

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of August, 2019.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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73 EMPIRE DEVELOPMENT LLC,

Plaintiff(s),

- against -

MDL EQUIPMENT DEVELOPMENT LLC,

Defendant(s).

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The following e-filed papers numbered 88 to 172 read herein:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed_____

Opposing Affidavits (Affirmations)_____

Reply Affidavits (Affirmations)_____

DECISION AND ORDER

Index # 509099/2018

Mot. Seq. 2 & 3

Papers Numbered

88-133; 138-161

166 - 172

After oral argument and upon the foregoing papers, Defendant's motion for summary judgment dismissing Plaintiff's complaint is granted and Plaintiff's cross-motion for summary judgment is denied.

It is undisputed that Plaintiff is in default of the subject lease insofar as Plaintiff failed to have requisite insurance coverage for at least one month and, more significantly, failed to timely commence and complete development of the subject premises. The lease required Plaintiff to "diligently proceed with the construction of the Approved Improvements...on or before the date which is thirty (30) months following the Commencement Date." Since the Commencement Date was on or about March 15, 2014, Plaintiff was obligated to have construction completed in or around September 2016. When Plaintiff commenced this action in May 2018, construction of the subject premises had yet to even begin.

Moreover, there is no issue as to waiver under these circumstances. The fact that Defendant waited two years to issue a notice of default, which is Plaintiff's only argument

in support of waiver, cannot constitute waiver as a matter of law under these circumstances. “Waiver, which is the voluntary and intentional relinquishment of a contract right, ‘should not be lightly presumed’ and must be based on a clear manifestation of intent to relinquish a contractual protection” (*Stassa v Stassa*, 123 AD3d 804, 805 [2d Dept 2014]). Here, there is no clear manifestation of intent to relinquish a contractual right by Defendant. Plus, Plaintiff’s default herein is significant and material. A finding of waiver herein would constitute a re-writing of the parties’ contract by providing Plaintiff unlimited time in a 49-year lease to develop the property despite the fact that the subject lease specifically provided Plaintiff with only 30 months.

Based on the foregoing, Defendant’s motion for summary judgment is granted. The issue of Defendant’s damages, including attorneys’ fees, shall be referred to a special referee to hear and report. A referral order is executed simultaneously herewith.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.