SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED J.S.C. PART 60

Justice

Index Number : 105565/2006
ELIZABETH STREET INC
vs
OSCAR Z.IANELLO ASSOCIATES
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. FBEM

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered, in motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum.

SO ORDERED

FILED
MAR 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/9/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1

BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

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ELIZABETH STREET, INC., ELIZABETH STREET COMPANY, and ALLAN REIVER,

Plaintiffs,

INDEX NO.
105565/06

-against-

OSCAR Z. IANELLO ASSOCIATES, INC. and ESTATE OF OSCAR Z. IANELLO,

Defendants.

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APPEARANCES:

Plaintiffs:
Smith & Krantz LLP
551 Fifth Avenue - 27th Floor
New York, NY 10176
Of Counsel: Wayne R. Smith, Esq.

Defendants:
Capell Vishnick LLP
3000 Marcus Avenue, Suite 1E4
Lake Success, NY 11042
Of Counsel: Andrew A. Kilmer, Esq.

FRIED, J.,

Under motion sequence 001, defendants move to dismiss plaintiffs' complaint, pursuant to CPLR 3212, and for judgment on their counterclaims for ejectment, and for use and occupancy, related to plaintiffs' continued occupancy of the top floor of 208-210 Elizabeth Street, New York, New York, after the expiration of plaintiffs' lease for those premises on or about March 31, 2006.

The parties do not dispute that the corporate defendant, Oscar Z. Ianello Associates, Inc. (Ianello, Inc.), at all times owned the adjacent buildings located at 204-210 Elizabeth Street. The contiguous addresses are referred to together, in plaintiffs' complaint, and herein, as "the Building." Commencing in or around 1989, plaintiff Allan Reiver entered into leases

for various portions of the Building, starting with the top floor "loft" and the basement of that portion of the Building identified as 208-210 Elizabeth Street. The leases were then assigned to one of the corporate plaintiffs, Elizabeth Street, Inc. or Elizabeth Street Co., both of which are Colorado corporations. The lease agreements annexed by defendants, which have not been supplemented by plaintiffs, indicate that plaintiffs entered into a lease for the 3rd floor of the 208-210 portion of the Building on or about July 1, 1991. Plaintiffs leased the ground floor of the 204 portion of the Building in or around August 1998, and the basement of the 204 portion of the Building starting in or around March 1999. All of the leases, and the renewal leases, annexed by defendants, are for a term of five years, unless extended by separate agreement. All of the leases are commercial or store leases, and state that plaintiff Reiver, as Tenant under the leases, would use the leased premises for either the restoration, or the sale of antiques, or both.

Plaintiffs' complaint alleges that when plaintiffs took possession of the leased premises in or around 1989, the Building was in substantial disrepair, and needed both structural and non-structural renovation. Plaintiffs allege that, before they took possession, in 1989, the now deceased principal of Ianello, Inc., Oscar Ianello, promised that, upon his death, he would leave Allan Reiver a one-half interest in the Building, if Reiver, at his own expense, would rehabilitate the exterior and common areas of the Building, rehabilitate tenant spaces as they became available, perform management functions for the Building, and locate more upscale subtenants. Plaintiffs allege that pursuant to this verbal agreement, as tenant space became available, Reiver would lease the space, renovate it, enter into a primary lease for the vacant premises, and attempt to sublease the space to upscale subtenants.

Plaintiffs commenced this action against Ianello, Inc., and the estate of Oscar Ianello, on or about April 24, 2006, shortly after Oscar Ianello's death, and after a demand for rent by Ianello, Inc. Plaintiffs refused the landlord's demand for payment, upon the ground that, as a result of Oscar Ianello's death, Reiver owned one-half of the Building. Plaintiffs' complaint asserts nine causes of action. The first cause of action is for specific performance of the alleged contract to convey a one-half interest in the Elizabeth Street properties, or $50,000,000 in damages. The second asserts a breach of the covenant of good faith and fair dealing. The third cause of action is for *quantum meruit*. The fourth cause of action seeks to impose a constructive trust on the Building or any proceeds thereof. The fifth cause of action is for unjust enrichment, and the sixth, asserts promissory estoppel. Under the seventh, eighth, and ninth causes of action, plaintiff seeks $50,000,000 in damages for constructive eviction and breach of the warranty of habitability.

Defendants move to dismiss the complaint, asserting that the alleged oral contract, and any quasi-contractual claims, arising out of the alleged promise to convey an interest in the Building, are barred by the statute of frauds, and by the terms of the lease agreements. Defendants additionally seek judgment on their counterclaims for ejectment, and for use and occupancy at a rate of $11,000 per month from May 2006.

As proponents of the motion for summary judgment, defendants must establish a *prima facie* right to judgment, as a matter of law, by tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065 [1979]). Failure establish a *prima*

facie case, requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing is made, the burden shifts to plaintiffs, as opponents of the motion, to submit evidence, in admissible form, sufficient to establish the existence of material and triable issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d at 562 [1980]).

Defendants' *prima facie* right to dismiss those claims arising out of Oscar Ianello's purported verbal promise to transfer an ownership interest in the Building to Reiver, post mortem, is established under GOL §5-703 (1), which states, in part:

> An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent. But this subdivision does not affect the power of a testator in the disposition of his real property by will...

None of the leases annexed by defendants evidence an intent to transfer anything other than a leasehold interest in various portions of the Building. Plaintiffs have failed to supplement these documents with any other writings that evidence the alleged promise, and defendants annex copies of a will and related trust agreement, executed by Oscar Ianello, that were submitted for probate, to demonstrate that the decedent did not devise any interest in the Building to plaintiffs. All of the lease agreements entered into by Reiver and Ianello Inc. between 1989 and 2001, contain "no representation" clauses that state:

> All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between Landlord and Tenant and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed...

(*see e.g.* Peter Ianello Aff., exhs C, J, and N, ¶ 20; exhs F, G, L, P, and Q, ¶21). Defendants' right to judgment, therefore, is also supported by GOL § 15-301, which provides, that where a contract requires modification to be in writing, oral modifications are barred.

The evidence of part performance offered by plaintiffs in opposition to the motion, is insufficient to take the alleged promise outside the statute of frauds. Reiver alleges, that prior to the end of 1990, he spent over $ 1 million to renovate not only the demised premises, but the common areas of the Building. Reiver asserts, that he would not have made that kind of investment in the absence of the decedent's promise of convey an ownership interest to him. Even if the promise was made, however, it is not enforceable, unless plaintiffs can demonstrate that the acts allegedly performed in detrimental reliance on the promise, are "unequivocally referable" to the promise or agreement (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v Aegis Group PLC*, 93 NY2d 229, 235 [1999]; *Jonestown Place Corp v 153 West 33rd Street Corp.*, 53 NY2d 847 [1981]; *Geraci v Jenrette*, 41 NY2d 660, 666-67 [1977]; *Richardson & Lucas, Inc. v New York Athletic Club of the City of N.Y.*, 304 AD2d 462, 463 [1st Dept 2003]; *Lebowitz v Mingus*, 100 AD2d 816 [1st Dept 1984]).

To be "unequivocally referable," conduct must be inconsistent with any other explanation (*Richardson & Lucas, Inc. v New York Athletic Club of the City of N.Y.*, 304 AD2d at 463; *Joseph P. Day Realty Corp. v Jeffrey Lawrence Assoc., Inc.*, 270 AD2d 140,

141 [1st Dept 2000]; *Curanaj v Security Pacific Nat. Bank*, 202 AD2d 856, 857 [3rd Dept 1994], *quoting Burns v McCormick*, 233 NY 230, 232 [1922]). Reiver's affidavit in opposition to defendants' motion, states that before plaintiffs took possession of the leased premises in 1989, the Building was in a state of substantial disrepair. Paragraph 40 of the 1989 lease riders for the top floor and basement of the 208-210 Elizabeth Street portion of the Building, state:

> Tenant..., agrees to accept the demised premises in its "AS IS" physical condition and acknowledges that Landlord shall not be obligated to make any improvements or alterations to the demised premises whatsoever."

In addition, notwithstanding paragraph 4 of the printed portion of the1989 leases, which makes the landlord responsible for the interior and exterior public portions of the building, the 1989 lease riders state that the landlord was not required to provide the tenant with heat, electricity or air conditioning. Heat, electricity, and air conditioning had to be installed by the tenant, at the tenant's expense, with the supervision and approval of the landlord, and paragraph 61 of the 1989 lease riders, created an exception to the requirement, that any repairs and renovations be done exclusively within the demised premises for, "necessary exterior duct work and certain related air-conditioning equipment."

The affidavit of plaintiffs' contractor, states that he performed $250,000 worth of renovations to the roof of the 208-210 portion of the Building which included the installation of a concrete "platform" on the roof, and the annexed receipts for renovation expenses which total approximately $200,000, and which include $27,000 for the installation of air conditioning, labor, lumber, wood flooring, counter tops, doors, fixtures, electrical wiring and metal duct work, are consistent with the renovations contemplated under the leases,

given the admitted state of the Building. The part performance alleged by plaintiffs, therefore, is not "unequivocally referable" to the purported promise, and thus, is insufficient to take the promise outside the statute of frauds (*see e.g. Geraci v Jenrette*, 41 NY2d at 662; *Lebowitz v Mingus* , 100 AD2d at 817). Neither plaintiffs' first cause of action seeking specific performance, of the alleged verbal agreement, nor plaintiffs' second cause of action, for breach of the related covenant of good faith and fair dealing, which arises out of the same set of operative facts and circumstances, can survive, absent an enforceable promise (*see American-European Art Assoc., Inc. v Trend Galleries, Inc.* 227 AD2d 170, 171 [1st Dept 1996]: *see also Herman v Green*, 234 F3d 1262 [2d Cir 2000]; *Travelers Indem. Co. of Illinois v CDL Hotels USA, Inc., 322 F Supp 2d 482 [SD NY* 2004]). Thus, defendants' motion for judgment dismissing these claims is granted.

With respect to plaintiffs' third, fifth and sixth causes of action for *quantum meruit,* unjust enrichment, and promissory estoppel, respectively, it is well settled, that *quasi*-contract claims cannot be used to circumvent the statute of frauds (*Jonestown Place Corp. v 153 West 33rd St.* Corp., 53 NY2d 847, 849 [1981]; American-European *Art Assoc. v Trend Galleries, Inc.* 227 AD2d at 171; *see also Fitz-Gerald v Donaldson, Lufkin & Jenrette, Inc.*, 294 AD2d 176 [1st Dept 2002]; *Wings Assoc., Inc. v Warnaco, Inc.*, 269 AD2d 183 [1st Dept], *lv denied* 95 NY2d 759 [2000]). The purpose for invoking the court's equitable jurisdiction on such claims, is to impose a legal obligation, in the absence of an enforceable contract, in order to prevent a party's unjust enrichment (*Heller v Kurz*, 228 AD2d 263 [1st Dept 1996], *citing Martin v Campanaro* 156 F2d 127 [2d Cir], *cert den* 329 U S 752 [1946]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]). *Quasi*-contract claims cannot

be maintained when there is an express agreement covering the same subject matter (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 23 [2005]; Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 NY2d at 388).

The lease agreements also include provisions for sharing of profits from any sublease of the demised premises, such as paragraph 67 (h) of the 1989 lease riders, which states, in pertinent part, "[i]n the event Tenant should assign or sublease the Demised Premises, Landlord shall be entitled to one-third of each month's profit...." Reiver's renovations to the Building and leased premises are the only acts alleged or documented in detrimental reliance on the purported promise. The lease agreements include terms and conditions regarding the respective rights and obligations of the parties with regard to repair and renovation of the Building, and the demised premises. Moreover, plaintiffs had the use and enjoyment of the improved premises for approximately 17 years, and they agreed to relinquish their right to retain any installations and fixtures pursuant to paragraph 51 (b) of the lease riders which state, in part, "[a]ll improvements, including all fixtures therein, shall become the property of the Landlord except that upon the termination of this Lease, the Landlord shall have the option to require the Tenant to remove any improvements made by the Tenant...." It cannot be said, therefore, that defendants' retention of any benefit conferred by the renovation work performed by plaintiffs between 1989 and 1990, is unjust. Thus, the third, fifth and sixth causes of action alleged in plaintiffs' complaint are dismissed.

The elements of plaintiffs' fourth cause of action, which seeks to impose a constructive trust on the Building, or its proceeds, are: 1) a confidential or fiduciary relationship; 2) a promise, express or implied; 3) a transfer in reliance; and 4) unjust

enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Matter of Urdang*, 304 AD2d 586 [2d Dept 2003]; *Cilibrasi v Gagliardotto*, 297 AD2d 778, 779 [2d Dept 2002]; *Gottlieb v Gottlieb*, 166 AD2d 413, 414 [2d Dept 1990]; *Spodek v Riskin*, 150 AD2d 358, 361 [2d Dept 1989]; *Plotnikoff v Finkelstein*, 105 AD2d 10, 13 [1st Dept 1984]). A fiduciary relationship "might be found to exist, in appropriate circumstances, between close friends ... or even where confidence is based upon prior business dealings" (*Penato v George*, 52 AD2d 939, 942 (2d Dept 1976); *Levine v. Chussid*, 31 Misc 2d 412, 415 [Sup Ct, Queens County 1961]; *Cody v Gallow*, 28 Misc 2d 373, 374 [Sup Ct, Bronx County 1961]). In this case, however, plaintiffs do not allege that Reiver and the now deceased Oscar Ianello were friends, or entrusted business associates, prior to the time the promise purportedly was made, in 1989, and the details of the alleged friendship, as recounted by Reiver, are, in any event, insufficient to support the imposition of a constructive trust on the Building (*see e.g. Matter of Estate of Stalter*, 270 AD2d 594 [3rd Dept], *lv denied* 95 NY2d 760 [2000]; *Bontecou v Goldman*, 103 AD2d 732 [2d Dept 1984]). As discussed above, plaintiffs have also failed to raise a triable issue of fact with respect to whether defendants were unjustly enriched by the renovations. Plaintiffs' fourth cause of action is dismissed.

The seventh and eighth causes of action alleged in plaintiff's complaint assert actual and constructive eviction in relation to the basement of the 204 portion of the Building, and the 3rd floor of the 208-210 portion of the Building. Recent precedent appears to recognize actual and constructive eviction as affirmative causes of action for damages or other relief (*see e.g. Eastside Exhibition Corp. v 210 East 86th Street Corp.*, 23 AD3d 100 [1st Dept 2005] [tenant brought an action seeking abatement of entire rental obligation, court found

money damages to be an appropriate remedy]; *Whaling Willie's Roadhouse Grill, Inc. v Sea Gulls Partners*, 17 AD3d 453 [2d Dept 2005]; *Appliance Giant, Inc. v. Columbia 90 Assoc., LLC*, 8 AD3d 932, 933 [3rd Dept 2004]; *Cut-Outs, Inc. v Man Yun Real Estate Corp.*, 286 AD2d 258, 260 [1st Dept 2001], *lv denied* 100 NY2d 507 [2003]), notwithstanding precedent to the contrary (*cf. 81 Franklin Co. v Ginaccini*, 160 AD2d 558, 559 [1st Dept 1990][actual or constructive eviction can only be asserted in defense of a claim for rent, or for use and occupancy; *in accord, see 487 Elmwood, Inc. v Hassett*, 107 AD2d 285 [4th Dept 1985]). Plaintiffs additionally assert these claims in their Verified Reply, in relation to part of the top floor of the 208-210 portion of the Building, as affirmative defenses to defendants' counterclaim for use and occupancy.

Plaintiffs allege that their business involves the delivery and shipment of heavy pieces of furniture, metal work statuary and antiques. According to plaintiffs, commencing in or around 2003, the defendant landlord permitted the tenant operating a restaurant on the first floor of 208-210 Elizabeth Street, to obstruct most, if not all, of the loading dock for the Building. Plaintiffs allege, that the obstruction of the loading dock, completely blocked access to the freight elevator, which substantially impeded their business, and eventually caused them to abandon the leased premises.

An eviction, constructive or actual, requires a wrongful act by the landlord, that deprives the tenant of the beneficial enjoyment of something the tenant is entitled to by virtue of the lease, or which deprives the tenant of actual possession of the leased premises, or a portion thereof (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82 [1970]). In opposition to plaintiff's causes of action, defendants assert that the freight

elevator and loading dock are not part of the demised premises, that there are no lease or rider provisions specifically granting a right of access to the loading dock, and that plaintiffs' attempt to assert an easement, for use of those portions of the Building is prohibited by the "no representation" clauses, such as paragraph 21 of the printed portion of the 2001 lease for the third floor premises, that states, in part, "...no rights, easements or licenses are acquired by the Tenant by implication or otherwise except as expressly set forth in this provision." However, these provisions do not establish a *prima facie* right to judgment. Plaintiffs' right to use and access the loading dock and freight elevators may be inferred from paragraph 1, of the "Rules and Regulations" of the subject leases, which states, in pertinent part, "...sidewalks, entrances...vestibules, stairways, corridors or halls shall not be...used for any purpose other than for ingress or egress and delivery of merchandise and equipment in a prompt and efficient manner using elevators and passageways designated for such delivery...," and from paragraph 8 of the Rules and Regulations stating, in part, "... [f]reight, furniture, business equipment, merchandise and bulky matter of any description shall be delivered to and removed from the premises only on the freight elevators and through the service entrances and corridors..." (*see KRU, Inc. v 1000 Massapequa, Inc.*, 283 AD2d 314, 315 [2d Dept 1997]). Whether the loading dock and freight elevators, or access thereto, were appurtenant to plaintiffs' leaseholds is, thus, an issue of fact (*see Barash v Pennsylvania Terminal Real Estate* Corp., 26 NY2d 77, *supra*; Kru, *Inc. v 1000 Massaqequa, Inc.*, 283 AD2d at 315; *1328 Broadway, LLC v MCM Foootwear Ltd.*, 1 Misc3d 910(A), 781 NYS2d 629 [Civ Ct, N Y County 2004]; *Arbern Realty Co. v Clay Craft Planters Co., Inc.*, 188 Misc

2d 314 [App Term, 2d Dept 2001]; *Bijan Designer for Men, Inc. v St. Regis Sheraton Corp.*, 142 Misc 2d 175 [Sup Ct, NY County], *affd* 150 AD2d 244 [1st Dept 1989]).

The exculpatory provisions in the leases, pursuant to which plaintiffs waived any cause of action for constructive or actual eviction, arising out of lack of access to the freight elevators,[1] also are insufficient to establish a *prima facie* right to judgment on these claims and defenses, as there are issues of fact regarding whether the intended scope of these clauses is broad enough to encompass the interference alleged (*cf. compare Cut-outs, Inc. v Man Yun Real Estate Corp.*, 286 AD2d 258, *supra* [language in lease barring claims for constructive eviction upheld as basis to dismiss claim]; *with Eastside Exhibition Corp. v 210 East 86th Street Corp.*, 23 AD3d 100,103 [1st Dept 2005][exculpatory provision did not cover permanent deprivation of use]; *Bijan Designer for Men, Inc. v St. Regis Sheraton Corp.*, 142 Misc 2d at 181 [landlord's interference exceeded scope of exculpatory clause).

Reiver's allegations in opposition to defendants' motion to dismiss make it difficult to determine whether plaintiffs are alleging that they were expelled from the loading dock or freight elevators, which would support a finding of a partial actual eviction (*see Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d at 82-3; *Whaling Willies's Roadhouse Grill v Sea Gulls Partners, Inc.*, 17 AD3d at 454; *Appliance Giant, Inc. v. Columbia 90*

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Paragraphs 57 and 60 of the lease riders for the 3rd floor premises (Ianello Aff., Exhs J, K, L), and Paragraph 58 of the 1999 lease for the 204 basement premises (Ianello Aff, Exh Q), state, in part, "The Landlord is making the freight elevator available during normal business hours....In the event that there is a discontinuance of elevator service for any reason, the parties agree that such discontinuance shall in no way affect the Tenant's obligation to pay rent and the failure to provide such service may not be used by the Tenant to constitute an actual partial eviction or a constructive eviction from the premises."

Associates, LLC, 8 AD3d at 933; 487 *Elmwood, Inc. v. Hassett*, 107 AD2d at 286-87), whether they abandoned their use of the loading dock and freight elevators, which would support a finding of a partial constructive eviction (*see Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d at 83), notwithstanding the fact that plaintiffs remained in possession of the basement and third floor premises through January 2006, and continue to occupy the top floor of the 208-210 portion of the Building (*see* e.g. *Whaling Willies's Roadhouse Grill v Sea Gulls Partners, Inc.*, 17 AD3d at 454). Plaintiffs also fail to demonstrate how, and to what extent the alleged interference affected their ability to do business on the premises, and none of the parties have offered evidence to demonstrate the existence of alternative means for the delivery and shipment of furniture and other heavy items. In absence of a *prima facie* showing by defendants, however, the deficiencies in plaintiffs' evidence are not fatal (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d at 853), and under either scenario, partial actual or partial constructive eviction, plaintiffs may be entitled to recover damages, or offset defendants' counterclaim for use and occupancy (*cf. compare Eastside Exhibition Corp. v 210 East 86th Street*, 23 AD3d at 105 [in light of current realities and policies, more realistic remedy should be imposed for partial eviction of minimal proportions], *with Whaling Willies's Roadhouse Grill v Sea Gulls Partners, Inc.*, 17 AD2d 453, *supra* [partial actual eviction from part of parking lot would entitle tenant to full abatement of rent]; *see also Appliance Giant, Inc. v Columbia 90 Assoc.*, LLC, 8 AD3d 932, *supra*]; P.W.B. *Enterprises, Inc. v Moklam Enterprises, Inc.*, 243 AD2d 350 [1st Dept 1997][in an appropriate case, tenant may recover consequential damages]). In that regard, Reiver's correspondence does not, as asserted by defendants, conclusively demonstrate that plaintiffs' refusal to pay rent for the

top floor of the 208-210 portion of the Building is attributable to the alleged partial eviction and, thus, constitutes an election of remedies with respect to these claims (*see 487 Elmwood, Inc. v Hassett*, 107 AD2d at 289; *Frame v Horizons Wine & Cheese, Ltd.*, 95 AD2d 514, 518 [2d Dept 1983]). Accordingly, defendants' motion for summary judgment on the seventh and eighth causes of action alleged in plaintiffs' complaint, and on defendants' second counterclaim for use and occupancy, at a rate of $11,000 per month, is denied.

Plaintiffs' ninth cause of action, for breach of the warranty of habitability, is dismissed. All of the leases for the space in question are commercial leases, and defendants have a *prima facie* right to dismiss based upon the rule that a warranty of habitability is not applicable to commercial premises (*see Rivera v JRJ Land Property Corp.*, 27 AD3d 361, 364-65 [1st Dept 2006]; *Polak v Bush Lumber Co.*, 170 AD2d 932 [3rd Dept 1991]). In opposition, plaintiff Reiver alleges, without supporting evidence, that he has occupied part of the top floor loft of the 208-210 portion of the Building, as his residence, since 1989, with the defendant landlord's full knowledge and consent. However, in opposing the CPLR 3212 motion to dismiss, plaintiffs are required to lay bare their proofs (*Zuckerman v City of New York*, 49 NY2d 557, *supra Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, *supra; Batista v Mohabir*, 291 AD2d 365 [2d Dept 2002]). According to a certificate of occupancy annexed to the 1989 lease for the premises, the top or fourth floor of the 208-210 portion of the Building was formerly an apparel manufacturing facility. Plaintiffs submit no evidence demonstrating that the demised premises were converted into residential space, and no evidence of Reiver's residential use of the premises. The affidavit submitted by Reiver is devoid of any details regarding the alleged interference with his use and enjoyment of the

premises, commencing in or around 1995, and there is no evidence to demonstrate, that the landlord was notified of any alleged defect, or should be charged with a duty to repair (*see e.g. Batista v Mohabir*, 291 AD2d 365, *supra* [plaintiff required to lay bare proof of actual or constructive notice in opposition to motion for summary judgment]).

Finally, plaintiffs assert no viable defense to defendants' counterclaim for ejectment. Plaintiffs do not dispute that the lease for the subject premises expired on March 31, 2006, and that they have paid no rent since the expiration of the lease term. The landlord's alleged failure to obtain a certificate of occupancy, covering plaintiff's alleged use of the premises, is no defense to an action for ejectment (*see J.Z. & A.E. Realty Corp. v Putnam*, 258 AD2d 442 [2d Dept 1999]; *99 Commercial Street, Inc. v Llewelyn*, 240 AD2d 481 [2d Dept], *lv denied* 90 NY2d 809 [1997]; *see also Yuko Nii v Quinn*, 195 Misc 2d 821, 822 [App Term, 2d Dept 2003]). Moreover, under the leases, it was the tenants' burden to obtain a certificate of occupancy covering their intended use (*see Rivera v JRJ Land Property Corp,* 27 AD3d 361 [1st Dept 2006]; *McClelland v Robinson*, 94 Misc 2d 308 [Civ Ct, NY County 1978]; *cf. compare Lutine Realty Corp. v Perry Films, Inc.*, 33 AD3d 486 [1st Dept 2006]).[2] Plaintiffs

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For instance, paragraph 63 of the lease rider for the 1989 lease for the top floor loft of 208-210 Elizabeth street provides, in part:

> ...Tenant acknowledges that the present Certificate of Occupancy does not encompass Tenant's use. In the event that any governmental agency determines that the Tenant's use of the premises is in violation of the Certificate of Occupancy, then, in that event, Tenant shall discontinue the use of the premises on thirty (30 days' notice to the Landlord), or shall do each and everything necessary, at the Tenant's sole cost and expense, in order to amend the Certificate of Occupancy in order to allow the Tenant to continue to use the premises for the uses set forth in paragraph "2" hereof.

assert no defect of notice (*see e.g. Kosa v Legg*, 12 Misc 3d 369 [Sup Ct, Kings County 2006]), and no basis for protection under any of the statutes potentially applicable to residential tenants (*see e.g.* Emergency Tenant Protection Act of 1974 [L 1974, ch 576, §4], Multiple Dwelling Law, Art. 7-C, §280, et seq). Thus, in the absence a viable defense, the landlord's motion for summary judgment, on its second counterclaim for ejectment, is granted (*see East 82 LLC v O'Gormley*, 295 AD2d 173 [1st Dept 2002]; *J.Z. & A. Realty Corp. v Putnam*, 258 AD2d 442, *supra*; *99 Commercial Street, Inc. v Llewelyn*, 240 AD2d at 483; *Siegmund Strauss, Inc. v Strategic Dev. Concepts*, 10 Misc 3d 1067(A), 814 NYS2d 565, 2006 WL 20391 *10 [Sup Ct, NY County 2006]; *Yuko Nii v Quinn*, 195 Misc 2d at 822).

For the reasons stated, it is:

ORDERED, that defendants' motion for summary judgment is granted to the extent of dismissing the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH, and NINTH causes of action alleged in plaintiffs' complaint, and to the further extent of granting defendant Oscar Z. Ianello Associates, Inc. judgment on its 1st counterclaim, for ejectment. The Clerk is directed to enter judgment thereon. In all other respects, defendants' motion is denied; and it is further

ORDERED that a conference will be held in Part 60 on April [redacted] 2007 at 10:30 a.m.;

Dated: 3/9/07

ENTER

J.S.C.
BERNARD J. FRIED
J.S.C.