SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK, Plaintiff, against FC 42ND STREET ASSOCIATES, L.P., Defendant.	Index No. 451648/2017 (Hon. Charles E. Ramos) Mot. Seq. 002 **AFFIRMATION IN OPPOSITION TO DEFENDANT'S APPLICATION FOR A STAY OF ITS TIME TO SERVE PAPERS IN OPPOSITION TO THE CITY'S CROSS-MOTION**

MARK R. ZANCOLLI, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following to be true under the penalties of perjury:

1. I am a partner of the law firm of Carter Ledyard & Milburn LLP, counsel for plaintiff, the City of New York (the "City"), in this action. I submit this affirmation in opposition to the application by defendant, FC 42nd Street Associates, L.P. ("FC"), for a stay of its time to serve papers opposing the City's cross-motion (the "Stay").

2. The Stay should be denied because (a) neither the CPLR nor case law authorizes a party to prevent or delay another party from making a cross-motion; (b) FC already signed a stipulation agreeing to a briefing schedule for the City's cross-motion, and so waived any right it might have to delay such briefing; and (c) the City's cross-motion asking this Court to decide the issues presented as a matter of law is based on a long line of Court of Appeals and Appellate Division cases interpreting similar long term ground leases under similar conditions and could lead to judicial economy by requiring the Court to consider the relevant issues only once.

3. This declaratory judgment action seeks judicial construction of the term "Fair Market Value" as that term is used in a certain ground lease dated December 13, 1996 (as amended to date, the "Ground Lease"). Judicial resolution of this threshold matter of legal interpretation of the Ground Lease is necessary so that the parties' appraisers can properly prepare appraisals – and the arbitrator can properly render a decision[1] – regarding Fair Market Value of the land for the purpose of determining the amount of base rent under the Ground Lease for the next rental period in accordance with the Ground Lease's definition of Fair Market Value.

4. FC has advised the New York City Economic Development Corporation ("EDC") that, in determining the value of the land, on which the "Base Rent" for the upcoming "2nd Rental Period"[2] of the Ground Lease will be based, FC would have the appraisers take into consideration the existing subleases and actual rents being paid by some or all of FC's sublessees. The City's position is that the Ground Lease contains no such direction and that any valuation must value the Land and the New 42 Land without consideration of existing subleases, and that in arriving at a Fair Market Value for the Land and the New 42 Land, the appraisers must consider current market conditions, including market rents. This, and other disagreements between the parties, produce ground rent calculations by each party that differ by as much as a factor of ten. Accordingly, a justiciable controversy exists between the parties necessitating a judicial declaration of the correct meaning of the relevant terms of the Ground Lease.

5. The City filed its Summons and Complaint in this action on May 31, 2017 (NYSCEF Doc. No. 1), and FC filed its Answer on September 20, 2017 (NYSCEF Doc. No. 19).

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[1] The arbitration procedure for determining Fair Market Value is set forth in Section 3.01(c) of the Ground Lease. Ground Lease, § 3.01(c), at 39-43. The Ground Lease (sans exhibits) is attached as Exhibit A to the Complaint.
[2] Capitalized terms not otherwise defined herein have the meaning set forth in the Ground Lease.

6. On August 14, 2017, FC filed a motion to compel arbitration and stay this action (the "Motion to Compel Arbitration"; NYSCEF Doc. Nos. 4-17).

7. On September 18, 2017, the parties entered into a stipulation agreeing to a briefing schedule with regard to FC's Motion to Compel Arbitration and the City's planned cross-motion for summary judgment (the "Cross-Motion for Summary Judgment"). See Exhibit A hereto, 9/18/17 Stipulation (NYSCEF Doc. No. 20). In that stipulation, FC agreed to serve its reply papers in support of its Motion to Compel Arbitration and its opposition papers to the City's Cross-Motion for Summary Judgment by October 18, 2017. Ex. A, at ¶ 4. FC did not object to the cross-motion in any way, so its application now to put off the briefing and submission of the cross-motion should be denied as any opposition to current briefing and submission has been waived.

8. FC's contention that requiring it to serve its opposition to the Cross- Motion for Summary Judgment would cause it to waive its right to compel arbitration and stay the proceedings (10/24/17 Mac Avoy Aff. of Emergency, ¶ 4) lacks merit, as the parties expressly agreed, in paragraph 6 of the 9/18/17 Stipulation, that FC's opposition to the Cross-Motion for Summary Judgment would not constitute such a waiver by stating as follows:

> The City shall not assert, and FC 42nd's service of an answer, its opposition to the City's cross-motion for summary judgment or, if it chooses to do so, FC 42nd's own application for summary judgment, shall not be deemed to constitute a waiver of FC 42nd's arbitration rights under the Ground Lease or a waiver of its Motion to Compel Arbitration, and shall not be deemed to be participation by FC 42nd in this litigation so as to constitute such a waiver.

Ex. A, at ¶ 6.

9. On October 4, 2017, the City filed its opposition to the Motion to Compel Arbitration and its Cross-Motion for Summary Judgment (NYSCEF Doc. Nos. 21-38), in

accordance with the briefing schedule in the 9/18/17 Stipulation. The Cross-Motion was filed pursuant to CPLR 2215, which authorizes a cross-motion anytime a motion is made, and provides that the cross-motion need not be responsive to the motion made by the movant. There is no statutory basis for preventing a party from making a cross-motion. After the Cross-Motion for Summary Judgment was filed, the parties entered into a stipulation on October 19, 2017 which further adjourned to October 25, 2017 the time for FC to serve its reply papers in support of its Motion to Compel Arbitration, and the time for FC to serve its opposition papers to the City's Cross-Motion for Summary Judgment, unless the Court directs otherwise (NYSCEF Doc. No. 39, at ¶¶ 2 and 3).

10. FC's claim that the City's Cross-Motion is too early and violates this Court's Practice Rule 5(f)(ii), because no note of issue has yet been filed (10/24/17 FC Memo of Law, at 5), results from a misreading of the Rule. CPLR R. 3212(a) provides that a party may move for summary judgment after issue has been joined by stating as follows:

> Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Here, issue was joined when FC filed its Answer on September 20, 2017 (NYSCEF Doc. No. 19), and therefore the filing of the City's Cross-Motion for Summary Judgment on October 4, 2017 complied with CPLR R. 3212(a). It is respectfully submitted that, when read together with CPLR R. 3212(a), this Court's Practice Rule 5(f)(ii) – which states that "**Summary judgment motions** should be initiated within 30 days after the filing the Note of Issue, unless otherwise directed" – does not set a 30-day window after a note of issue has been filed within which

summary judgment motions are required to be filed as FC contends, but instead sets a date of 30 days after the filing of a note of issue after which summary judgment motions should not be filed consistent with the first sentence of CPLR R. 3212(a). Accordingly, FC's contention that the Cross-Motion for Summary Judgment violates this Court's Practice Rule 5(f)(ii) because a note of issue has not been filed lacks merit.

11. The City's burden on the Cross-Motion for Summary Judgment is to show that there is no triable issue of fact concerning the meaning of the term "Fair Market Value" in the Ground Lease, and that the Court should decide the issue as matter of law. With respect to the upcoming 2nd Rental Period at issue, Section 3.01(c)(vi) of the Ground Lease defines "Fair Market Value" as follows:

> "**Fair Market Value**" means (A) with respect to the 2nd Rental Period and the 3rd Rental Period, the most probable price in terms of money which a conveyance of the **fee simple interest** in the Land and the New 42 Land would bring in a competitive and open market under all conditions requisite to a fair sale **considering that the Land and the New 42 Land enjoys the benefits and the rights accorded by, and is subject to the restrictions and limitations on the development and use of the Land and the New 42 Land contained in, this Lease, including DUO**; (emphasis added).

As demonstrated in the City's memorandum of law in support of its Cross-Motion for Summary Judgment (the "City's S/J Memo of Law"), because the Ground Lease requires that "Fair Market Value" be determined by considering "the fee simple interest in the Land and the New 42 Land," subleases are not to be considered as a matter of law. See Exhibit B hereto, the City's S/J Memo of Law, at Point II, pages 21-24 (NYSCEF Doc. No. 38). Accordingly, FC's request for a Stay should be denied because there is no triable issue of fact as to the interpretation of the term "Fair Market Value" in the Ground Lease, and its interpretation can and should be determined by this Court on summary judgment.

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