



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

ART AND ARCHITECTURE BOOKS OF
THE 21ST CENTURY,

Debtor.

Case No. 2:13-bk-14135-RK

Chapter 11

ORDER ON LANDLORD'S REQUEST
FOR COSTS RELATING TO "AS-BUILT"
SURVEY

Pending before the court is AERC Desmond's Tower, LLC's ("Landlord") request for costs relating to the performance of an "as-built" survey of Art and Architecture Books of the 21st Century, dba Ace Gallery's ("Debtor"), leased premises located at 5500 Wilshire Boulevard, Los Angeles, California, as made part of its motion for immediate payment of rent pending assumption or rejection of the lease pursuant to 11 U.S.C. § 365(d)(3). While the parties disagree whether this particular cost request was part of the original motion, it was raised in the Landlord's reply to Debtor's opposition in the motion, and the request was set for hearing on April 2, 2014 pursuant to its scheduling order filed on March 19, 2014. Further hearings on the request were held on April 8, 11, 23, and 25, and May 28, 2014.

1 At the initial hearing on April 2, 2014, the court orally granted Landlord's request
2 for access to conduct the "as built" survey pursuant to Section 24 of the Master Lease on
3 grounds that its original request for such access to Debtor's lease premises was for a
4 commercially reasonable purpose. The express terms of Section 24 of the Lease
5 provide:

6 Landlord and its employees and agents shall **at all**
7 **reasonable times have the right to enter the Premises to**
8 **inspect the same for a commercially reasonable purpose,**
9 **to supply any service specifically required to be provided**
10 **by Landlord under this Lease,** to exhibit the Premises to
11 prospective lenders or purchasers (or during the last year of
12 the Term subject to extensions of the Term pursuant to the
13 terms of Rider No. 1 to this Lease) to prospective tenants), to
14 post notices of non-responsibility; and/or to alter, improve or
15 repair the Premises or any other portion of the Building or
16 Property in accordance with the provisions set forth in this
17 Lease, all without being deemed guilty of or liable for any
18 breach of Landlord's covenant of quiet enjoyment or any
19 eviction of Tenant, and without abatement of Rent. In
20 exercising such entry rights into any portion of the Premises
21 where Tenant is exhibiting artwork, Landlord shall use
22 reasonable efforts to minimize, to the extent reasonably
23 practicable, the interference with Tenant's business, and **shall**
24 **provide Tenant with reasonable advance written notices**
25 **of at least three (3) business days of such entry (except in**
26 **emergency situations and for scheduled services), the**
27 **timing and duration of such entry shall be reasonable and**
28 **mutually agreed,** and Tenant shall have right to have any
such entry be accompanied by a representative of Tenant.
For each of the foregoing purposes, Landlord shall at all times
have and retain a key with which to unlock all of the doors in,
upon and about the Premises, excluding Tenant's vaults and
safes, and Landlord shall have the means which Landlord
may deem proper to open said doors in an emergency in
order to obtain entry to the Premises. Any entry to the
Premises obtained by Landlord by any of said means or
otherwise shall not under any circumstances be construed or
deemed to be a forcible or unlawful entry into, or a detainer of,
the Premises, or an eviction of tenant from the Premises or
any portion thereof, or grounds for any abatement or reduction
of Rent or any other damages. Notwithstanding anything
contrary in the foregoing, *Landlord's right to access Tenant's*
art storage rooms shall be subject to Landlord providing notice
as required by this Article 24, and Tenant's approval, which
Tenant shall not unreasonably withhold provided that
Landlord has a legitimate business purpose for such
entry.

1 Lease § 24 (emphasis added). The court was and is persuaded that Landlord's written
2 request for entry (or access) to the leased premises had complied with the notice
3 requirement of advance written notice of at least three (3) business days and there was a
4 commercially reasonable purpose for such entry (i.e. landlord's repair obligations, a
5 service required to be provided by landlord under section 8.1 of the Lease to repair,
6 maintain and replace the foundation and structural elements of the building, etc.), to
7 enable landlord to identify specific structural columns, beams, and load bearing walls that
8 require seismic assessment, and to perform core sampling that would enable landlord to
9 determine the seismic constraints of the building. *Supplemental Declaration of Sidney P.*
10 *Levinson* and Exhibits A-D attached thereto (Docket No. 478). Debtor breached Section
11 24 of the Lease by unreasonably refusing to grant access to the premises to Landlord's
12 representative, Mr. Fisher, the surveyor contractor, on February 17, 2014. *Declaration of*
13 *William Brian Fisher* (Docket No. 481). Accordingly, Landlord's request for access was
14 granted.

15 Thereafter, the court held further hearings to discuss the scheduling of Landlord's
16 survey of the premises, Debtor's concerns regarding the effect on Landlord's intended
17 use of infrared light survey equipment on artwork situated on the premises, and
18 Landlord's claim of costs resulting from Debtor's refusal to grant reasonable access to
19 the premises.

20 After the court's ruling the survey was completed the week of May 5, 2014.
21 *Supplemental Declaration of Scott Aaron* (Docket No. 619) at ¶ 3. At the final hearing on
22 the request on May 28, 2014, the court heard argument from the parties on Landlord's
23 request for costs resulting from Debtor's breach of Section 24 of the Lease regarding the
24 "as built" survey, and the court took the matter under submission.

25 Having reviewed Landlord's breakdown for the asserted costs relating to the "as
26 built" survey and other substantiation it offered and Debtor's papers in opposition, and
27 pursuant to Section 23.3 of the Master Lease, the court hereby grants in part and denies
28 in part Landlord's request for costs.

1 The express terms of Section 23.3 of the Lease provide:

2 Except as specifically provided otherwise in this Lease, all
3 covenants and agreements by Tenant under this Lease shall
4 be performed by Tenant at Tenant's sole cost and expense
5 and without any abatement or offset of Rent. In the event of
6 any Default by Tenant, Landlord may, without waiving or
7 releasing Tenant from any of Tenant's obligations following
8 any applicable required notice set forth in this Lease, (WHICH
9 NOTICE SHALL STATE IN BOLD-FACED ALL CAPITAL
10 LETTERS, THAT TENANT'S FAILURE TO PERFORM
11 WITHIN THIRTY (30) DAYS OR SUCH SHORTER PERIOD
12 AS IS REASONABLE GIVEN THE NATURE OF TENANT'S
13 DEFAULT) make such payment or perform such other act as
14 required to cure such Default on behalf of Tenant. **All
15 reasonable sums so paid by Landlord and all necessary
16 incidental reasonable costs incurred by Landlord in
17 performing such other acts** shall be payable by Tenant to
18 Landlord within thirty (30) days after demand therefor as
19 Additional Rent.

20 Lease, § 23.3 (emphasis added). Thus, under the Lease, the court may only grant "all
21 reasonable sums" paid by Landlord and "all necessary incidental reasonable costs" it
22 incurred relating to the Default of Debtor with respect to the breach of Section 24
23 regarding its denial of reasonable access to the premises to Landlord's surveyor.
24 Accordingly, the court grants Landlord's request for costs under Section 23.3, but not the
25 entire amount, as Landlord has not met its burden of showing that its claim for
26 reimbursement of travel costs for an out-of-state surveyor was reasonable. In this
27 regard, the court determines that Landlord had not made a sufficient showing that travel
28 costs for an out-of-town surveyor were reasonable on grounds that a local surveyor could
not perform the work. Although the Declaration of Lyle Hutson, Landlord's architect,
purports to detail Landlord's efforts to contact a local surveyor to perform the scanning
work for the survey, the court observes that the declaration lacks sufficient detail, such as
the names of the two local surveyors, or the amount of fees quoted by such surveyors,
and thereby undercuts Landlord's argument that a local surveyor could not perform the
work. *Declaration of Lyle Hutson, Regarding "As-Built" Survey* (Docket No. 620) at ¶ 5.

When Landlord notified Debtor of its request for access to conduct the "as built"
survey, it indicated that it would need four days access to conduct the survey. The court

1 notes that the parties agreed that the survey could be conducted manually without using
2 infrared scanning equipment, and therefore, the court awards to Landlord costs for
3 conducting the redone "as built" survey based on the alternative manual scanning survey
4 of \$1,500 per day for four days, and \$500 for data integration into previous work, for a
5 total award of costs of \$6,500, as described in the Supplemental Declaration of Scott
6 Aaron.¹ *Supplemental Declaration of Scott Aaron* (Docket No. 619) at 2. No allowance is
7 made for claimed travel costs.

8 IT IS HEREBY ORDERED that Landlord's request for costs resulting from
9 Debtor's breach of Section 24 of the Lease relating to the denial of reasonable access to
10 the leased premises for the "as-built" survey is granted in the amount of **\$6,500**. Debtor
11 is ordered to pay this amount to Landlord in care of its counsel of record, Jones Day,
12 within thirty (30) days of demand as Additional Rent due under Section 23.3 of the Lease
13 and 11 U.S.C. § 365(d)(3).

14 IT IS SO ORDERED.

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24 Date: September 8, 2014



Robert Kwan
United States Bankruptcy Judge

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26 ¹ The contractor agreed to charge the same price for the work charged for the aborted first attempt to
27 conduct the survey, though the actual survey took more than four days and the alternative process required
28 an additional surveyor, which according to the contractor resulted in additional travel costs. *Supplemental
Declaration of Scott Aaron* (Docket No. 619) at 2.