At an IAS Term, Part 42 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 1st day of March, 2007.

P R E S E N T:

HON. IRA B. HARKAVY,

Justice.

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752 PACIFIC LLC, et ano.,

Index No. 32819/03

Plaintiffs,

- against -

PACIFIC CARLTON DEVELOPMENT CORP., et ano.,

Defendants.

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The following papers numbered 1 to 9 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	6, 7
Affidavits (Affirmations)	
Other Papers: Memoranda of Law; Transcript of Proceedings	5, 8, 9

Upon the foregoing papers, defendants Pacific Carlton Development Corp. (Pacific Development) and 535 Carlton Avenue Realty Corp. (Carlton Realty) (collectively "defendants" or "landlords") move for an order: (1) pursuant to CPLR 3211 (a) (7), dismissing plaintiffs' first cause of action for failure to state a claim, (2) pursuant to CPLR 3212, granting defendants partial summary judgment on their third and fourth counterclaims against plaintiffs, (3) pursuant to CPLR

6314, vacating the *Yellowstone* injunction issued on September 11, 2003 and modified in May 2006, (4) pursuant to RPAPL 221, restoring defendants to possession of the subject premises, and (5) pursuant to RPAPL 601, awarding defendants the fair market rental value of plaintiffs' use of the subject premises. Plaintiffs 752 Pacific LLC (752 Pacific) and Pacific Street Park Corp. (Pacific Street) cross-move for an order, pursuant to CPLR 3212, granting summary judgment against defendants on plaintiffs' first and third causes of action and dismissing defendants' third and fourth counterclaims.

Background

The instant motion and cross motion arise from the allegedly improper assignment of two commercial leases to AY 535 Carlton, LLC ("AY Carlton"), a company associated with the proposed Atlantic Yards development project in Brooklyn.

On October 27, 1999, Pacific Development, as landlord, entered into a long-term commercial lease agreement with 752 Pacific for a six-story building located in Brooklyn, and Carlton Realty, as landlord, entered into a similar long-term commercial lease agreement with Pacific Street for a parking lot also located in Brooklyn (collectively "the leases"). In addition, on the same date, Jeshayahu Boymelgreen executed a personal agreement in which he "irrevocably and unconditionally guarantee[d] to Landlord payment when due . . . of any and all Obligations to the Landlord" which accrued within the first six years of the leases.

Each of the leases requires the tenant to obtain the written consent of the landlord before assigning the lease, providing, in relevant part:

> "Without the written consent of Landlord first had and received in each instance, which consent shall not be unreasonably withheld or delayed, neither this Lease nor the interest of Tenant hereunder shall be sold, mortgaged, encumbered,

assigned or otherwise transferred . . . nor shall Tenant sublet the Premises except for Space Leases. . . .

"[In addition], [a]t the time of any assignment or subletting, this Lease must be in full force and effect without any breach or default thereunder on the part of the Tenant. . . .

"Tenant's failure to comply with all of the provisions and conditions of this Article and all of the subsections hereof shall (whether or not Landlord's consent is required), at Landlord's option, render any purported assignment or subletting null and void and of no force and effect" (Article 14).

Each lease also specifies that the tenant's sole remedy in the case of the landlord's unreasonable refusal to consent is to seek to compel consent by providing, in pertinent part:

"Whenever Landlord is required hereunder not to act unreasonably or not to unreasonably withhold or delay its consent or approval, Tenant's sole remedy for Landlord's failure to act reasonably shall be an equitable action for specific performance and under no circumstances shall Landlord be liable for any damages due to such failure" (Section 30.06).

The leases define an unauthorized assignment, among other things, as an event of default, providing that a default occurs when:

"This Lease or the estate of Tenant hereunder shall be transferred or shall pass to or devolve upon any person or party whether by operation of law or otherwise, except in a manner herein permitted" (Section 22.01 [c]).

In the case that a defined event of default occurs, the leases allow the landlords to terminate the leases upon written notice to the tenants:

"If an Event of Default shall occur (other than under 22.01 (a) or (b) [nonpayment of rent]), Landlord, at any time thereafter, may at its option give written notice to Tenant stating that this Lease and the term hereby demised shall expire and terminate on the date specified in such notice (which shall be no earlier than 5 days after the mailing of said notice), and upon the date specified in such notice, this Lease and the term hereby demised, and all rights of the Tenant under this Lease shall expire and terminate as if that date were the date herein definitely fixed for the termination of the term of this Lease, and Tenant shall quit and surrender the Premises but Tenant shall remain liable as hereinafter provided" (Section 22.02).

On or around August 27, 2003, landlords sent plaintiffs a Notice of Default and Demand for Indemnification outlining several alleged defaults by plaintiffs, including subletting the use of the roof and failing to pay additional security. Plaintiffs thereafter brought the instant action, by summons and order to show cause, seeking, among other things, a *Yellowstone* injunction tolling plaintiffs' time to cure.[1] On September 11, 2003, a temporary restraining order ("TRO") was issued, granting plaintiffs' request for a *Yellowstone* injunction, which prohibited landlords from terminating the leases, interfering with plaintiffs' tenancies, or attempting to recover possession of the premises.

In November 2003, the parties, seeking to resolve their dispute without litigation, stipulated that plaintiffs' motion by order to show cause would be marked off the calendar. However, the stipulation also provided that the TRO would be continued, that plaintiffs would continue to pay the fixed monthly rent, and that either party could restore the motion by written notice.

Approximately a year and a half later, on March 31, 2005, Pacific Street and 752 Pacific entered into an option agreement with AY Carlton giving it an irrevocable option to acquire all of each tenant's rights, title and interest in its lease. The option agreement notes that an "affiliate" of AY Carlton "intends to be the master developer [] of the proposed 'Atlantic Yards Project'," a development project in Brooklyn associated with Bruce Ratner and the Forest City Ratner Companies. Also on March 31, 2005, the tenants each executed an assignment of their respective leases to AY Carlton, pursuant to the option agreement. The assignment agreements were allegedly placed in escrow, and a memorandum of the option agreements was recorded with the City Register.

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[1] "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" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]; *see also First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968]).

The tenants did not seek written permission from the landlords to enter into these agreements.

The landlords allege that, on May 18, 2005, they met with Forest City Ratner's vice-president, James Stuckey, who "made [] a verbal offer to buy defendants' properties – which FCRC [Forest City Ratner Companies] refused to confirm in writing – coupled with the threat that, if defendants did not reach an agreement with FCRC, then ESDC [the Empire State Development Corporation] would take defendants' properties by eminent domain."[2] Thereafter, on or around October 3, 2005, the landlords sent a letter to the tenants indicating that the landlords had learned of the option agreement and asking to be provided with "full copies of the agreements entered into with the optionee."

On or around February 20, 2006, Pacific Street and 752 Pacific each sent a letter, dated February 16, 2006, to the landlords seeking written consent to assign their leases to AY Carlton. Attached to the letters were new assignment agreements, which they asked the landlords to countersign. The letters assert that AY Carlton is an affiliate of Forest City Ratner Companies and state that "upon acquiring a leasehold title to the Property, Assignee desires to finance and grant a mortgage lien on such leasehold interest." The letters provide little further information regarding the assignment; however, they state that "If you have any questions or requests for any additional information, please let us know."

The February 16th request letters were addressed and sent to an address in Brooklyn. However, in August 2000, the landlords had sent written notice to the tenants that the landlords' mailing address had changed to an address in Cedarhurst, New York. The landlords claim that they did not receive the request letters until March 10, 2006, due to this mistake.

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[2] Plaintiffs deny that they made any "threats" or raised the issue of condemnation.

Meanwhile, on March 2, 2006, the tenants chose to execute the assignments, which were then recorded on March 14, 2006. The tenants do not dispute that they executed the assignments without the landlords' written consent, nor do they assert that they made any attempt (other than the request letters) to contact the landlords before executing the assignments. Instead, AY Carlton states that, "Not having received any response to their joint request for the Landlords' consent, and confident that there is no reasonable basis for an objection by the Landlords to the assignments, the Assignors and the Assignee effectuated the assignments on March 2, 2006."[3]

On or around March 21, 2006, the landlords sent tenants a letter noting their February 16th letter requests. The landlords' letter states that the tenants had not provided "all pertinent information required to make a proper request." The letter asks for various information and documents, including financial statements for AY Carlton and Forest City Ratner Companies, the proposed financing and mortgage, a copy of any personal guarantee with which AY Carlton proposed to replace Mr. Boymelgreen's, and the plans for the use of the two premises. The letter further states that, "Meanwhile, you may not effectuate any such sale or assignment of the Leases, or financing and a mortgage lien thereupon, unless and until you receive the Landlords' written consent."

On March 22, 2006, defendants moved, by order to show cause, to restore this action and vacate the TRO. (In May 2006, the parties stipulated to restore the action to the calendar and to modify the TRO to the extent of allowing defendants to serve plaintiffs with notices related to the lease agreements.)

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[3] Similarly, in their complaint, plaintiffs allege that "Having received no response from the Landlords [to their February 16th letters], on March 2, 2006, the Tenants and the Assignee closed their transaction. The assignment and assumption agreements were released from the escrow, delivered to the Assignee and, on March 14, 2006, recorded in the office of the City Register of the City of New York."

On or around May 1, 2006, AY Carlton wrote to the landlords, informing them that the assignments had already been executed and providing responses to the landlords' request for information. Among other things, AY Carlton "decline[d] to provide" the financial statements of either AY Carlton or Forest City Ratner Companies, and stated that it no longer intended to finance the properties. The letter also asserted that, "[b]y its terms, Mr. Boymelgreen's guarantee does not apply to any obligations of the Assignors" that arise after the first six years of the leases (*i.e.*, after November 1, 2005), while Mr. Boymelgreen "presumably" remains responsible for any obligations accruing before that time. Thus, AY Carlton concluded, "Under these circumstances, there is no reason why the Assignors or the Assignee should be expected to provide the Landlords with a new guarantee to replace that of Mr. Boymelgreen." As for the future plans for the premises, the letter states that:

> "The Assignee [AY Carlton] and FCR [Forest City Ratner] hope to reach a mutually acceptable agreement with the Landlords for the acquisition of the Landlords' fee interest in these two properties. The Assignee and FCR hope that these properties will be incorporated in the proposed Atlantic Yards Arena and Redevelopment Project (the "Project"), and that the Landlords' interests in the properties either will be acquired by an affiliate of FCR pursuant to agreement or, upon completion of the public approval process in accordance with applicable law, by the Empire State Development Corporation pursuant to its powers of eminent domain. Until that occurs, it is the Assignee's intention to operate the properties lawfully and in accordance with the Ground Leases. No decisions have been made as to the operation of these properties in the event that the Project is not approved, except that the Assignee will take all reasonable steps necessary to ensure that they are operated lawfully and in accordance with the Ground Leases."

On or about June 9, 2006, the landlords sent a letter to the tenants stating that "the Landlords hereby decline to consent to your sale and assignment of the Leases to [AY Carlton]. . . for the reasons set forth in their . . . order to show cause [motion papers] dated March 22, 2006." On or around June 16, 2006, the landlords sent notices of termination to each of the tenants. The notices

state that the tenants violated the leases by assigning the leases without the landlords' written consent "and without first complying with the conditions set forth in Article 14.03 [requiring, among other things, that there be no existing default or breach of the lease by the tenant at the time of any assignment]." The notices further state that the landlords were exercising their option, under Sections 22.01(c) and 22.02, to terminate the leases effective as of June 23, 2006, and requiring the tenants to vacate and surrender possession of the premises on or before that date. Simultaneously, the landlords served each tenant with a notice to cure, alleging various other defaults on each of the properties.

On or about July 14, 2006, plaintiffs served a complaint upon defendants. Plaintiffs' first cause of action seeks a judgment declaring that: the tenants are not in default, the landlords' refusal to consent to the assignments of the leases is unreasonable and in violation of the leases, and the notices of termination are null and void. That cause of action also seeks to enjoin the landlords to consent to the assignments and to award the tenants compensatory damages. As part of that cause of action, the complaint asserts that AY Carlton has "assured the Landlords that it is financially responsible, as it is affiliated with both Forest City Ratner, a major real estate development and management business, and Forest City Enterprises, Inc., a publicly traded corporation with assets of $7.3 billion as of January 31, 2005 (according to its Form 10-K) and a market capitalization of $4.9 billion as of April 27, 2006." The complaint further alleges that the landlords are only withholding their consent "to increase the value of their fee interests in the properties in negotiations with Forest City Ratner or in contemplation of a condemnation by ESDC [Empire State Development Corporation]." In addition the plaintiffs state that "[n]otwithstanding the unreasonableness of the Landlords' refusal to consent to the assignments, the Tenants and the Assignee would be willing and

able to cancel and unwind the assignments in the event that the courts determined that the assignments were improper." The second and third causes of action deal with the other alleged events of default contained in the notices to cure.

On or about August 7, 2006, defendants answered the complaint and brought seven counterclaims against plaintiffs. The third and fourth counterclaims seek, among other things, a judgment stating that plaintiffs violated their leases and are in default based upon the assignment of the leases, and an order vacating the *Yellowstone* injunction and awarding defendants "fair market rental value of [plaintiffs'] use and occupancy of the [premises] in an amount to be determined at trial from and after March 2 or June 23, 2006, whichever date the Court deems just and proper, plus interest."

On or about September 18, 2006, defendants brought the instant motion, by order to show cause, asking the court: (1) to dismiss plaintiff's first cause of action for failure to state a claim, (2) to grant partial summary judgment on defendants' third and fourth counterclaims "declaring that the plaintiffs' assignment of their respective leases without defendants' prior written consent constituted violations and defaults" of the leases, (3) to vacate the *Yellowstone* injunction issued in September 2003 and modified in May 2006, (4) to restore defendants to possession of the premises and eject plaintiffs, and (5) to award defendants fair market rental value from and after either March 2 or June 23, 2006. On or about October 17, 2006, plaintiffs cross-moved for summary judgment: (1) granting plaintiffs' first cause of action, (2) dismissing defendants' third and fourth counterclaims, and (3) granting plaintiffs' third cause of action, which seeks to compel defendant Carlton Realty to consent to the demolition of a free-standing wall.

The Parties' Contentions

Defendants argue that plaintiffs violated Section 14.01 of the leases by assigning the leases to AY Carlton (in both 2005 and 2006) without having first obtained the landlords' written consent. In particular, they note that the contract language explicitly states that "[w]ithout the written consent of the Landlord *first* had and received in each instance," the tenants shall not assign their interests in the leases (emphasis added). Defendants further contend that said violation is a default of the leases pursuant to Section 22.01 (c), which defines the transference of plaintiff's interest in the lease in an unauthorized manner as an event of default. They also assert that plaintiffs had no right to cure that default pursuant to Section 22.02, which gives the landlords the option to terminate the leases, upon written notice to tenants, for a defined event of default. Defendants thus argue that the assignments constituted an incurable default, and so the *Yellowstone* injunction should be vacated and the leases terminated (*see e.g. Zona, Inc. v Soho Centrale, L.L.C.*, 270 AD2d 12, 14 [2000] [unauthorized lease assignment constituted incurable default]; *Pergament Home Ctrs., Inc. v Net Realty Holding Trust*, 171 AD2d 736, 737 [1991] [*Yellowstone* injunction properly denied where tenant had no ability to cure improper lease assignment]).

Moreover, defendants argue that they reasonably withheld consent to the assignments. They contend that the February 16th letter requests were "bereft of any facts upon which defendants could be expected to decide whether to consent to the requests." In addition, defendants argue that withholding consent was reasonable because: (1) plaintiffs were already in default under the Leases based upon the allegations made in this case prior to the assignments, (2) the proposed assignee was a "shell corporation," (3) plaintiffs failed to provide financial documents for the proposed assignee, and (4) defendants could "reasonably object to the nature of the proposed occupancy, to wit: a means concocted by plaintiffs and Ratner to diminish defendants' property value in anticipation of a buyout

or condemnation." Defendants contend that these reasons constitute objective factors justifying their withholding of consent to the assignments (*see e.g. 8902 Corp. v Helmsley-Spear, Inc.*, 23 AD3d 316, 316 [2005] [withholding consent could not be considered unreasonable where plaintiffs failed to provide required financial information]; *Forty Four Eighteen Joint Venture v Rare Medium, Inc.*, 18 AD3d 237, 238 [2005] [consent to assignment reasonably withheld because tenant's rent was in arrears]; *Sayed v Rapp*, 10 AD3d 717, 720 [2004] [consent to assignment reasonably withheld where proposed use of premises was materially different from use specified in lease]; *200 Eighth Ave. Rest. Corp. v Daytona Holding Corp.*, 293 AD2d 353, 353 [2002] [withholding consent reasonable where, among other things, tenant failed to timely provide financial information regarding proposed assignee]).

Defendants also note that the February 16th letter requests did not ask the defendants to respond by any particular time. They further assert that the letters' envelopes were postmarked February 20th, and that, as the leases state that all notices and requests are deemed served on the third business day following mailing, the requests would not have been considered served until February 23rd, and that plaintiffs executed their assignments only a week later, on March 2nd. In addition, defendants allege that as of March 2, 2006, they had not, in fact, received the letters because tenants sent them to a prior address despite defendants' written notice of the address change six years previously.

Finally, defendants contend that "even if" the tenants honestly believed that the landlords were unreasonably withholding or delaying consent, they had no right to choose to execute the assignments. Instead, they argue that the tenants' sole remedy was to bring an action for specific performance, as outlined in Section 30.06, which provides that:

> "Whenever Landlord is required hereunder not to act unreasonably or not to unreasonably withhold or delay its consent or approval, Tenant's sole remedy for Landlord's failure to act reasonably shall be an equitable action for specific performance and under no circumstances shall Landlord be liable for any damages due to such failure."

Thus, the landlords argue that tenants' assignments were a violation of the leases and that they are not entitled to seek damages based upon the landlords' failure to consent, whether or not that withholding of consent was reasonable, and so plaintiffs' first cause of action must be dismissed.

In their opposition and cross motion, plaintiffs argue that the landlords unreasonably withheld their consent to the assignments in violation of the lease agreements, and that "it is manifest that the Landlords never have had any intention of consenting to the assignments" and that the landlords' objective is not to protect their properties but "to enhance the condemnation award to which [they] will be entitled if ESDC condemns these two parcels." In addition, plaintiffs argue that, even if the landlords had a reasonable basis for withholding their consent, plaintiffs' default in assigning the leases is curable and not a reason for terminating the leases. Finally, plaintiffs contest the landlords' allegations of other defaults under the leases.

In support of their contention that the assignments were permitted, plaintiffs note that, in order for a landlord's withholding of consent to be considered reasonable, it must be based upon objective factors, such as the assignee's financial responsibility and identity or business character, the legality of the proposed use, and the nature of the occupancy (*see e.g. Sayed*, 10 AD3d at 720; *Kruger v Page Mgt. Co.*, 105 Misc 2d 14, 23 [1980]). Plaintiffs assert that based upon these factors, defendants' consent was unreasonably withheld.

First, plaintiffs assert that AY Carlton is financially responsible because it is an "affiliate" of Forest City Ratner and Forest City Enterprises, Inc., which are both financially stable companies.

Moreover, they note that, under the terms of the leases, the tenants would remain financially responsible, and so the assignments would not "diminish" the landlords' financial position but would, instead, "enhance it dramatically." Second, plaintiffs contend that AY Carlton has "assured the Landlords in writing" that it will operate the premises lawfully and in conformity with the leases "until such time (if ever) as the Landlords' fee interests are acquired consensually." They further note that Section 20.01 allows the premises to be used for "any lawful use."

Based upon the above, plaintiffs argue that "the Assignee easily qualifies as a suitable tenant, and the Landlords' refusal to consent to the assignments is unreasonable as a matter of law" (*see e.g. Giordano v Miller*, 288 AD2d 181, 182 [2001] [consent to assignment unreasonably withheld where landlord demanded a fee for consent]; *Astoria Bedding, Mr. Sleeper Bedding Ctr., Inc. v Northside Partnership*, 239 AD2d 775, 776 [1997] [consent to assignment unreasonably withheld based upon proposed use different from tenant's use required in lease]; *Hunan 7 (N.Y.C.) v Ding*, 216 AD2d 356, 357 [1995] [consent to assignment unreasonably withheld based upon non-rent related defaults where lease did not condition consent upon plaintiff's performance of the lease]; *Ontel Corp. v Helasol Realty Corp.*, 130 AD2d 639, 640 [1987] ["subjective concerns and personal desires" were not reasonable basis for withholding consent to assignment]; *Filmways, Inc. v 477 Madison Ave., Inc.*, 36 AD2d 609, 609 [1971] [consent to sublet unreasonably withheld where subtenant was bound in writing to "each and every provision" of the prime lease], *affd* 30 NY2d 597, 598 [1972]).

In addition, plaintiffs argue that defendants' proffered reasons for withholding their consent are merely "disingenuous pretexts" and that the record shows that the landlords' principal, Henry Weinstein, "would never consent to the assignments given his stated opposition to the Atlantic Yards Project and his obvious interest in terminating the Ground Leases to enhance the value of his fee

interests." The plaintiffs thus argue that the landlords are actually basing their refusal to consent upon their "private agenda" (*cf. e.g. Am. Book Co. v Yeshiva Univ. Dev. Found., Inc.*, 59 Misc 2d 31, 36 [1969] [commercial landlord's refusal of assignment to Planned Parenthood based upon philosophical objections unreasonable]).

Moreover, plaintiffs assert that they made a good faith effort to obtain the landlords' written consent and that they did not know that the landlords had not received plaintiffs' letter requests at the time they executed the assignments. They argue that their error in mailing the requests to the wrong address was excusable and that thus a forfeiture of their leaseholds "would be completely inequitable and unsupportable" (*cf. e.g. J.N.A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 NY2d 392, 402 [1977] [tenant entitled to equitable relief from forfeiture despite inadvertent failure to give required notice to renew]).

In addition, plaintiffs argue that, even if the landlords had a reasonable basis to withhold consent, the unauthorized assignment is curable. In support of that contention, they note that Section 14.03 (h) of the leases state that:

> "Tenant's failure to comply with all of the provisions and conditions of this Article and all of the subsections hereof shall (whether or not Landlord's consent is required), at Landlord's option, render any purported assignment or subletting null and void and of no force and effect."

Thus, plaintiffs argue that if the landlords' consent was reasonably withheld, the assignment was "null and void" and so there was no event of default as the tenants' interest did not "transfer[] or . . . pass to or devolve upon any person or party" as defined in Section 22.01(c). Moreover, plaintiffs assert that they are "ready and willing to comply with § 14.03(h) and reverse the assignments if it is determined by the courts that the assignments

are improper." Accordingly, plaintiffs dispute the landlords' contention that the default is incurable. Plaintiffs also argue that *Zona*, 270 AD2d 12, and *Pergament*, 171 AD2d 736, are distinguishable herein in that *Zona* the tenant did not seek the landlord's consent at all and could not dissolve the assignment, and in *Pergament*, the tenant refused to provide the landlord with any financial information and did not offer to cure until after the motion court had rendered an adverse decision.

Discussion

Where the terms of a written contract are clear and unambiguous, the courts will enforce it according to its terms (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 160 [1990]; *Automotive Mgt. Group, Ltd. v SRB Mgt. Co., Inc.*, 239 AD2d 450, 451 [1997]). The leases in question here clearly and unambiguously required tenants to "first" obtain the written consent of the landlords before any assignment of the leases. Notwithstanding that provision, the tenants chose to execute the assignments to AY Carlton, even though they had not received the written consent of the landlords. Indeed, the tenants chose to execute the assignments less than two weeks after sending their letter requests, before they received any response from the landlords, without trying to contact the landlords. The tenants' assignment was clearly not permitted by the leases. Pursuant to Section 20.01(c), any assignment not made in a manner "permitted" by the contract is defined as an event of default. Finally, pursuant to Section 20.02, the landlords had the option to terminate the leases upon notice for any such defined event of default. The landlords have served the requisite notices in this

case. Thus, defendants have demonstrated that they are entitled to a judgment declaring that the assignments were improper and that the leases have been terminated.

Plaintiffs' argument otherwise are unavailing. For example, plaintiffs allege that the landlords' withholding consent was unreasonable. However, according to the clear terms of the leases, plaintiffs were required to obtain consent prior to assigning the leases, regardless of the reasonableness of withholding consent. Additionally, it is not clear that the landlords' withholding was unreasonable as a matter of law. First, the initial requests themselves provided virtually no information about the assignments, and so the landlords were justified in seeking additional information (*see e.g. 8902 Corp.*, 23 AD3d at 316 [consent to assignment not unreasonably withheld where tenant failed to provide required financial information]; *200 Eighth Ave. Rest. Corp.*, 293 AD2d at 353 [withholding consent reasonable where, among other things, tenant failed to timely provide financial information regarding proposed assignee]).

Moreover, even after plaintiffs responded, they refused, among other things, to provide specific financial information about AY Carlton itself, instead simply asserting that AY Carlton is "affiliated" with larger companies. Similarly, the proposed use of the premises–namely, demolition–would constitute a material change in use. As plaintiffs themselves note, financial responsibility and proposed use of the premises are both objective factors that landlords can use in determining whether to consent to an assignment (*see e.g. Sayed*, 10 AD3d at 720 [consent not unreasonably withheld based on materially different

proposed used]; *Kruger*, 105 Misc 2d at 23 [financial responsibility and proposed use constitute objective factors]).

Similarly, plaintiffs' argument that they are entitle to cure the improper assignment is not supported by the terms of the leases. The leases clearly and unambiguously give the landlords the option to terminate the leases in the event of a default. When the landlords chose to do so, the default became incurable (*see e.g. Zona*, 270 AD2d at 14 [finding tenant's unauthorized assignment to be an incurable default]). Plaintiffs' argument that there was no default because there was no transference of their interests is unpersuasive. Plaintiffs base this argument upon Section 14.03 (h), which states that an improper assignment may be rendered "null and void." However, that section also states that rendering the assignments null and void is "at Landlord's option." In this instance, the landlords did not choose to exercise this option. And, to the extent that plaintiffs argue that an improper assignment is automatically null and void, and thus not an event of default, that argument would render Section 22.01 (c), defining any unauthorized assignment as an event of default, meaningless.

Furthermore, if the tenants believed that the landlords were unreasonably withholding, or even delaying, their consent, the leases provided a specific and sole remedy; namely, to institute an "equitable action for specific performance" pursuant to Section 30.06 of the leases. The tenants chose not to utilize that option and so they cannot now try to cure their default in another manner. Moreover, the court notes that the tenants did not offer to undo the assignments until defendants brought the instant motion (*cf. e.g. Pergament*, 171 AD2d

at 737 [Yellowstone injunction properly denied where, among other things, tenant did not indicate desire to cure until after an adverse court decision]).

Thus, the defendants have demonstrated that they should be awarded summary judgment on their third and fourth counterclaims, that plaintiffs' first cause of action should be dismissed, and that the *Yellowstone* injunction should be vacated. As to plaintiffs' third cause of action, and the other alleged defaults, the record indicates that there are disputed issues of fact, and so summary judgment is denied as to those issues.

Conclusion

Accordingly, defendants' motion is granted to the extent that (1) plaintiffs' first cause of action is dismissed, (2) defendants are awarded partial summary judgment under their third and fourth counterclaims to the extent that the assignments to AY Carlton are declared in violation of the leases, and the leases are declared terminated, and (3) the *Yellowstone* injunction, issued in September 2003 and modified in May 2006, is vacated. Defendants' motion is otherwise denied. Plaintiffs' cross motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

IRA B. HARKAVY
Justice of the Supreme Court