PS Food Corp. v Granville Payne Retail, LLC

Supreme Court of New York, Kings County

November 10, 2014, Decided

16438/2013

Reporter
2014 N.Y. Misc. LEXIS 4834; 2014 NY Slip Op 51601(U)

[**1] ***PS Food Corp.***, Plaintiff, against Granville Payne Retail, LLC, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

lease, Notice, cure, install, default, tenant, Termination, fire alarm, notice of default, supermarket, fire alarm system, fire sprinkler, Landlord, Premises, sprinkler system, requirements, days, cause of action, set forth, terminating a lease, deposition, injunction, alleges, lease provision, occupancy, attorney's fees, receive notice, declaration, argues, equitably estopped

Counsel: [*1] For Plaintiff: Robert Salzman, Esq., Salzman & Salzman LLP, Brooklyn, NY.

For Defendants: Gary Rosen, Esq., Gary Rosen Law Firm, P.C., Great Neck, NY.

Judges: Carolyn E. Demarest, J.

Opinion by: Carolyn E. Demarest

Opinion

In this action by plaintiff ***PS Food Corp.*** (plaintiff), a tenant pursuant to a commercial lease, against defendant Granville Payne Retail LLC (defendant), its landlord, for a declaratory judgment that a Notice of Default under the lease, a Notice of Termination of the lease, and a lease termination clause contained in section 23.2 (a) of the lease are invalid and unenforceable, and that defendant is equitably estopped from terminating the lease, plaintiff moves, under motion sequence number four, for an order, pursuant to pursuant to *CPLR 3212*, granting it summary judgment in its favor and awarding it attorney's fees as the prevailing party pursuant to section 28.11 of the lease. Defendant moves, under motion sequence number five, for an order granting it summary judgment dismissing this action and awarding it costs and attorney's fees as the prevailing party pursuant to the lease terms.

BACKGROUND

On June 24, 2011, plaintiff, as the tenant, and defendant, as the landlord, entered into a lease agreement (the lease) for commercial premises [*2] which are part of a condominium unit in a building located at 340 Pennsylvania Avenue a/k/a 626 Sutter Avenue, in Brooklyn, New York. Pursuant to section 2.1 of the lease, the lease was for a 26-year term, commencing on July 1, 2011 and ending on June 30, 2037. In accordance with section 7.1 of the lease, plaintiff leased the premises for the operation of a Key ***Food*** supermarket. The building in which the leased premises are located contains seven stories, with the supermarket on the first floor and a part of the cellar, and 103 residential apartments on the second through seventh floors.

The lease required plaintiff, as the tenant, to be responsible for, and pay the costs for installing and maintaining a Fire Sprinkler System as

required by law. Section 11.4 of the lease provided as follows:

"If Tenant cooks or has cooking facilities in the Premises, then Tenant shall install and maintain an "Ansul' system or fire sprinkler system permitted by the City of New York to be installed in the Premises, at Tenant's sole cost and expense."

Section 11.5 of the lease provided, in pertinent part, as follows:

"In the event that Tenant's use of the Premises requires a fire sprinkler system and/or fire extinguishers or if there is presently a fire [*3] sprinkler system installed in the Premises, the Tenant, shall be required to (x) install and maintain a sprinkler system and/or fire extinguishers as required by law in the Premises to the extent not thereto for installed and (y) make all modifications to any existing sprinkler system, if any. "[I]n connection with the foregoing, the following provisions of this Section shall apply: (i) such sprinkler system and/or modifications thereto shall comply with all applicable laws, orders, rules and regulations . . . "

Section 11.7 of the lease, in pertinent part, provided:

"Tenant, at Tenant's sole cost and expense, shall comply with all Legal Requirements (hereinafter defined) which shall impose any duty upon Tenant with respect to Tenant's use or occupation of the Premises, including, but not limited to, the installation of, modification to and/or maintenance of a sprinkler system to serve the Premises or any part thereof required by Tenant's specific use . . . For all purposes of this Lease the term Legal Requirements' shall mean all present and future laws, codes, ordinances, statutes, requirements, orders and regulations . . . of any Governmental Authority . . . and all directions, requirements, orders [*4] and notices of violations thereof."

Section 23.1 (a) of the lease set forth that:

"An event of default by Tenant shall occur if one or more of the following events shall occur:

. . .

(ii) if Tenant shall fail to perform any of its . . . obligations [other than failing to pay Fixed Rent or additional rent when due] under the Lease and such failure shall continue for a ten (10) day period after Landlord shall have given Tenant written notice of its failure to perform."

Section 23.2 (a) of the lease stated as follows:

"If an event of default by Tenant shall have occured under the terms of section 23.1 of this Lease, Landlord shall as its sole and exclusive remedy:

(a) Give Tenant a notice of Landlord's intention to end the term of this Lease at the expiration of the five (5) day period after such notice of cancellation is given. Unless the default is cured before the expiration of the five (5) day period, this Lease shall be canceled, and all of the obligations and responsibilities of the parties under this Lease shall terminate except for accrued liabilities and except that Tenant shall surrender the Premises to Landlord in accordance with this Lease."

On July 31, 2012, the New York City Fire Department issued a violation order for the [*5] Retail (Key ***Food***) Supermarket (the Violation Order). The Violation Order stated that an inspection of the supermarket premises indicated the existence of a violation, listing the absence of an interior fire alarm. It required that a fire alarm system be provided and installed in accordance with the "real occupancy of the building," and that all required documentation and forms be submitted and an inspection be arranged. It cited Administrative Code of the City of New York § 901.5 as authority for the violation. The Violation Order listed that it was received by Richard Quiroz (Quiroz), as the owner's representative. In addition, Ahmed A. Hakim (Hakim), a 50% owner

of the corporate shares of plaintiff, admitted, at his deposition, that he received a copy of the Violation Order in August 2012, when the fire department came to the supermarket (Hakim's Dep. Transcript at 46-47). He explained that he was present when the fire department came and the Violation Order was handed to his manager, who then gave it to him, and that he then contacted Quiroz, who had also received a copy of the Violation Order and they began a conversation on how to ″do the fire alarm″ (*Id*. at 47). He further stated that he never **[*6]** told defendant or its representatives that it was not plaintiff's responsibility to install a fire alarm (*Id*. at 47-48).

Quiroz sent an e-mail to Hakim on October 16, 2012 (defendant's exhibit 1), in which he stated as follows:

″As per your request, what is needed for your supermarket is a Fire Alarm System installed to your retail space. There is a basic code established by the City of New York that you must follow and any alarm specialist can tell what is required. We took the liberty of having our Fire Alarm specialist give us a quote for this work, originally it was $35,000 but we were able to reduce that to $24,000. If you can find a licensed company to do this work at a lower cost please feel free, but we need to do this ASAP. The fine for this can be up to $2500.00 every two weeks, so please make this a priority. Please contact me directly once you have made your **[**3]** decision.″

From August 2012 to May 2013, plaintiff obtained price quotes for installing the fire alarm system. However, Hakim claims that since he did not have the funds to pay for the installation, no fire alarm was installed by plaintiff (Hakim's Dep. Transcript at 62). One year after the violation was issued, plaintiff received **[*7]** a Notice of Default dated July 31, 2013 from defendant's attorney, Gary Rosen, Esq. (Mr. Rosen) of the Gary Rosen Law Firm, PC (the Gary Rosen Law Firm). The Notice of Default advised plaintiff that the Gary Rosen Law Firm represented defendant and issued this letter with its authority. It set forth that it constituted notice that plaintiff was in default of the lease, and that in the event that it did not cure the default within 10 days, the lease would terminate. It specified that the present fire code required plaintiff to install a fire alarm system connected to a central station, and cited and attached a copy of the Violation Order, listing exactly what had been set forth in that order, i.e., that it required that a fire alarm system be provided and installed in accordance with the real occupancy of the building, and that documentation was required to be submitted and an inspection arranged. The Notice of Default further referred to sections 11.4, 11.5, and 11.7 of the lease, and set forth what these sections stated in their entireties. It then warned that if plaintiff failed to comply with the attached Violation Order, the lease would be terminated.

In response to the Notice of Default, plaintiff **[*8]** did not seek a *Yellowstone* injunction to toll the cure period. Plaintiff claims that, instead, it responded to it by meeting with defendant's representatives at its offices on August 5, 2013 to discuss curing the alleged default. Plaintiff alleges that at that meeting, defendant's representatives advised it that they would consider contributing $10,000 toward an alarm system to cure the violation to be paid back in future rent installments, and that they needed a few days to finalize this arrangement, and that they would contact defendant to finalize the details on August 9, 2013. Plaintiff claims that it relied on the ongoing negotiations with defendant's representatives and took no legal action to stay the 10-day period set forth in the Notice of Default, which ended on August 9, 2013. Plaintiff alleges that on August 9, 2013, defendant's representative called it and advised that defendant would not work with it in any manner to cure the violation.

Plaintiff received a Notice of Termination dated August 27, 2013 (27 days after the date of the

Notice of Default and 18 days after plaintiff claims to have become aware that defendant would not work with it to cure the violation) from [*9] the Gary Rosen Law Firm, signed by Mr. Rosen, which terminated the lease. The Notice of Termination advised plaintiff that it was being issued with the authority of defendant. It stated that on August 1, 2013, plaintiff had received the Notice of Default and was provided with a 10-day opportunity to cure the default, and that since plaintiff failed to cure the default, the lease was thereby terminated. It reiterated that plaintiff was advised that the present fire code required plaintiff to install a fire alarm system connection to a central station, and, again, [**4] set forth the Violation Order and sections 11.4, 11.5, and 11.7 of the lease. It notified plaintiff that since the lease was terminated, plaintiff was required to tender possession of the premises to defendant forthwith.

On September 11, 2013, plaintiff filed this action against defendant. Plaintiff's complaint sets forth five causes of action. Plaintiff's first cause of action seeks a declaration that the Notice of Default was defective because it: failed to state the default provision of the lease relied upon; failed to give notice of its right under section 23.1 (b) of the lease to commence a cure where the default cannot be reasonably cured within 10 days, [*10] and that it would not be in default if a cure was diligently prosecuted within that 10-day period; failed to refer to any lease clause which required it to install a fire alarm; and was signed by an attorney who was not specifically authorized by the lease to sign and serve notices and no authorization from defendant was annexed. Plaintiff's second cause of action seeks a declaration that the Notice of Termination was defective because it failed to state the termination provision of the lease relied upon, failed to give the five-day cure period which section 23.2 of the lease required to be included in a Notice of Termination in addition to the 10-day Notice of Default under section 23.1 (b) of the lease and to state that the cure period ran concurrent with the five-day termination period. Plaintiff's third cause of action seeks a declaration that section 23.2 (a) of the lease provides for a legally impossible combined Notice of Termination and Notice of Cure. Plaintiff's fourth cause of action demands a declaration that defendant is equitably estopped from terminating the lease because plaintiff justifiably relied upon defendant's words and conduct and was thereby misled into taking no action with respect to the Notice of Default [*11] based on its reasonable belief that defendant would not terminate the lease during negotiations. Plaintiff's fifth cause of action seeks a declaration that defendant is equitably estopped from terminating the lease because it obstructed any attempt to cure by refusing to provide filed plans required for the installation of a fire alarm system.

On September 16, 2013, defendant filed an action against Hakim and Jaynal Abdin (Abdin) (who is the other 50% owner of the shares of plaintiff), in the Supreme Court, Nassau County (Index No. 602527/2013) (the Nassau County action), based upon their personal guarantees executed on June 24, 2011, which guaranteed plaintiff's obligations under the lease. Defendant alleged, in the Nassau County action, that plaintiff had defaulted in its obligations to pay rent and other charges required to be paid by it under the lease, which had accrued prior to its termination of the lease by the Notice of Termination, and that use and occupancy charges continued to accrue since plaintiff remained in possession of the premises. It further alleged that the debt owed at that time amounted to $100,445.62. Hakim and Abdin interposed an answer in the Nassau County [*12] action. By a stipulation dated December 18, 2013, entered into by the parties and so-ordered by this court, the Nassau County action was consolidated with the present action in this court, and plaintiff agreed to pay rent arrears and all sums required under the lease [**5] as use and occupancy to defendant during the pendency of this action. On December 18, 2013, the court, following oral argument, denied a motion to dismiss the present action

against defendant, which sought dismissal based upon plaintiff's failure to obtain a *Yellowstone* injunction prior to the termination of the lease by the Notice of Termination.

Defendant interposed an answer in this action dated January 15, 2014. It alleges, as affirmative defenses, that the lease terminated by plaintiff's failure to obtain a *Yellowstone* injunction, that plaintiff's claims are barred based upon the doctrine of unclean hands, and that plaintiff breached the lease. Thereafter, the parties engaged in discovery, including taking the depositions of Hakim and Quiroz. On May 20, 2014, plaintiff filed its instant motion for summary judgment, and, on June 2, 2014, defendant filed its motion for summary judgment.

DISCUSSION

Defendant, in support [*13] of its motion, relies upon the well settled principle that courts cannot reinstate a lease after the lapse of time specified to cure a default (*see* *Goldcrest Realty Co. v 61 Bronx Riv. Rd. Owners, Inc., 83 AD3d 129, 133, 920 N.Y.S.2d 206 [2d Dept 2011]*; *Korova Milk Bar of White Plains, Inc. v PRE Props., LLC, 70 AD3d 646, 647, 894 N.Y.S.2d 499 [2d Dept 2010]*). It argues that since the time specified in the Notice of Default to cure plaintiff's default has lapsed, the lease has been terminated, and that since no *Yellowstone* injunction was sought or obtained by plaintiff prior to such termination, the court cannot reinstate the lease.

"A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" of the lease (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514, 715 N.E.2d 117, 693 N.Y.S.2d 91 [1999]*). " To obtain a *Yellowstone* injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared [*14] and maintains the ability to cure the alleged default by any means short of vacating the premises'" (*JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC, 101 AD3d 1089, 1090, 956 N.Y.S.2d 536 [2d Dept 2012]*, quoting *Barsyl Supermarkets, Inc. v Avenue P Assoc., LLC, 86 AD3d 545, 546, 928 N.Y.S.2d 45 [2d Dept 2011]*; *see also* *Trump on the Ocean, LLC v Ash, 81 AD3d 713, 716, 916 N.Y.S.2d 177 [2d Dept 2011]*, *lv dismissed* *17 NY3d 875, 956 N.E.2d 1270, 932 N.Y.S.2d 425 [2011]*; *Korova Milk Bar of White Plains, Inc., 70 AD3d at 647 [2010]*; *see generally* *Graubard Mollen Horowitz Pomeranz & Shapiro, 93 NY2d at 514*).

Plaintiff argues that defendant did not issue a valid Notice of Default, and that, therefore, there was no cure period to extend. It contends that since the Notice of Default was defective, the absence of a *Yellowstone* injunction does not bar it from challenging its purported default (*see* *380 Yorktown **Food** **Corp**. v 380 Downing Dr., LLC, 35 Misc 3d [**6] 1243[A], 2012 NY Slip Op 51132[U], *2-3 [Sup Ct, Westchester County 2012]*, *appeal dismissed* *107 AD3d 786, 967 N.Y.S.2d 125 [2d Dept 2013]*, *lv denied* *22 NY3d 860, 981 N.Y.S.2d 371, 4 N.E.3d 383 [2014]* [noting that where there was no notice of default, there was no cure period to extend and a *Yellowstone* injunction was not appropriate]).

The purpose of a Notice of Default, also referred to as a Notice to Cure, " is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time'" (*ShopRite Supermarkets, Inc. v Yonkers Plaza Shopping,*

LLC, 29 AD3d 564, 566, 817 N.Y.S.2d 291 [2d Dept 2006], quoting *Filmtrucks, Inc. v Express Indus. & Term. **Corp**., 127 AD2d 509, 510, 511 N.Y.S.2d 862 [1st Dept 1987])*. A Notice of Default ″must set forth sufficient facts to establish grounds for the tenant's eviction, and inform the tenant as to how the tenant violated the lease, as well as the conduct required [*15] to prevent eviction″ (*Westhampton Cabins & Cabanas Owners **Corp***. v Westhampton Bath & Tennis Club Owners ***Corp***., *62 AD3d 987, 988, 882 N.Y.S.2d 124 [2d Dept 2009]*; *see also Domen Holding Co. v Aranovich, 1 NY3d 117, 124-125, 802 N.E.2d 135, 769 N.Y.S.2d 785 [2003]*; *Chinatown Apts. v Chu Cho Lam, 51 NY2d 786, 788, 412 N.E.2d 1312, 433 N.Y.S.2d 86 [1980]*; *ShopRite Supermarkets, Inc., 29 AD3d at 566*; *Matter of Ranalli v Burns, 157 AD2d 936, 937, 550 N.Y.S.2d 192 [3d Dept 1990]*; *200 W. 58th St. LLC v Little Egypt **Corp**., 7 Misc 3d 1017[A], 801 N.Y.S.2d 243, 2005 NY Slip Op 50640[U], *2 [Civil Ct, NY County 2005])*. ″To determine the adequacy of a predicate notice, the standard is one of reasonableness in view of the attendant circumstances'″ (*75 Monroe St. LLC v Moy, 12 Misc 3d 1175, 2006 NY Slip Op 51238[U], *2 [Civil Ct, NY County 2006]*, quoting *Hughes v Lenox Hill Hosp., 226 AD2d 4, 18, 651 N.Y.S.2d 418 [1st Dept 1996]*, *lv denied 90 NY2d 829, 683 N.E.2d 17, 660 N.Y.S.2d 552 [1997])*. A Notice of Default is insufficient where it fails to apprise the tenant of the condition that the landlord wishes to have cured or fails to reference the specific section of the lease that addresses the condition (*see Chinatown Apts., 51 NY2d at 788 [1980]*; *Ellivkroy Realty **Corp***. v HDP 86 Sponsor ***Corp***., *162 AD2d 238, 238, 556 N.Y.S.2d 339 [1st Dept 1990]*; *Garland v Titan W. Assoc.,147 AD2d 304, 310-311, 543 N.Y.S.2d 56 [1st Dept 1989])*. Thus, as a threshold matter, the court must determine if the Notice of Default sufficiently apprised plaintiff of the lease provisions violated.

Here, as discussed above, the Notice of Default specifically cited the lease provisions violated, i.e., sections 11.4, 11.5 and 11.7 of the lease, and set forth what these lease provisions stated in their entireties. It further specified that plaintiff was required to install a fire alarm system as mandated by the present fire code, and cited and attached a copy of the Violation Order. Thus, plaintiff was sufficiently apprised of the lease provisions violated and what it was required to do in order to avoid default under the lease (*see Domen Holding Co., 1 NY3d at 125*; *Matter of One Main v Le K Rest. **Corp***., *1 AD3d 365, 366, 766 N.Y.S.2d 878 [2d Dept 2003]*; *CRS Realty Assoc. Inc. v 235 Tenth Ave. Car Wash Inc., 43 Misc 3d 1226[A], 992 N.Y.S.2d 158, 2014 NY Slip Op 50790[U], *4 [Civil Ct, NY County 2014])*.

Plaintiff contends, however, that the Notice of Default is confusing and ambiguous [**7] because the words ″fire [*16] alarm″ do not appear in the lease provisions cited. It asserts that this confusion is compounded by the lack of any explanation as to what the lease provisions have to do with the Violation Order. It acknowledges that the Violation Order listed the absence of an interior fire alarm and required that a fire alarm system be provided and installed, but asserts that sections 11.4 and 11.5 of the lease referred to a fire sprinkler system as required by law and not an interior fire system. It also concedes that section 11.7 of the lease required that, it, as the tenant, comply with all legal requirements, including the installation of a sprinkler system in accordance with all laws and codes, but contends that this section did not identify the code provision which imposed a duty on it to install an interior fire alarm system.

Plaintiff's denial of its unawareness of what the lease provisions had to do with the Violation Order, however, are belied by Hakim's deposition testimony. Hakim, at his deposition, admitted that he received the Violation Order, and that he knew that it meant that a fire alarm was required in the supermarket (Hakim's Dep. Transcript at 46-47). He conceded that he had conversations with

Quiroz regarding [*17] installing a fire alarm in the supermarket in 2012 and that Quiroz told him that he was required to install it (*Id*. at 21-22). Thus, plaintiff was already aware, at the time it received the Notice of Default, that what was required was a fire alarm. Indeed, Hakim testified that he understood when he received the Notice of Default that the problem was that he had to install a fire alarm and that he had to cure this problem within a certain time period (*Id*. at 49). He also admitted receiving the Notice of Termination, and that he understood that the Notice of Termination meant that the lease was void (*Id*. at 49-50). Hakim conceded that a fire alarm is required for the supermarket (*Id*. at 33). He testified that he had a conversation with Quiroz and agreed to install a fire alarm system and that he was negotiating with a fire alarm installer, who he called ″probably 5,000 times″ (*Id*. at 25, 31). He further testified that he had a robbery in his store, and that he did not have enough money to pay for the alarm system (*Id*. at 23-26). He admitted that he did not install a fire alarm system (*Id*. at 31).

In addition, Quiroz testified, at his deposition, that he had sent Hakim the October 16, 2012 e-mail (set forth above), which informed him that there was [*18] a code provision that plaintiff was required to follow and that plaintiff needed to install a fire alarm system (Quiroz's Dep. Transcript at 35). He specified that he had spoken to Hakim and told him that it was part of his lease to be responsible for the fire alarm (*id*.). Furthermore, Jorge Madruga (Madruga), the manager of defendant, has submitted his sworn affidavit, in which he attests that on August 5, 2013, he met with Hakim, along with Quiroz, and explained that plaintiff needed to install the fire alarm, and that Hakim told him that plaintiff did not have the money to install it. Madruga explains that at this August 5, 2013 meeting, Hakim requested that defendant loan $10,000 to plaintiff to pay for the fire alarm system which cost approximately $30,000, but defendant did not agree to pay any monies towards such installation.

While plaintiff admits that there was no fire alarm system installed by it in the supermarket, it argues that the lease provisions cited do not require it to install one. In response to the request by plaintiff's attorney made at Quiroz's deposition (*Id*. at 39) to identify where the lease provided that the tenant was responsible for installing a fire alarm, defendant [*19] responded that ″a fire alarm is a component of a fire sprinkler system,″ and that section 11.5 of the lease required the tenant to comply with all lawful requirements with regard to the fire sprinkler system.

Defendant has submitted the expert affidavit of Ariel Aufgang (Aufgang), a registered architect, who was affiliated with Hugo S. Subotovsky, A.I.A. LLC, which was the architecture firm responsible for creating the building plan and obtaining approvals for the building when it was constructed. It has also submitted the expert affidavit of Sam LaMontanaro (LaMontanaro), a licensed professional engineer employed by DiBari Engineering P.C., who was the project engineer for the building. Aufgang and LaMontanaro, in their respective affidavits, both explain that a fire sprinkler system consists of a water supply system, flow-valves, distribution piping, sprinkler heads and, in New York City, where the premises is being used as a supermarket, a fire alarm is required as part of the fire sprinkler system. Aufgang and LaMontanaro, in their sworn affidavits, both state that an application was filed on May 5, 2011 with the New York City Department of Buildings for the establishment of a supermarket on [*20] the first floor of the building, and the Building Code required a fire alarm system to be installed in the supermarket because it is a ″market.″ They note that the Key ***Food*** Supermarket is known as a Mercantile Group M classification under the New York City Building Code and, as such, it is required to have a fire sprinkler system, including a fire alarm system and sprinkler heads to comply with the Building Code and the Violation Order. They assert that the Violation Order is valid and has not been corrected.

Aufgang and LaMontanaro point to the fact that the Violation Order referenced Administrative Code § 901.5, which states that ″[it] shall be unlawful to occupy portions of a structure until the required fire protection systems within that portion of the structure have been tested and approved.″ They note that the fire protection systems within the supermarket have not been approved because there is a need for a fire alarm system, and that plaintiff, as the tenant, was unlawfully occupying the supermarket, without the required fire protection systems, which includes a fire sprinkler system and a fire alarm system with sprinkler heads and other devices. They also point out that Administrative Code § 907.2.7 **[*21]** requires that a fire alarm system be installed in Group M occupancies where, as here, the Group M fire area (i.e., the square footage of the supermarket) exceeds 12,000 square feet.

The court also notes that Administrative Code § 903.4, entitled ″Sprinkler system monitoring and alarms,″ provides that ″[a]ll valves controlling the water supply or sprinkler systems . . . on all sprinkler systems shall be electrically supervised by the fire alarm system.″ Administrative Code § 903.4.2, entitled ″Alarms,″ provides that **[**8]** ″[a]pproved audible devices shall be connected to every automatic sprinkler system,″ and that ″[w]here a fire alarm system is installed, actuation of the automatic sprinkler system shall actuate the building fire alarm system.″ Therefore, the Administrative Code specifically requires that a fire alarm system (which, as noted above, is required to be installed in Group M occupancies pursuant to Administrative Code § 907.2.7) be part of the automatic sprinkler system. Furthermore, Administrative Code § 901.6.1 ″requires that automatic sprinkler systems shall be monitored by an approved supervising station.″ Administrative Code § 902.1 defines a ″supervising station″ as ″[a] facility that receives signals and at which personnel are **[*22]** in attendance at all times to respond to these signals,″ and a ″supervisory signal″ is defined as ″[a] signal indicating the need for action in connection with the supervision of . . . fire alarm systems.″ Thus, these sections further demonstrate that a fire alarm system is required as part of an automatic sprinkler system.

Significantly, Hakim testified that he hired Edourd Paknia (Paknia), a professional engineer, who came to the supermarket three times to check the system (Hakim's Dep. Transcript at 42-43), and that Paknia told him that an alarm to make noise if the fire sprinklers went off was missing (*Id*. at 44-45). Defendant has submitted the deposition of Paknia, who, as a non-party witness, testified that the lease required the installation of a sprinkler system and a sprinkler alarm system (Paknia's Dep. Transcript at 14). He explained that a sprinkler system must be equipped with an alarm that automatically notifies a central station when the sprinkler system is activated as per code requirements (*Id*. at 65-67). Paknia admitted that he did not see any components of a fire alarm connected to any pipes that were going to the first floor of the supermarket, and that he did not observe a fire alarm **[*23]** connected to the sprinkler system that was going into the first floor of the supermarket (*Id*. at 65). Paknia further admitted that it was possible that the fire alarm was not connected to the supermarket sprinkler system and that it was in violation of the Building Code (*Id*. at 69-71). He denied stating in an earlier expert affidavit that he had observed an alarm in the supermarket that automatically notified the central station when the fire sprinkler was activated, and testified that he had only stated that the type of system that he observed would generally be equipped with such a system, but that he was not referring to this specific supermarket (*Id*. at 101-104).

In response to defendant's submissions, plaintiff does not dispute that since the occupancy of the portion of the building leased by it is a supermarket, a fire sprinkler system, which includes a fire alarm, is required by the New York

City Fire Department and the Building Code. Plaintiff also does not dispute that there is no fire alarm connection to the fire sprinkler system, and that the fire sprinkler system in the supermarket does not have a fire alarm. Thus, since the fire alarm is a component of and part of the fire sprinkler system, section 11.5 of the [*24] lease required plaintiff to install it, and since section 11.7 of the lease required plaintiff to comply with all legal requirements, this section required plaintiff to install the fire alarm to comply with the Violation Order and the New York City Building Code. Consequently, the court finds [**9] that contrary to plaintiff's contentions and its allegations in its first cause of action, plaintiff is not entitled to a declaration that the Notice of Default was defective for failing to refer to a lease clause which required it to install a fire alarm.

Plaintiff was, therefore, in default of the lease since it was in breach of the provision of the lease requiring it have a fire sprinkler system which complied with applicable law, i.e., which had a fire alarm. Plaintiff does not dispute that it did not commence to cure its default pursuant to section 23.1 of the lease following its receipt of the Notice of Default. It is also undisputed that defendant waited 27 days after serving the Notice of Default, until August 27, 2013, well beyond the 10-day period set forth in the Notice of Default and required by the lease, before terminating the lease.

Plaintiff further argues, however, that the Notice of Default was defective [*25] because it failed to notify it that under section 23.1 (b) of the lease, it could avoid default by starting and diligently pursuing a cure. As set forth above, section 23.1 (b) of the lease provided that if the tenant failed to perform any obligation under the lease, other than an obligation to pay rent, and "the failure cannot reasonably be cured by Tenant within ten (10) days after Landlord shall have given written notice of such failure, an event of default shall not occur if Tenant commences to cure such failure within the ten (10) day period and diligently thereafter prosecutes the cure to completion." Plaintiff alleges that it had a right to be told of this in the Notice of Default.

This argument is unavailing. Plaintiff has not cited to any authority requiring that the Notice of Default must advise it of this right. Plaintiff does not deny that it had a copy of the lease and that it could have ascertained this right by reading it. Moreover, plaintiff does not deny that it did not attempt to commence a cure within the 10-day period or at any time thereafter or that it ever prosecuted the cure to completion. Thus, the court finds that there is no merit to plaintiff's first cause of action insofar as it alleges [*26] that the Notice of Default is defective in this respect

Plaintiff additionally argues that the Notice of Default and Notice of Termination were invalid because they were both signed by Mr. Rosen of the Gary Rosen Law Firm, who was not specifically named in the lease as authorized to serve notices on behalf of defendant and since these notices were not accompanied by proof of his authority to bind defendant in the giving of these notices. It contends that this renders these notices legally deficient to terminate its tenancy pursuant to the holding in *Siegel v Kentucky Fried Chicken of Long Is. (108 AD2d 218, 223, 488 N.Y.S.2d 744 [2d Dept 1985]*, *affd 67 NY2d 792, 492 N.E.2d 390, 501 N.Y.S.2d 317 [1986])*.

Contrary to plaintiff's contention, however, the facts herein are readily distinguishable from the Appellate Division, Second Department's decision in *Siegel (108 AD2d at 221*). Indeed, the Appellate Division, Second Department, in *Matter of QPII-143-45 Sanford Ave., LLC v Spinner (108 AD3d 558, 559, 969 N.Y.S.2d 90 [2d Dept 2013])*, has recently observed that "*Siegel* is limited to the factual peculiarities' of the lease in that case." The lease in *Siegel (67 NY2d at 794*), unlike the lease in the case at bar, designated certain rights that were to be exercised by "the Landlord or

Landlord's agent[[**10]]'" and designated the landlord's attorney by name, while the three-day forfeiture notice that was the subject of that dispute was sent by another [*27] attorney, who was unknown to the tenant. Here, section 23.2 of the lease required the "Landlord . . . [to g]ive Tenant a notice of [its] intention to end the term of the Lease" if an event of default by the Tenant shall have occurred, and section 26.1 of the lease, under Article 26, entitled "Notice," stated that notice would be effective upon receipt by the Tenant of written notice. Thus, unlike the lease in *Siegel*, the lease did not expressly obligate defendant to act only personally or through an identified agent (*see* *Equator Intl., Inc. v NH St. Invs., Inc., 43 Misc 3d 251, 263, 978 N.Y.S.2d 817 [Sup Ct, NY County 2014]*). Consequently, although the notices were signed by Mr. Rosen, the failure to include evidence of his authority to bind defendant did not render defendant noncompliant with the requirements of any notice provision in the lease (*see* *Matter of QPII-143-45 Sanford Ave., LLC, 108 AD3d at 559-560*).

Moreover, the holding in *Siegel* has been held to be inapplicable where the landlord's attorney is not completely unknown to the tenant and the tenant had fair notice that the landlord's attorney was authorized to act on behalf of the landlord because they have had prior dealings (*see* *Karron v Karron, 41 Misc 3d 1215[A], 2981 N.Y.S.2d 636, 2013 NY Slip Op 51698[U], *2 [Dist Ct, Nassau County 2013]*). Here, Mr. Rosen was not a total stranger' to the lease or a person with whom plaintiff had never previously interacted (*see id.*). Rather, plaintiff was aware, [*28] at the time it received the Notice of Default and the Notice of Termination, that Mr. Rosen was defendant's attorney and authorized to act for it in matters concerning the leased premises (*see* *Prime Realty Holdings Co. v Alpine Group*, 225 AD2d 533, 534, 638 N.Y.S.2d 746 [2d Dept 1996], *lv denied* *88 NY2d 806, 670 N.E.2d 227, 646 N.Y.S.2d 986 [1996]*; *Matter of Owego Props. v Campfield, 182 AD2d 1058, 1059, 583 N.Y.S.2d 37 [3d Dept 1992]*). Hakim admitted, at his deposition, that he knew that Mr. Rosen was defendant's attorney since he had represented defendant at the closing of the lease with plaintiff (Hakim's Dep. Transcript at 45-46). In addition, section 26.2 of the lease specifically named Mr. Rosen as defendant's attorney, requiring a copy of any notices served by the Tenant upon the Landlord to be served upon him. Furthermore, the Notice of Default and Notice of Termination each expressly stated that "this [law] office is counsel to [defendant] and issues this letter with the authority of [defendant]." Plaintiff also indicated its knowledge that the Notice of Default was issued with defendant's authority because promptly after receiving it, Hakim called defendant and scheduled the meeting, which was held on August 5, 2013, to discuss the Notice of Default and the fire alarm issues. Thus, the fact that the Notice of Default and the Notice of Termination notices were signed by Mr. Rosen did not render them invalid (*see* [*29] *Matter of QPII-143-45 Sanford Ave., LLC, 108 AD3d at 559-560*; *Prime Realty Holdings Co.*, 225 AD2d at 534; *Matter of Owego Props., 182 AD2d at 1059*; *Karron, 41 Misc 3d 1215[A], 2981 N.Y.S.2d 636, 2013 NY Slip Op 51698[U], *2)*. Plaintiff's first cause of action is, therefore, wholly lacking in merit.

Plaintiff further contends (as alleged by it in its second cause of action) that the Notice of Termination was defective because it purported to be effective immediately, [**11] rather than providing for a five-day period pursuant to section 23.2 of the lease. Plaintiff argues that since it was not given an additional five days after the Notice of Termination was served to cure its default, this notice was ineffective. This argument by plaintiff must be rejected. It is undisputed that defendant did not serve the Notice of Termination before the expiration of the operable cure period, and that plaintiff was given 27 days, which was more than the required 10-day period to cure its default. Plaintiff does not allege that it sought or had the financial ability to cure its default in the five-day

period after it was served with the Notice of Termination. There is no affidavit from plaintiff, in which it asserts that it was willing to or had the financial ability to install a fire alarm. Furthermore, plaintiff does not state that it ever requested an extension of time to cure the default. Rather, Hakim admitted [*30] that plaintiff did not cure the default because it could not afford to do so (Hakim's Dep. Transcript at 25, 62). Thus, the fact that the Notice of Termination stated that it was effective immediately, rather than in five days, did not render it ineffective.

The court notes that plaintiff, in its third cause of action, seeks a declaration that sections 23.1 and 23.2 (a) of the lease provide for a legally impossible combined time period for the Notice of Termination and Notice of Default. This cause of action is similarly devoid of merit since, as plaintiff acknowledges, the lease provided that it could have commenced a cure within this time period, but it did not attempt to do so based upon a lack of financial ability.

Plaintiff, in its fourth cause of action seeking a declaratory judgment that defendant is equitably estopped from terminating the lease, alleges that it justifiably relied on defendant's words and conduct and was thereby misled into taking no action with respect to the Notice of Default based on the reasonable belief that defendant would not terminate the lease during negotiations. It further alleges that to permit defendant to terminate the lease would be fraudulent and unjust.

"The purpose [*31] of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted . . . Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v Mark D., 7 NY3d 320, 326, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006]*). Thus, the essential elements of an equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would reasonably induce reliance, and reliance by the party seeking estoppel to his or her detriment (*see Fisk Bldg. Assoc. LLC v Shimazaki II, Inc., 76 AD3d 468, 469, 907 N.Y.S.2d 2 [1st Dept 2010]*; *BWA **Corp***. v Alltrans Express U.S.A., 112 AD2d 850, 853, 493 N.Y.S.2d 1 [1st Dept 1985]; *Airco Alloys Div. v Niagara Mohawk Power **Corp**., 76 AD2d 68, 81-82, 430 N.Y.S.2d 179 [4th Dept 1980]*).

Here, plaintiff has not shown any detrimental reliance by it. While Hakim [**12] testified, at his deposition, that he was trying to negotiate with defendant's representatives to have them give him $10,000 towards the cost of the alarm system (Hakim's Dep. Transcript at 51-52) and plaintiff's complaint alleges that plaintiff had met with defendant's representatives on August 5, 2013, plaintiff admitted, [*32] in its complaint, that on August 9, 2013, defendant's representative had advised it that defendant would not work with it in any manner to cure the violation. Thus, defendant could not have induced reasonable reliance by plaintiff nor could plaintiff have reasonably relied upon any misrepresentation by defendant since, by plaintiff's own admissions, plaintiff knew from August 9, 2013 that defendant would not work with it to cure the violation, but did nothing to attempt to cure the default in the next 18 days prior to the time that it received the August 27, 2013 Notice of Termination. Significantly, plaintiff has not submitted any affidavit by Hakim or any representative, in which he sets forth how he justifiably relied upon defendant's words or conduct. Plaintiff, instead, argues that it could not have cured its default because the 10-day cure period ended on August 9, 2014, and that it could not have obtained a *Yellowstone* injunction. Plaintiff, though, does not assert that it was prepared or maintained the ability to cure the

default during that time period. Thus, the court finds that this cause of action is devoid of merit and cannot form a basis for granting plaintiff any declaratory [*33] relief.

Plaintiff's fifth cause of action, which also seeks a declaration that defendant is equitably estopped from terminating the lease, alleges that defendant obstructed any attempt to cure by refusing to provide filed plans required for the installation of a fire alarm system. Plaintiff, however, in its papers, does not pursue this allegation and makes no argument in this respect. Furthermore, Hakim, in his deposition, did not testify that this was the reason for plaintiff's failure to attempt to cure the fire alarm violation. Rather, Hakim, as noted above, testified that the only reason for plaintiff's failure to cure it was the lack of financial ability to do so (Hakim's Dep. Transcript at 62). Thus, this cause of action is unsupported and lacking in merit.

Both plaintiff and defendant, in their respective motions, seek to recover attorney's fees as the ″prevailing party″ pursuant to section 28.11 of the lease. This section provides:

″Attorneys' Fees. If any action or proceeding at law or in equity, (collectively, an action') shall be brought on account of any breach of or to enforce or interpret any of the terms, covenants, or conditions of this Lease, the prevailing party shall be entitled [*34] to recover from the other party as a part of such action, or in a separate action brought for that purpose, its reasonable attorneys' fees, costs and expenses incurred in connection with the prosecution or defense of such action. Prevailing party' within the meaning of this paragraph shall include, without limitation, a party who brings an action [**13] against the other after the other is in breach or default, including if such action is dismissed upon the other's payment of the full sums allegedly due or upon the other's performance of the covenants allegedly breached, or if the party commencing such action or proceeding obtains full relief sought by it in such action, whether or not such action proceeds to a final judgment or determination.″

Here, defendant is the ″prevailing party″ since this action was brought by plaintiff seeking to interpret the terms of the lease, whether it was in breach of the lease, and the notices required to be served thereunder, which caused defendant to incur attorneys' fees in connection with its defense. As such, defendant is entitled to recover its reasonable attorney's fees in accordance with section 28.11 of the lease. Defendant shall submit the affidavit of counsel, [*35] together with appropriate documentation, as to the basis of legal fees charged to defendant, on notice to plaintiff, within 30 days of the date of this decision. Plaintiff may respond to such demand for fees within 20 days thereafter. If the amount to be awarded as reasonable attorney's fees cannot be agreed, a hearing will be ordered.

CONCLUSION

Accordingly, plaintiff's motion for summary judgment in its favor and for an award of attorney's fees is denied. Defendant's motion for summary judgment is granted and it is declared that the Notice of Default, the Notice of Termination, and section 23.2 (a) of the lease are not invalid, and that defendant is not equitably estopped from terminating the lease. A hearing may be scheduled on the issue of the amount of defendant's reasonable attorney's fees incurred in connection with the defense of this action, following compliance with the above procedure.

This constitutes the decision, order, and judgment of the court.