted Yellow's plans to Inglett, who, plaintiff asserts, signed the application for the plans to be presented to the New York City Landmarks Preservation Commission so that the Buildings facade could be altered without conducting a meeting of the Board. However, according to Casey, Inglett refused to approve the portion of the renovation plans seeking to perform the electrical work for the HVAC system. Allegedly, Inglett told Casey that she and John Delapa (Delapa), the third member of the three-member Board, would not approve the HVAC plans. Plaintiff argues that this constitutes Board denial of the plan, making this action ripe for adjudication. As additional support for this contention, plaintiff cites to paragraph 32 of the verified answer in which defendant states:

> "admits that Co-op refused to approve the installation, alteration, replacement, construction, work, and/or tampering with any and all condenser, electric, plumbing, the building structure, and those structures appurtenant thereto, that was sought by plaintiff or plaintiff's subtenant."

Plaintiff also contends that, pursuant to section 3 of the lease, it is allowed to make non-structural changes without the Co-

op's consent. This contention is based on the above-quoted lease provision.

Plaintiff avers that, based on this lease, it has the right to make the proposed alterations without prior written Board approval.

In addition, plaintiff provides a copy of a letter sent to it by Margaret Baisley (Baisley), the attorney for the Co-op, in which she stated, among other things:

> "You are hereby notified that the Board of Directors has not approved any application to place air conditioning units in the Landlord's common area. You are required to remove all air conditioning equipment from the Landlord's premises forthwith."

Cross Motion, Ex. 9.

According to plaintiff, this letter indicates Board rejection of the application, thereby making the dispute ripe for determination.

Moreover, plaintiff asserts that Inglett's statement that the Board would not approve the application is binding on the Board, since she made the statement in her capacity as co-president.

In sum and substance, plaintiff's arguments are fourfold:

1. Defendant's legal arguments are without merit, because the judicial precedent upon which it relies concerns declaratory judgments being sought for future events, whereas, in the case at bar, by Inglett's statement the Board has already acted;

2. By the terms of the lease, the proposed work does not

require prior written approval;

3. The condensers in the rear yard are appurtenances to the leased premises and the changes are reasonably necessary to the successful operation of the business; and

4. The cross motion is timely.

In opposition to plaintiff's cross motion, defendant argues that the cross motion is not timely, based on a stipulation executed by the parties, which states that plaintiff's opposition to defendant's motion must be received by defense counsel by November 4, 2011. Opp., Ex. B. Defendant's counsel avers that he did not receive the notice of cross motion until November 14, 2011, and it was dated November 11, 2011. Therefore, defendant maintains that the cross motion should be rejected as untimely because: (1) it is based on nearly identical grounds of defendant's motion; (2) all of the facts were already within the knowledge of plaintiff; and (3) plaintiff has not provided any good cause for the delay.

In reply, plaintiff admits that its opposition was not dated until November 11, 2011, but asserts that its opposition to defendant's motion is timely nonetheless, since no showing of prejudice was shown by defendant. Also, since the court permitted the parties to conclude discovery after filing the note of issue, and the deposition of Inglett was changed by defendant from September 20, 2011 to October 3, 2011, this establishes good cause for any delay because plaintiff contends that the adjournment of

the deposition was demanded simply to delay plaintiff's time in which to file opposition.

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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (2) the court has not jurisdiction of the subject matter of the cause of action; or
>
> * * *
>
> (10) the court should not proceed in the absence of a person who should be a party; ...."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary

nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002).

Defendant's motion is granted and the action is dismissed as not ripe for determination.

> "The 'justiciable controversy' upon which a declaratory judgment may be rendered requires not only that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs. ... [T]he controversies involved in the present action are not ripe for determination ... .
>
> * * *
>
> The action is premature and as a matter of law may not be maintained if the issue presented for adjudication involves a future event beyond the control of the parties which may never occur."

American Insurance Association v Chu, 64 NY2d 379, 383, 385 (1985); *Flomenbaum v New York University*, 71 AD3d 80 (1st Dept 2009) *affd* 14 NY3d 901 (2010); *Waterways Development Corp. v Lavalle*, 28 AD3d 539 (2d Dept 2006).

In the case at bar, section 3 of the lease requires Board approval for any alteration that would affect the utility services and/or plumbing to the Building, and must provide appropriate governmental permits to the Board prior to beginning any such work.

Additionally, even for work not requiring prior written approval, the contractors and mechanics that plaintiff intends to use must be submitted to the Board for approval.

Although plaintiff has stated that the new condensers would use the same footprint as the existing condensers and would be connected to the air conditioning units already in place, plaintiff specifically avoids any direct denial of defendant's assertion that the work would affect the Building's plumbing and electrical system. As indicated in section 3 of the lease, if such were the case, prior Board approval would be necessary.

Further, plaintiff has failed to state that it has provided the names of the contractors and mechanics who it intends to use for Board approval, nor has it indicated that it has received the mandated governmental permits.

Therefore, since the conditions precedent to performing any such work have not been met, the matter is not ripe for adjudication. Also, there is no way of knowing whether plaintiff would be able to receive the necessary permits to perform the work. *See Ashley Builders Corp. v Town of Brookhaven,* 39 AD3d 442 (2d Dept 2007)(complaint dismissed because plaintiff did not apply for a certificate of occupancy and defendant had not made a final determination thereon).

The court is unpersuaded by plaintiff's argument that Inglett's statement that the Board would not approve the plans is

sufficient to indicate Board action. The individual action of the co-president is ineffectual to bind the Board absent actual ratification. *See Spanos v Boschen*, 61 AD2d 837 (2d Dept 1978). Further, the primary case cited by plaintiff is distinguishable, involving entering into contracts on behalf of the Board (*Goldston v Bandwidth Technology Corp.*, 52 AD3d 360 [1st Dept 2008]), not actions specifically requiring Board approval. Acts done informally by a member of the Board do not constitute Board action. *Douglas Development Corp. v Carillo*, 64 NYS2d 747 (Sup Ct, Kings County 1946).

The court also notes that neither party has provided any affidavit from Delapa who, as the third member of the Board, has the deciding vote on this issue.

Similarly, plaintiff mischaracterizes the letter sent by Baisley. In that letter, the pertinent portion quoted above, she does not say that the Board did not approve the plan, she simply states that no plan has been approved (or denied) by the Board, which is totally different from saying that a plan was denied, indicating, rather, a lack of action.

Since plaintiff has not demonstrated a present injury, but only alleges contingent events, plaintiff has not met its burden of showing immediate prejudice or injury so as to warrant granting a declaratory judgment. *Police Benevolent Association of the New York State Troopers, Inc. v New York State Division of State*

Police, 40 AD3d 1350 (3d Dept 2007).

With respect to the arguments posed regarding the timeliness of the opposition, in the interests of justice the court has considered it but, based on the above reasoning, has found it unavailing.

Based on the foregoing, defendant's motion is granted and the complaint is dismissed. Plaintiff's cross motion is denied as moot. Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied as moot.

Dated: February 1, 2012

ENTER:

Joan M. Kenney, J.S.C.