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SCANNED ON 5/13/2009

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

PRESENT: HON. JANE S. SOLOMON Justice

PART 55

Accurate Copy

INDEX NO. 101802/08

MOTION DATE 3/2/09

- v -

MOTION SEQ. NO. 01

Fisk Building

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in the accompanying memorandum decision + order.

FILED
MAY 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/12/09

HON. JANE S. SOLOMON J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55
- X

ACCURATE COPY SERVICE OF AMERICA, INC., et al., Index No. 101802/08

Plaintiffs,

- against -

FISK BUILDING ASSOCIATES L.L.C. and 250 West 57th Street Associates L.L.C.,

Defendants.
- X

JANE S. SOLOMON, J.:

Defendant 250 West 57th Street Associates (250 West) is the owner of the building at that location (Building), and Fisk Building Associates L.L.C. (Fisk) is the Building's landlord. Together, they move, pursuant to CPLR 3211 (a) (1), (5), & (7) and CPLR 3013 and 3014, for an order dismissing the complaint filed by 45 of their tenants or, in the alternative, transferring the matter to Civil Court pursuant to CPLR 325 (d). At various times between February 11, 1999 (in the case of plaintiff The Dennelisse Corp.) and March 6, 2007 (in the case of plaintiff Sound Body and Soul Inc.), Fisk entered into leases (collectively, Leases) with the plaintiffs, each Lease providing for the payment of "electricity" as additional rent. The calculation of this additional rent charge is the primary subject matter of this action.

THE COMPLAINT

Although the Leases contain some variances in the language used to describe how electricity charges are billed, the complaint alleges that Fisk has uniformly billed the plaintiffs pursuant to a fabricated formula created by Fisk and its managing agent (Cushman & Wakefield,

Inc.). The electricity clauses are said to be ambiguous and, in particular, although they have the effect of having Fisk profit over time, they do not expressly state that Fisk will so profit. The claim is that Fisk should not be permitted to charge additional rent that exceeds what Fisk is required to pay for utility service. Based on the formula in the Leases, when the cost of electricity goes up, so does Fisk's profit margin, because it passes on percentage increases to tenants, the result of which is said to be unconscionable. Plaintiffs contend that, at most, Fisk should be allowed to collect only each tenant's proportionate share of actual increases in electricity costs. Although industry standards in New York City currently call for approximately $4 per square foot for electricity charges, Fisk is attempting to collect upwards of an average of $10 per square foot. Fisk has attempted to collect a 124.52 percent increase of electricity charges from each tenant. Because the Leases contain a $3.20 per square foot "Electricity Rent Inclusion Factor" (ERIF), any electricity charge increases owed by tenants should be based on actual cost to Fisk over and above $3.20 per square foot.

It further is alleged that the supporting data that Fisk has distributed to various plaintiffs about the Building's total monthly average charge for electricity is inconsistent. For example, some documentation shows $75,879.45 for 1996, while elsewhere, the Building's total monthly average charge in 1996 was set at $79,964.69. Again, in 2007, Fisk has asserted both that the Building's total monthly average charge for electricity was $158,131.24 and $170,360.81. This is crucial because higher representation of its average monthly cost leads to an increase in the amount passed on as additional rent.

Finally, it is alleged that Fisk has commenced at least four nonpayment eviction proceedings against certain plaintiffs, which it repeatedly adjourned and failed to prosecute, a

matter plaintiffs assert is based on Fisk's awareness that it has no legal right to collect the alleged electricity charges. Nevertheless, although it discontinued the eviction proceedings, it has not removed the rent overcharges from plaintiffs' monthly bills.

There are six causes of action. The first cause of action, for breach of the Leases, seeks to recover the alleged electricity overcharges. The second, for unjust enrichment, alleges that Fisk has inequitably retained the rent overcharges that it was duty-bound to deliver to plaintiffs. The third seeks rescission of the electricity provisions of the Leases based upon Fisk's alleged misrepresentation and fraud regarding additional rent charges. The fourth seeks a declaration that plaintiffs are not in default of their Leases regarding electricity and "fuel cost adjustment" charges. The fifth seeks a permanent injunction, enjoining Fisk from taking any steps to terminate plaintiffs' Leases based upon the alleged electricity and fuel cost adjustment arrears. The last seeks damages based upon Fisk's billing plaintiffs for attorney's fees that are not owed by plaintiffs.

THIS MOTION

Defendants seek dismissal of the complaint on the grounds that (1) they have a defense founded upon documentary evidence; (2) the causes of action may not be maintained because they previously were asserted and rejected; (3) it fails to state a cause of action; and (4) the causes of action are pleaded improperly. For the reasons discussed below, the motion is granted. Some of the allegations contained in the complaint are conclusively controverted by the Lease documents, while those that are not fail to state a cause of action, and the fraud claim is not pleaded with sufficient specificity.

DISCUSSION

As a preliminary matter, the 32-page, 172-paragraph, complaint does not assert any claims against defendant 250 West, nor do plaintiffs respond to defendants' persuasive argument that, on this basis alone, the complaint should be dismissed as against this defendant.

Defendants also contend that plaintiffs' claims are barred in that they were rejected in another action, i.e., *The Dennelisse Corp. v Fisk Build. Assoc.* (Index No. 300047-2007, Civil Court, New York County). The parties in that action include The Dennelisse Corp. (a plaintiff here) and Lower Westside Household Services Corp., as plaintiffs, and Fisk, Cushman & Wakefield, Inc., and Helmsley-Spear, Inc., as defendants. Plaintiffs there sought to recover alleged overcharges based on theories of breach of contract and unjust enrichment. When the defendants moved to strike the complaint for plaintiffs' failure to comply with a discovery order, plaintiffs cross-moved to amend the complaint to add, among other things, a cause of action to recover electric overcharges. The Court denied the motion for leave to amend the complaint, finding that the plaintiffs did not provide evidence that supported the proposed additional causes of action. Because the Court there addressed the issue of electrical charges in a motion to amend the complaint, Fisk fails to show a prior judgment on the merits, a requirement for a res judicata dismissal (*see Miller Mfg. Co. v Zeiler*, 45 NY2d 956 [1978]). Hence, dismissal on this ground is denied.

Nevertheless, dismissal of the complaint is warranted because, pursuant to 3211 (a) (1), the documentary evidence, namely, the Leases, conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Sempra Energy Trading Corp. v BP Prods. N. Am., Inc.*, 52 AD3d 350 [1st Dept 2008]). "[W]here a written

agreement (such as the lease in this case) unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

In connection with the claim that Fisk's application of the electricity and fuel adjustment provisions of the Leases has resulted in an unwarranted profit to it, the Leases are subject to the rules of construction applicable to any other agreement (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217 [1978]). Thus, whereas the complaint states that, in the majority of the negotiations of the Leases, Fisk maintained that the average cost of electricity usage to tenants would be $3.20 per square foot, the Leases expressly state that the ERIF of $3.20 per rentable square foot per annum is subject to adjustment, and the relevant provisions contain a formula for the application of that adjustment. The complaint does not allege that Fisk is not enforcing the electricity charge provisions in conformance with their terms, but, rather, that Fisk is making a profit as the charges from Con Edison increase. The complaint does not allege that this alleged profit violates the terms of the Leases, and there is no merit to the complaint's assertion that the Leases must expressly provide that Fisk is entitled to make a profit from the electric rent charges.

As for the allegation that the electricity provisions are ambiguous, where documentary evidence contains an ambiguity, that evidence does not conclusively establish a defense as a matter of law (*Mendelovitz v Cohen*, 37 AD3d 670 [2d Dept 2007]). Here, however, although the complaint alleges in conclusory fashion that the Leases are ambiguous concerning

electric charges, it offers no explanation as to its alleged ambiguity. Instead, the text of the "Electricity" provision common to most of the Leases is copied into the complaint, taking up more than five single-spaced pages. While this text may be dense, and the section may be complicated, that, alone, does not signify ambiguity.

In the first instance, in subparagraph "A (i)" the electricity is said to be provided on a rent inclusion basis; the ERIF is defined, begins at $3.20 per square foot to compensate for wiring and other installations facilitating distribution, and, under subparagraph "A (ii)" is to be changed measured by certain factors set forth. Moreover, that subparagraph provides for Fisk's selection of "a reputable, independent electrical consultant" who is to "determine the percentage change in the ERIF due to Landlord's changed costs."

Thereafter, subparagraph "C (i)" provides for a challenge by a tenant to the determinations of the electrical consultant. Those determinations are to be "binding and conclusive on Landlord and on Tenant from and after the delivery of each such relevant determination to Landlord and Tenant, unless, within fifteen (15) days after delivery thereof, Tenant disputes such determination." In that event, the Lease contemplates that the tenant would engage an electrical consultant to make a determination and then try to resolve its determination with that of the Landlord's consultant, failing which a third consultant is to make a controlling determination and, failing agreement on that third consultant, this court is to make the appointment.

One last assertion in the complaint bears mentioning. Paragraph 138 asserts that, by its terms, the electricity section of the lease has remedy for, and therefore, contemplates, a finding of unenforceability. That is a misreading of the relevant portion of subparagraph "C

(iii)." The text there anticipates changes in pricing and methods or rules of billing, in which event a formula is set forth explicitly contemplating that the Landlord's actual utility payments are a floor, above which certain percentage increases are to be applied.

To the extent that the other allegations are not disposed of by documentary evidence, taken together, they fail to state a cause of action, because they are either conclusory or make allegations that are not supported by a recognized theory of liability. By way of example, the complaint alleges that Fisk's billing practice regarding electricity charges is onerous and against public policy and controlling law, and Fisk should not be permitted to bill out additional rents in sums that exceed the amounts that Fisk actually paid for the corresponding costs. The claim that the enforcement of the Lease provisions as to the electricity adjustment violates public policy is belied by the Court of Appeals decision in *George Backer Mgt. Corp. v Acme Quilting Co.* (46 NY2d at 218 ["Significantly, the lease contains no requirement that rent escalations be measured by actual costs as opposed to the common industry-wide criterion chosen by the parties here"]).

Indeed, the public policy in New York is to respect negotiated commercial leases (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]). As stated by the Court of Appeals:

> "Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the 'correct' rule. This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside."
>
> (*id.* [internal citations omitted]).

In that case, the Court refused to disturb the rule that commercial landlords have no obligation to

mitigate damages. In light of that holding, there is no basis to consider the policy claim made here regarding the electricity clause.

The complaint alleges that Fisk distributed documentation claiming that the Building's total monthly average charge for electricity in 1996 was $75,879.45, while other Fisk documentation claims that the Building's total monthly average charge for electricity in 1996 was $79,964.69. For 2007, some of the documentation of Fisk claims that the Building's total monthly average charge for electricity was $158,131.24, while other of its documentation claims $170,360.81. Notwithstanding these assertions of the inconsistency of documentation, the complaint does not allege that the electric charge adjustment was supported by the use of false or erroneous documentation.

Accordingly, none of the causes of action are viable. The issues pertaining to the first cause of action, for breach of the Leases, have been addressed above. The second cause of action, for unjust enrichment, is not viable because there is an enforceable agreement that governs the terms of the subject matter at issue (*Taddeo v Medallic Art Co.*, 40 AD3d 444 [1st Dept 2007], *lv denied* 9 NY3d 817 [2008]; *Adelaide Prods. v BKN Intl. AG*, 38 AD3d 221 [1st Dept 2007]). The third cause of action seeks rescission of the electricity provisions of the Lease, because of Fisk's misrepresentation and fraud regarding additional rent charges related to electricity. Plaintiffs contend that the fraud cause of action is based upon paragraphs 114 and 115 of the complaint. Paragraph 114 alleges that Fisk should have included in the Leases a definite sum representing its actual electricity costs, and it mandated that all Leases contain a reference to "the cost to Landlord of electricity" as of May 1, 1996. Paragraph 115 alleges that "[d]uring lease negotiations, Landlord routinely maintained that the passing reference to 1996

electricity cost to Landlord is merely for ease of accounting purposes and the ERIF provided in the lease (almost always $3.20 per square foot) is in fact a fair approximate of Landlord's electric cost." As evident by these allegations, upon which plaintiffs rely, the fraud cause of action is not adequately pleaded, because there is no specificity as to the alleged misrepresentation, and it merely "suggests" fraud on the part of Fisk during lease negotiations (*Sempra Energy Trading Corp. v BP Prods. N. Am., Inc.*, 52 AD3d at 350; *Samsung Am. v GS Indus.*, 250 AD2d 368 [1st Dept 1998]).

The fourth cause of action seeks a declaration that plaintiffs are not in default of their Leases regarding electricity and fuel cost adjustment charges. Generally, a dismissal of a complaint that seeks declaratory relief, on the ground of a defense founded on documentary evidence, would entitle the defendant to a declaration in its favor (*see e.g. Town of Southampton v Portman*, 52 AD3d 819 [2d Dept], *lv denied* 11 NY3d 708 [2008]). Here, however, defendants do not seek a declaration, and, moreover, the dismissal here is largely based upon the failure to state a cause of action.

In view of the foregoing, the fifth cause of action, which seeks a permanent injunction enjoining Fisk from taking any steps to terminate plaintiffs' Leases based upon the alleged electricity and fuel cost adjustment arrears, is dismissed, as is the sixth cause of action which seeks damages based upon the allegation that Fisk billed plaintiffs for attorney's fee charges that are not owed by plaintiffs. There are no allegations in the complaint as to the nature or the basis of these alleged charges.

Finally, to the extent that any plaintiff has a defense to the amount billed for additional rent measured by the electricity provision, it has a defense in any nonpayment

summary proceedings brought by Fisk in Civil Court. Therefore, there is nothing in this action to transfer to the Civil Court.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 12, 2009

ENTER:

J.S.C.

HON. JANE S. SOLOMON

FILED
MAY 13 2009
COUNTY CLERK'S OFFICE
NEW YORK