

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 54EFM-----X
THE JAN COMPANIES OF NY LLC III,

Plaintiff,

- v -

106 FULTON STREET OWNER LLC,

Defendant.

INDEX NO. 651425/2018MOTION SEQ. NO. 002 003**DECISION + ORDER ON
MOTION**-----X
HON. JENNIFER G. SCHECTER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 163, 164, 165, 166, 167, 170, 173

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 156, 157, 158, 159, 160, 161, 162, 169, 171, 172

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant's motion to substitute the new owner (106 Fulton LLC) as the defendant in this action is GRANTED without opposition, defendant's motion for summary judgment is DENIED, and plaintiff's motion for summary judgment is GRANTED.

There is no question of fact that plaintiff is entitled to summary judgment. Section 66(iii) of the lease does not require landlord's consent because the assignee was another Burger King franchisee and the guaranty remained in effect (Dkt. 126 at 36). Indeed, on multiple occasions, landlord admitted that its consent was not required (Dkts. 137, 152).

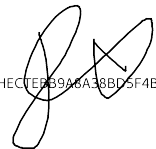
Even if tenant breached by failing to provide timely notice, its breach was cured (*see 456 Johnson, LLC v Maki Realty Corp.*, 177 AD3d 829, 830 [2d Dept 2019], citing *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]). It is well settled that "strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation" (*Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [1st Dept 2006]). Here, landlord eventually received notice and suffered

no prejudice whatsoever as the assignee is subject to the lease, has the same assets and is backed by the same guaranty (*see* Dkt. 126 at 36). This was a curable default (*see Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545, 546 [1st Dept 2015]; *see also Empire State Bldg. Assocs. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]).

As the prevailing party, plaintiff is entitled to recover its reasonable costs and attorneys' fees incurred in this action (*see* Dkt. 126 at 33).

Accordingly, it is ORDERED that by January 13, 2021, plaintiff shall e-file its legal bills and an affirmation of counsel setting forth the reasonable fees being sought that were incurred in this action; defendant may e-file any objections to the fee application by January 22, 2021 at 9:30 a.m.; and plaintiff shall notify the court by email when the fee application is fully submitted. The court will enter judgment after deciding the fee application.

It is further ORDERED that by January 13, 2021, the parties shall e-file and email the court an executed Word version of a stipulation to be so-ordered directing the Clerk to amend the caption to reflect the substitution of the new defendant and upon entry of the stipulation the parties shall e-file the requisite notice to the Clerk so the caption is changed on NYSCEF accordingly.

<p style="text-align: center;"><u>1/6/2021</u> DATE</p>	 <small>20210106164057JSCHECTER99A6A38BD5F4BED93333653C35F5ECF</small> <hr/> JENNIFER G. SCHECTER, J.S.C.						
<p>CHECK ONE:</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 25%;"><input checked="" type="checkbox"/> CASE DISPOSED</td> <td style="width: 25%;"><input type="checkbox"/> NON-FINAL DISPOSITION</td> </tr> <tr> <td><input type="checkbox"/> GRANTED</td> <td><input type="checkbox"/> GRANTED IN PART</td> </tr> <tr> <td><input type="checkbox"/> DENIED</td> <td><input checked="" type="checkbox"/> OTHER</td> </tr> </table>		<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
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