SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------x

52 EAST 41 STREET, LLC & 52 LIBERTY STREET, INC.,

Plaintiffs,

Index No.: 651401/10

-against-

DECISION & ORDER

NYC VALUE ADDED I LLC,

Defendant.

----------x

SHIRLEY WERNER KORNREICH, J.:

Plaintiff 52 Liberty Street, Inc. (52 Liberty) moves for a *Yellowstone* injunction.[1] It asks the court to toll its time to cure the alleged commercial lease defaults appearing in a July 21, 2010 Notice to Cure sent by defendant NYC Value Added I LLC (Value Added), and for a preliminary injunction to enjoin Value Added from terminating the lease for any of the grounds appearing in said Notice to Cure, pending the determination of this motion and any time thereafter set by the court to permit 52 Liberty to cure said alleged defaults. Originally, this application was made on behalf of both plaintiffs, but pursuant to a stipulation dated October 8, 2010, it is now made only on behalf of 52 Liberty, the assignee of plaintiff 52 East 41 Street, LLC (52 East). Motion, Ex. G.

Value Added cross-moves, pursuant to CPLR 3212, for partial summary judgment on its counterclaims and to dismiss the Second and Third Causes of Action appearing in plaintiffs' Verified Complaint.

---

[1] *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968).

On October 28, 2010, this court granted plaintiffs a preliminary injunction on this matter. A hearing on this motion and cross motion was held on January 18, 2011.

I. Background

Value Added is a limited liability company organized pursuant to the laws of the State of Delaware, whose members are USA Value Added I LLC (USA Value Added), another Delaware limited liability company, which owns 75% of Value Added, and 52 East, which owns the remaining 25% of Value Added. On March 27, 2007, Value Added leased the Dylan Hotel, located in New York City, to 52 East, for a period of 20 years. Motion, Ex. D. The lease was signed on behalf of Value Added by both Losan Hotels World Value Added I, S.L. (Losan), a Spanish entity, and 52 East. Cesar Losada (Losada), Losan's chairman, signed on behalf of Losan. Losada also was the CEO of Value Added and a member of its board. Both Hotels Turistos Unidos, SA (HOTUSA), a Spanish entity, indicating that it was 52 East's sole member, and Amancio Lopez Seijas (Lopez), HOTUSA's chairman and CEO, signed on behalf of 52 East as landlord. *Id.* Lopez also signed, in his representative capacity, for HOTUSA, on behalf of 52 East as the tenant of the lease. *Id.*

Insurance CoverageProvisions

Pursuant to section 12 of the lease, tenant, 52 East, was to procure and maintain the following insurance: (1) a policy covering the property; (2) a policy covering the hotel contents; (3) a policy for business interruption sufficient to cover rent, leasehold mortgage payments, real estate taxes, hazards and maintenance; (4) workers compensation; (5) comprehensive commercial general liability; and (6) a dram shop (liquor liability) policy. This lease provision required that the insurance name both 52 East and Value Added as named insureds and that the Dylan hotel be

provided coverage for a minimum of $20,000,000.00.

Budget Provisions

Section 1 (F) of the lease states:

> "Tenant shall submit to Landlord on or before November 1 of each year of [*sic*] this Lease shall be in effect, an 'Annual Budget' for the next succeeding Fiscal Year setting forth a budget for replacement of furniture, fixtures and equipment and additional capital expenditures at the Premises. Each such Annual Budget shall specify material assumptions contained therein and shall be sufficiently detailed so as to allow for the reasonable review thereof. Landlord shall submit comments, if any, to the Annual Budget within fifteen (15) days of the receipt thereof. Tenant shall consider Landlord's comments and discuss any comments that Tenant does not wish to include in the Annual Budget. If Landlord and Tenant cannot come to an agreement on the Annual Budget by December 15 of such year, Tenant's decision shall be final, and Landlord shall be bound by the Annual Budget of Tenant; provided that Tenant's decision will instead be final with respect to the amount of reserves for FF&E after the fourth Lease Year."

Renovation Projects

Section 8 (C) of the lease provides that Value Added would make available to 52 East, up to $3,000,000.00 for a renovation program, reasonably agreed upon by the parties, to address needed structural or other major repairs discovered by Value Added, as well as for other repairs that both parties agreed were necessary. The parties were required to cooperate on this renovation program and, to that end, within 30 days after the rent commencement date, 52 East was to provide Value Added 'with a complete budget and detailed' proposed budget for the renovations. Lease, § 8 (C) (1). After this budget was submitted, Value Added had 60 days to approve it, provide comments or to submit an alternative renovation plan and budget. *Id.* Subsequent to the agreement on these renovations, Value Added was either to pay 52 East's bills or reimburse 52 East for the funds spent on the renovations. Lease, § 8 (C) (2).

Guaranty and Pagaré

Section 20 of the Lease mandates that, as a condition precedent to the effectiveness of the lease, 52 East was to provide HOTUSA, Value Added's sole member, as a guarantor, the guaranty secured by a "Pagaré," a Spanish document, by which 52 East was to provide:

> "in the aggregate amount of one (1) year of Basic Rent and issued by Hotusa (the 'Pagaré') in connection with the execution of this Lease. Nothwithstanding anything to the contrary in this Agreement, this Lease shall not be effective and Tenant shall have no right hereunder if Parent fails to execute the Guaranty and provide the initial Pagaré as of the date of entering this Lease and in the terms and conditions agreed."

Lease, § 20 (A).

On March 27, 2007, Lopez signed the guaranty on behalf of HOTUSA, by which instrument HOTUSA "unconditionally and irrevocably" guaranteed, among other things, payment of all the types of rent set forth in the lease, according to all lease provisions dealing with such rents, including all covenants and obligations of 52 East pursuant to the lease. Motion, Ex. F. This guaranty was to be construed and governed by the laws of the State of New York. *Id.* The guaranty provides that, before May 15, 2007, HOTUSA was to execute a Pagaré in the amount of one year's fixed rent. The Pagaré allegedly has a one-year life, and so, HOTUSA was required to renew the Pagaré on or before May 15 of each succeeding year of the lease. The guaranty stated that the Pagaré was:

> "an unconditional and irrevocable guarantee in the form of a Pagaré payable on first written demand in the aggregate amount of one (1) year of the Fix [*sic*] Rent for the next year as adjusted according to the Lease, with effects [*sic*] May 15 of the year that the Pagaré is being delivered and with a maturity date of one full year."

Guaranty, § 4.02 (C).

In May of 2007, HOTUSA executed a Pagaré, which was eventually released to it at its supposed maturity date in May of 2008. HOTUSA then executed a second Pagaré in May of 2008, with a May 15, 2009 maturity date, but that Pagaré was never released to HOTUSA. That was the last Pagaré executed by HOTUSA.

Section 18 (A) of the lease states:

> "Any one or more of the following events shall constitute an event of default under this Lease ('Event of Default'):
>
> * * *
>
> (9) Parent HOTUSA shall default under the Guaranty and/or under the Pagaré and such default shall continue through the end of any specified cure period in the Guaranty or in the Pagaré, as applicable."

Assignment

On April 24, 2007, 52 East assigned the lease to 52 Liberty, whose sole shareholder was 52 East. This assignment was allegedly permitted, pursuant to section 16 (E) of the lease.

According to the provisions of Value Added's "Amended and Restated Operating Agreement," if 52 East committed a default under the lease, and such default was not timely cured, Value Added "shall have the exclusive right and power to take whatever actions are desirable and necessary on behalf of the Lessor with respect to the Lease Agreement, in its sole discretion." Motion, Ex. E, Operating Agreement, § 5.1.2. However, section 5.2.1 of the Operating Agreement also states that all "Major Decisions" require written approval of the Board.

On July 21, 2010, Value Added sent 52 East a 30-day Notice to Cure, alleging the following defaults under the lease: 1) Assignment of the lease to 52 Liberty; 2) Failure to comply with section 20 of the lease in that 52 East allegedly did not execute the yearly Pagaré as

required; 3) Failure to provide Value Added with an Annual Budget, pursuant to section 1 (F) of the lease; 4) Failure to cooperate with Value Added with respect to the renovation program; and 5) Failure to provide copies of certificates of insurance with respect to the insurance policies required under section 12 of the lease. Motion, Ex. A. On August 24, 2010, Value Added extended the expiration date of the Notice to Cure through and including September 14, 2010. Motion, Ex. M.

Previously, on December 23, 2009, Value Added sent 52 East a Notice to Cure based on rent due and owing, which resulted in Value Added instituting an action against HOTUSA on its guaranty. On June 11, 2010, Value Added again wrote to 52 East, 52 Liberty, HOTUSA and Lopez, stating that rent was due and owing, and providing the parties 15 days in which to cure the default. However, by letter dated July 14, 2010, Value Added notified the parties that a new Notice to Cure would be issued and that the earlier notices would be withdrawn. Motion, Ex. N. That new Notice to Cure was the one sent on July 21, 2010.

II. The Instant Action

Also, on July 21, 2010, 52 East and 52 Liberty instituted the present action, asserting seven causes of action: (1) a declaration that the Notice to Cure is defective in that it was not approved in writing by the Board as required by Value Added's Operating Agreement; (2) a declaration that they are not in default of the lease; (3) an injunction to allow plaintiffs time to cure any defaults of the lease, should the court find them in default; (4) an accounting for 52 East's earnings and profits from Value Added as a 25% owner thereof; (5) damages with respect to the earnings and profits due to plaintiffs from the operation of Value Added; (6) establishment of a constructive trust for plaintiffs' benefit for the 25% of the earnings and profits of Value

Added; and (7) reimbursement for expenses incurred by plaintiffs in the repair and maintenance of the leased property. The first cause of action was withdrawn. The only causes of action under consideration with respect to the instant motion and cross motion are the second and third causes of action concerning the Notice to Cure.

Plaintiffs' Contentions

52 Liberty first contends that the Notice to Cure is defective because it was addressed to 52 East, and 52 East had previously assigned the lease to 52 Liberty, allegedly with Value Added's consent. Motion, Ex. D, Assignment of Lease. In addition, 52 Liberty argues that the Notice to Cure only states that, if the alleged defaults are not cured within the 30-day time period, "the Lessor will serve upon you a notice stating that is has the right to immediately terminate the Lease," but does not state unequivocally that Value Added will automatically exercise its right to terminate the leasehold.

Second, 52 Liberty maintains that the alleged insurance default has been cured by their turning over to Value Added the certificates of insurance requested in the Notice to Cure. However, the court notes that the insurance policy provided with this motion indicates that the insurance policy period is from June 15, 2010 to June 15, 2011. Motion, Ex. L.

Third, with respect to the Pagaré, 52 Liberty avers that, according to the lease, 52 East, as the tenant, was only required to execute one Pagaré, in 2007, as a condition precedent to the commencement of the leasehold; thereafter, executing the Pagaré was the obligation of HOTUSA, as a condition of its guaranty, not the obligation of 52 East or 52 Liberty as its assignee, as the tenant. Fourth, 52 Liberty contends that it has provided a budget to Value Added with respect to the renovation program (motion, Ex. K), with varying proposals totaling in excess

of $2,000,000.00, but that it is Value Added that has failed to fulfil its lease obligations by refusing to cooperate with plaintiffs on this matter, and in failing to reimburse plaintiffs for expenses incurred in maintaining and repairing the premises, said expenses totaling $468,744.13.

Lastly, 52 Liberty maintains that it has paid all rents due and owing, based on a reduced rent accorded them by Losada on behalf of Value Added in a Commitment Agreement. In conclusion, 52 Liberty states that, should the court find that the alleged defaults have not been cured, it is ready and willing to do whatever is ordered to cure said defects.

Defendant's Opposition and Cross Motion

Defendants state that by an October 8, 2010 stipulation, the parties agreed that the assignment by 52 East to 52 Liberty was proper. Also, the Notice to Cure was amended to state that, should the defaults not be cured within the 30-day time period, Value Added will serve a Notice to Terminate. Cross Motion, Ex. D. Hence, the first cause of action asserted by plaintiffs and plaintiffs' procedural objections to the Notice to Cure were both withdrawn. *Id.*

Value Added argues that this, and various other proceedings currently ongoing around the world, were caused by the bad faith of Losada. Specifically, it alleges that Losada, while a member of Value Added's board of directors, embezzled funds, threatened personnel and lowered tenants' rents for properties leased by Value Added without authorization. It states that, as a result, Losada is currently under criminal indictment in Spain. One example of Losada's unauthorized acts cited by Value Added, appearing in the affidavit of Ferran Sanfelimon, the managing director of the Dylan Hotel, is an alleged Commitment Agreement[2] to reduce the rent

[2] This Commitment Agreement also provides Losan a five-month option to purchase a majority interest in a number of hotels owned by HOTUSA, and includes a financing provision; however, these other provisions are not relevant to the issues presented by the instant motions.

on the lease of the Dylan Hotel. Not only was this Commitment Agreement unauthorized, argues Value Added, but, additionally, that Commitment Agreement does not reduce plaintiffs' rent, because it was based on a financing condition that never occurred. According to Value Added, plaintiffs have been benefitting from Losada's unauthorized acts by paying rent far below the rent due pursuant to the lease.

With respect to the Pagaré, section 18 (A) (9) of the lease, previously quoted, specifically states that a default under the lease includes a failure by HOTUSA to maintain the requisite annual Pagaré, which it admittedly has failed to do. Therefore, even though the Pagaré provisions appear in the guaranty, HOTUSA's failure to meet those guaranty obligations constitutes a default under the lease. Value Added asserts that this default is incurable, since it applies to prior years for which a Pagaré can no longer be issued.

In addition, Value Added maintains that plaintiffs never actually provided it with the renovation budgets required under the lease. It contends that the documents provided by plaintiffs are only proposals from various contractors, and do not include an actual budget.

Most importantly, Value Added contends that plaintiffs have never provided the insurance mandated by the lease, an incurable default. The insurance policy provided by 52 Liberty in conjunction with this motion indicates a commercial general public liability insurance policy with a coverage of $25,000,000.00 for two hotels, the Dylan and Eurostars Wall Street. Value added in not named as an insured.

In its answer, Value Added has asserted five counterclaims for: (1) declaratory judgment as against 52 Liberty that HOTUSA's failure to execute the required Pagarés for 2009 and 2010, constitute an incurable default of the lease; (2) alternatively, a declaration against 52 Liberty,

that it has defaulted under the lease: by its failure to pay all rent due and owing; by HOTUSA's failure to provide annual Pagarés; by its failure to provide annual budgets; by its failure to cooperate in good faith with respect to the renovation program and budget; and by failing to procure the requisite insurance mandated by the lease; (3) ejectment against 52 Liberty, John and Jane Doe; (4) breach of contract as against 52 Liberty for the aforementioned defaults and for breach of the covenant of good faith and fair dealing; and (5) attorney's fees, as against 52 Liberty, pursuant to section 18 (J) of the lease.

Plaintiffs' Reply

In reply 52Liberty has provided the affidavit of Javier Szarfer (Szarfer), the chief financial officer and member of the board of HOTUSA. Szarfer attests that HOTUSA is in compliance with its obligations under the guaranty with respect to the Pagaré by executing a Pagaré in 2007 and another in 2008. He claims that the 2008 Pagaré is still in force and effect. Reply, Ex. E. Further, plaintiff argues that since 52 Liberty paid all of the rent for which it was invoiced, it is not in default and that the 2008 Pagaré should have been released to HOTUSA once the full rent for that year was paid by 52 Liberty. Reply, Ex. H, Rent Invoices. In addition, Szarfer says that the 2008 Pagaré became effective on its maturity date of May 15, 2009, and could be presented for full payment anytime thereafter, so that Value Added was fully protected. This assertion is substantiated by an opinion affidavit regarding the Spanish law with respect to Pagarés by Genis Marfa Pons, State Attorney of Spain. Therefore, since the 2008 Pagaré was neither returned nor presented for payment, 52 Liberty states that HOTUSA is relieved of executing additional Pagarés. Further, even if the court were to find that HOTUSA's failure to execute Pagarés for 2009 and 2010 was a default, 52 Liberty maintains that such default is

curable. Additionally, 52 Liberty maintains that the Notice to Cure is defective with respect to the Pagarés, since it failed to specify in which years the alleged default occurred and refers to section 20 of the lease rather than section 18 (A) (9), which concerns the Pagarés.

Szarfer also contends that plaintiffs did provide the renovation budget and that plaintiffs have provided certificates of insurance to evidence that they have met the insurance requirements of the lease. Reply, Ex. B. The court notes that this certificate of insurance is dated November 1, 2010, and indicates insurance coverage for the period commencing June 15, 2010.

Value Added also has included the affidavit of Pedro J. Arazuri, a Spanish attorney, who opines that, at the times in question, Losada was still acting in his lawful representative capacity, since his authority was not revoked in the Commercial Register nor was it personally revoked, orally or in writing, to Losada.

Value Added's Reply

Value Added has provided the affidavit of Miguel Troncoso Ferrer, an attorney licensed to practice in Spain and Belgium. He opines that HOTUSA's position regarding the Pagarés has no basis in Spanish law and that it was never relieved of its obligation to execute annual Pagarés. Value added asks that the court direct 52 Liberty immediately to provide Pagarés for 2009 and 2010.

Again, Value Added maintains that 52 Liberty is in default of its rent obligations, because the Commitment Agreement allegedly entered into with Losada was unauthorized and that the reduced rent it has been paying pursuant to the purported Commitment Agreement, is substantially less than the rent stated in the lease. Further, it notes that purported agreement was never signed by either 52 East or 52 Liberty, and so is invalid on that basis as well as Losada's

lack of authority.

III. DISCUSSION

Plaintiffs' motion seeking a *Yellowstone* injunction is denied.

> "The purpose of a *Yellowstone* injunction is to maintain the status quo until the merits of a landlord/tenant dispute are resolved in court. A tenant requesting a *Yellowstone* injunction 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 the termination of the lease, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises [internal citations omitted]."

Trump on the Ocean, LLC v Ash, 81 Ad3d 713, 716 (2d Dept 2011). If the tenant is incapable of curing the alleged default, it cannot establish its entitlement to *Yellowstone* relief. *JH Parking Corp. v East 112th Realty Corp.,* 298 AD2d 258 (1st Dept 2002).

The documents presented by 52 Liberty with respect to the insurance coverage mandated by the lease, evidence that the policies' coverage periods only started during the cure period, that they were prospective, and that they did not comport with the specific requirements of covering the Dylan hotel for a minimum of $20,000,000.00. 52 Liberty has not provided any evidence of coverage for the periods 2007 until the middle of 2010. Nor does the coverage provide all of the types of coverage required or include Value Added as an insured.

The facts presented indicate

> "that plaintiffs had not previously and continuously maintained insurance coverage as required by their commercial lease ... and, in these circumstances, [is] an incurable violation that is an independent basis for the denial of *Yellowstone* relief. Plaintiffs' attempt to demonstrate that their ability and readiness to cure the alleged violation by procuring, during the cure period, insurance coverage prospectively for the remaining [period] of their lease term is unavailing, as such policy does not protect defendant against the unknown universe of any claims arising during the period of no insurance

coverage [internal citations omitted]."

Kyung Sik Kim v Idylwood, N.Y., LLC, 66 AD3d 528, 529 (1st Dept 2009); *Kramer v Bohensky*, 27 Misc 3d 1237(A), 2010 NY Slip Op 51089(U) (Sup Ct, Kings County 2010)(failure to provide insurance an incurable breach of the lease).

Based on the insurance default alone, 52 Liberty is not entitled to the prayed for *Yellowstone* relief, and the court need not address the other lease defaults alleged in the Notice to Cure. In addition, 52 Liberty's procedural arguments with respect to the form of the Notice to Cure have either been corrected by the stipulation between the parties, referenced above, or relate to defaults other than the one pertaining to insurance coverage.

As a consequence of the foregoing, plaintiffs' motion is denied. That branch of Value Added's cross motion seeking to dismiss the second and third causes of action asserted in the complaint is granted, since those causes of action seek a declaration that plaintiffs are not in default of the lease and that they be permitted time to cure any alleged defaults.

That portion of Value Added's cross motion seeking partial summary judgment on its counterclaims is granted in part and denied in part. "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).

Value Added's first counterclaim seeks a declaratory judgment that 52 Liberty breached the lease by failing to renew the Pagaré for years 2008 and 2009. According to the lease (§ 20 [A] [1)], the Pagarés are to be construed pursuant to Spanish law. Each side has provided affidavits from lawyers licensed to practice in Spain regarding whether the Pagaré needs to be renewed on an annual basis. The affidavits present conflicting analyses of Spanish law.

> "[T]he interpretation of [Spanish] law is an issue of fact that can be resolved at trial. 'The existence and contents of a foreign law become a triable issue of fact when their contents are not set forth in detail, where their existence is disputed, or where the accuracy of the translation of the same is raised' [internal citation omitted]."

Amsellem v Amsellem, 189 Misc 2d 27, 30 (Sup Ct, Nassau County 2001); *Werfel v Zivnostenska Banka,* 287 NY 91 (1941); *Bercholz v Guaranty Trust Company of New York,* 179 Misc 778, 779 (Sup Ct, NY County 1943)("Foreign law is a fact which must be proved and until proved it is impossible for this court to determine the legal effect thereof."). Therefore, since the issue of the necessity of renewing a Pagaré is dependent upon foreign law, and the parties have presented conflicting affidavits with respect to the effect of that foreign law, that portion of Value Added's cross motion seeking summary judgment on its first counterclaim is denied.

That branch of Value Added's cross motion seeking a declaration that 52 Liberty defaulted under the lease is granted, based on 52 Liberty's failure to acquire the appropriate insurance, as discussed above. Since it has been determined that 52 Liberty committed an incurable default by not procuring the insurance mandated by the lease, the court need not address the other grounds for the default asserted by Value Added in its cross motion.

That portion of Value Added's cross motion seeking an ejectment as against 52 Liberty, John and Jane Doe is granted.

> "In order to maintain a cause of action to recover possession of real property, a plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession [internal quotation marks and citation omitted]."

Merkos L'Inyonei Church, Inc. v Sharf, 59 AD3d 408, 410 (2d Dept 2009); *Jannace v Nelson, L.P.*, 256 AD2d 385 (2d Dept 1998).

It is noted that neither party provided any argument with respect to this counterclaim. Nonetheless, based on this decision, Value Added has the right to terminate the lease because of plaintiff's incurable default with respect to maintaining the requisite insurance during the entire period of the leasehold. Hence, Value Added is entitled to seek ejectment by means of a counterclaim to plaintiff's action. *See Clark Construction Corp. v BLF Holding Co.*, 28 AD3d 367 (1st Dept 2006). However, any warrant of ejectment is stayed pending the ultimate conclusion of this lawsuit.

That portion of Value Added's cross motion seeking summary judgment on its fourth cause of action for breach of contract is granted with respect to liability. This determination is based on the court's finding that 52 Liberty incurably defaulted on the lease with respect to the lease's insurance requirements. Lastly, the court denies that branch of Value Added's cross motion for summary judgment on its fifth counterclaim for attorney's fees as being premature, since the litigation is ongoing.

The court notes that the parties have only provided detailed arguments with respect to the

Pagaré and while the court has reviewed and analyzed those arguments, because it involves the interpretation and application of Spanish law, it would be improper for the court to base a decision on that factual issue in a motion for summary judgment. Accordingly, it is

ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that the branch of defendant's cross motion seeking summary judgment dismissing plaintiffs' second and third causes of action is granted and those causes of action are dismissed; and it is further

ORDERED that the branch of defendant's cross motion seeking summary judgment on its first and fifth counterclaims is denied; and it is further

ORDERED that the branch of defendant's cross motion seeking summary judgment on its second counterclaim is granted; and it is further

ADJUDGED and DECLARED that 52 Liberty Street, Inc. has defaulted under its lease with NYC Value Added I LLC; and it is further

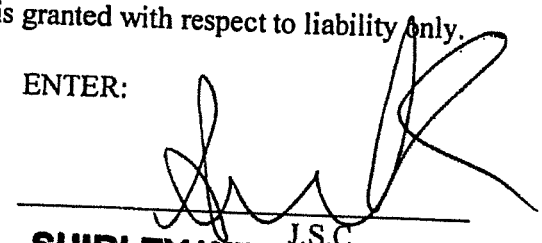
ORDERED that the branch of defendant's cross motion seeking summary judgment on its third cause of action for ejectment is granted; and it is further

ORDERED that a warrant of ejectment is stayed pending the ultimate outcome of this action; and it is further

ORDERED that the branch of defendant's cross motion seeking summary judgment on its fourth counterclaim for breach of contract is granted with respect to liability only.

Dated: May 6, 2011

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.