



use the subject premises, with the Defendant's knowledge and imprimatur, as a recording studio; that such use apparently violated the local Smithtown zoning ordinances; that the Landlord was aware of this; and that as a result Plaintiff was constructively evicted and damaged. Defendant's Answer alleges that the lease placed all responsibility for compliance with ordinances on the Tenant; that Plaintiff voluntarily vacated the subject premises; and that Defendant is entitled to its unpaid rent for the period of the lease as well as its attorneys' fees. Attached to Defendant's moving papers are a series of violations addressed to the Plaintiff from the Town of Smithtown. They vary in that some are based on the use as a recording studio, some are based on noise violations and others are based on fire code violations due to the removal of an exit door.

In support of its motion, Defendant asserts that the purported inability of Plaintiff to bring its use into compliance with Smithtown zoning ordinances is Plaintiff's responsibility as per the clear language of the lease. In addition, it asserts that Plaintiff's inordinate delay in vacating the premises (from February until August 2007) after learning of the issue (based on the letter from Plaintiff's engineer), acts to bar an action for constructive eviction. Since the cause of action for breach of the covenant of quiet enjoyment can only be raised by an eviction, actual or constructive, Defendant asserts that such must likewise be dismissed. In addition, Defendant states that Plaintiff is barred from bringing any of its breach or constructive eviction claims, due to its failure to pay rent and that Defendant is entitled to rent from February 2007 through April 2011, when the term of the lease was set to expire.

With regard to the cross-motion, Plaintiff asserts that it is based on the very same set of facts as contained in the Complaint and cannot prejudice the Defendant at this stage of the litigation. The claim is based on Plaintiff's assertion that Defendant's principal both knew of Plaintiff's purported use of the premises as a recording studio and informed Plaintiff that the space was suitable for such use; that, based on these

representations, Plaintiff incurred significant expenses in order to convert the premises, only later learning that such was not permitted by the local zoning ordinances. According to a letter, dated February 2, 2007, from Plaintiff's engineer, the building was not approved for multiple tenant uses; there were other tenants in the space; Plaintiff's purported use would require a substantial variance of the off street parking requirements and was unlikely to obtain approval.

In addition to the above, in opposition to Defendant's motion, Plaintiff asserts that after commencing a prior action to close Plaintiff's business, which was dismissed (Spinner, J Aug 23, 2007), Defendant used self help by entering into the premises, removing trade fixtures, and illegally changing the locks. Such gives rise to Plaintiff's cause of action pursuant to RPAPL § 853. Defendant counters that Plaintiff was already abandoning the premises voluntarily, attaching letters to that effect, and cannot, therefore, claim eviction of any sort. In addition, Defendant claims the RPAPL § 853 claim is time barred.

Defendant also argues that the proposed amendment is palpably improper because the local ordinances were a matter of public record and, therefore, Plaintiff cannot assert that it was justified , even in relying on Defendant's purported promises.

A party moving for Summary Judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Winegrad v New York University Medical Center**, 64 NY 2d 851, 476 NE 2d 642, 487 NYS 2d 316 (1985); **Zuckerman v City of New York**, , 49 NY 12d 557, 404 NE 2d 718, 427 NYS 2d 595 (1980). As Summary Judgment is a drastic remedy and should not be granted where there exists a doubt as to the existence of a triable issue of fact , once the prima facie showing is made, the burden shifts to the party opposing the motion to produce proof in evidentiary form sufficient

to establish the existence of material issues of fact which require a trial. **State Bank of Albany v McAuliffe, 97 AD 2d 607, 467 NYS 2d 944 (3d Dep’t 1983)**. The role of a court in determining a motion for Summary Judgment is not to resolve issues of fact or to determine issues of credibility, but merely to determine whether such issues exist. **Dyckmann v Barrett, 187 AD 2d 553, 590 NYS 2d 224 (2d Dep’t 1992)**.

A lease is a contract and subject to the same rules of construction. **See, Star Nissan v Frishwasser, 253 AD 2d 491, 677 NYS 2d 145 (2d Dep’t 1998)**. A lease, like all agreements, must be interpreted as a whole so as to carry out the parties’ intent. **See, Cobalt Blue Corp v 184 W 10<sup>th</sup> Street, 227 AD 2d 50, 650 NYS 2d 720 (1<sup>st</sup> Dep’t 1996)**. Whether its terms are ambiguous is a question for the court. **See, WWW Assoc., Inc. v Giancontieri, 77 NY 2d 157, 565 NYS 2d 440 (1990)**.

A tenant must abandon possession of premises in order to make a claim of constructive eviction. **S.E. Nichols Inc v American Shopping Centers, Inc, 115 AD 2d 856, 495 NYS 2d 819 (3d Dep’t 1985)**. In order to rely on a claim of constructive eviction, a tenant is required to abandon the subject premises within a reasonable period of time after the alleged unlawful act on the part of the landlord and the issue of what constitutes a “reasonable time” for such abandonment is generally considered a question of fact. **Zurel USA, Inc v Magnum Realty Corp, 279 AD 2d 520, 719 NYS 2d 276 (2d Dep’t 2001); Incredible Christmas Store-New York, Inc v RCPI Trust, 257 AD 2d 218, 690 NYS 2d 220 (1<sup>st</sup> Dep’t 2003)**. Where the Plaintiff is able to make a claim for constrictive eviction, a breach of the covenant of quiet enjoyment does not require a physical ouster; rather, a showing of abandonment of the premises under pressure is sufficient to sustain the claim. **Dinicu v Groff Studios Corp, 257 AD 2d 218, 690 NYS 2d 220 (1<sup>st</sup> Dep’t 1999)**.

Within its general provisions, the lease between the parties states that the “(t)enant is solely responsible for obtaining plans and permits for the demised premises”. Such general provisions lay the burden upon the tenant, at its cost and expense, to comply with all such laws and to pay any necessary costs to bring its use into compliance therewith. The Tenant also agrees to accept the premises subject to any code violations whether or not of record and states that the landlord has made no representations with regard thereto. However, Schedule A, attached to the general lease provisions, contains a diagram of the premises to be leased by Plaintiff, showing a checked off area with the designation “3MB Recording Studio”. A “Rider to Lease” states, in pertinent part, that if there is any conflict between its provisions and that of the Lease, the Rider provisions shall govern. Item 6 states as follows:

“Tenant covenants that Tenant shall use and occupy the demised premises solely as a recording studio/warehouse and for no other purpose unless approved in writing by Landlord. . . .”

“Tenant shall comply at its sole cost and expense with all applicable laws, resolutions, codes, orders , . . . of any governmental authority having jurisdiction over the use of the premises. Tenant will indemnify and save the Landlord harmless from and against any claims, penalties, loss, damage or expense imposed by reason of a violation of any applicable law or the rules and regulations of governmental authorities having jurisdiction thereof to Tenant’s use and occupancy”.

Defendant, in its motion papers makes a prima facie showing of entitlement to Summary Judgment, dismissing Plaintiff’s complaint based on the language of the Lease. However, in response, Plaintiff does raise a triable issue of fact with regard to its claim for constructive eviction as well as breach of the covenant of quiet enjoyment. Plaintiff

asserts that Defendant told Plaintiff that its proposed use as a recording studio was legal and, indeed the particular use as a recording studio is set forth in the Rider to Lease. Yet, according to Plaintiff, not only was the use illegal but there was no manner in which it could ever be legalized for all the reasons set forth in its engineer's letter, which the Defendant placed before the Court. The Court finds that the Rider to Lease is somewhat ambiguous. Under the circumstances, Plaintiff has raised issues of fact precluding Summary Judgement on those causes of action dealing with constructive eviction and breach of the covenant of quiet enjoyment. In addition, while abandonment of the leased premises is a prerequisite to the constructive eviction claim, the timing of such under the circumstances, remains a question of fact. As the constructive eviction claim is allowed to remain, the breach of the covenant of quiet enjoyment also states a cause of action deriving from the former.

With regard to Plaintiff's claims under RPAPL § 853 and for wrongful eviction, the Plaintiff has not set forth issues sufficient to raise questions of fact. Both claims require an eviction not an abandonment and are barred by the Plaintiff's essential allegation of constructive eviction. The letters attached to Defendant's moving papers demonstrate that the Plaintiff did intend to and in fact did ultimately depart from the premises, albeit allegedly due, in part, to the acts of the Defendant. **See, Verbitsky v Lamborn, 269 AD 2d 314, 703 NYS 2d 143 (1<sup>st</sup> Dep't 2000).** However, the viability of the constructive abandonment and breach claims prevents the Court, at this juncture, from granting Defendant's motion for judgment on its nonpayment counterclaim and, therefore, also on its claim for attorneys' fees. **See, Minjak v Randolph, 140 AD 2d 245, 528 NYS 2d 554 (1<sup>st</sup> Dep't 1988).** Should Plaintiff prevail on its constructive eviction and/or breach of the covenant of quiet enjoyment claims, such may act to negate and/or abate the rent due. **Id.**

With regard to the cross-motion pursuant to CPLR § 3025 (b), leave to amend is granted as Plaintiff has set forth a claim of fraudulent misrepresentation in its Amended Complaint. Such is to be freely granted, will not prejudice the Defendant, and is based on statements made in the original Complaint. The legal sufficiency or merits of a motion for leave to amend a pleading will not be examined by the Court unless insufficiency is clear from doubt. **Lucido v Mancuso, 49 AD 3d 220, 851 NYS 2d 238 (2d Dep't 2008)**. Plaintiff's allegations of promises made by Defendant, accompanied by the statement in the lease, as well as the attachment thereto, the alleged monies expended in reliance thereon and the assertion that such could not be rendered legal do support a claim, if proved, of misrepresentation. The Court does not find that looking at zoning ordinances would have provided the Plaintiff with the kind of detailed information necessary to make a reasoned decision whether or not to lease the subject premises.

Accordingly, Defendant's motion to dismiss Plaintiff's First and Second Causes of action is denied; Defendant's motion to dismiss Plaintiff's Third and Fourth causes of action is granted; Defendant's motion for Summary Judgement on its counterclaims is denied; and Plaintiff's cross-motion for leave to file and serve an Amended Complaint is granted, the copy attached to the cross motion papers being deemed served as of the date of service of this Decision.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 2, 2010  
Riverhead, New York

---

**EMILY PINES**  
J. S. C.