

Nejat v Axiotis

2010 NY Slip Op 32579(U)

September 17, 2010

Sup Ct, NY County

Docket Number: 100840/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

Index Number : 100840/2009
NEJAT, MORRIS
vs.
AXIOTIS, CONSTANTINE A.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

on this 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

motion (a) and cross-motion (b) decided in accordance with the annexed decision/order of even date.

FILED

SEP 21 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/17/10

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CROSS-MOTION SPECIFICALLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----x
MORRIS NEJAT,

Plaintiff,

Index No.
100840/09

-against-

Motion Sequence No.
001

CONSTANTINE A. AXIOTIS,

Defendant.
-----x

JUDITH J. GISCHE, J.:

Pursuant to CPLR 2219(a) the following numbered papers
considered on this motion:

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE
NUMBERED

PAPERS

Notice of motion, MN affd., PY affd., JE affirm., exhibits.....	1
Notice of Cross-Motion, CA affd., DA affirm., ADA affirm., MAR affirm., exhibits.....	2
MRK reply affirm., MN reply affd., JS affd., JE affirm., exhibits.....	3
CAA sur-reply affd., exhibit.....	4
JE affirm. In response to sur-reply, exhibit.....	5

Upon the foregoing papers the decision and order of the
court is as follows:

In this action, plaintiff, a proprietary lessee of
commercial space, seeks (1) monetary damages for breach of a
commercial sublease, and (2) an order declaring that defendant,
as subleasee, exercised two successive five-year options to renew
such sublease.

In the instant motion, plaintiff seeks summary judgment on

his complaint, as well as dismissal of defendant's affirmative defenses and counterclaims (CPLR 3212). Defendant cross-moves for summary judgment dismissing plaintiff's complaint (CPLR 3212), or, alternatively, for an order denying plaintiff's motion and compelling discovery under CPLR 3124 and 3212 (f).

Additionally, defendant seeks to refer, to a Special Referee, the issue of sanctions and an award of attorneys' fees, based upon plaintiff's alleged fraud in proffering certain documents in support of the instant motion.

For the reasons stated below, plaintiff's motion is granted, only to the extent of: (1) granting summary judgment on subsection (i) of the first cause of action, as well as the second and third causes of action in his complaint, and (2) dismissing all of defendant's affirmative defenses and counterclaims, and is otherwise denied. Defendant's cross motion is denied.

Background

On March 1, 2001, plaintiff, the proprietary lessee of commercial space on the lower level of 120 East 36th Street, New York, New York (the premises), subleased a portion of the premises to defendant for use as a "Medical Practice: Pathology Laboratory Practice."¹ See Notice of Motion, Exh. B. In

¹This court takes judicial notice of the fact that, in his verified complaint, plaintiff alleges that the sublease commenced on March 15, 2001. See Plaintiff's verified complaint, ¶¶ 5-6.

addition to specifically stating the permitted occupancy, the written sublease (the sublease) also required such occupancy to be in conformance with the proprietary lease.

The sublease period, as set forth in Article 27 of the Sublease Rider, was for an initial two-year term and provided for the option to renew for two consecutive five-year terms. Under the provisions of the sublease, if defendant wished to exercise his first renewal option, he could do so, in writing, within a 90-75 day window prior to the expiration of the initial two-year term.

It is uncontested that defendant failed to give the required written notice of his intention to remain in the premises after the expiration of the initial two-year sublease term. However, despite his failure to give such written notice, plaintiff allowed defendant to remain in the premises for more than five additional years, during which time plaintiff billed for rent and fees on the premises at the renewal lease rate. Defendant continued to pay rent on the premises through February 2008, but, although he also remained in possession from March 1, 2008 through August 31, 2008, he did not pay rent for that period. After sending a letter, dated August 1, 2008, in which he

However, all papers proffered in support of and in opposition to the instant motion and cross motion, including the copy of the sublease that is attached to plaintiff's verified complaint, state that the sublease commenced on March 1, 2001.

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indicated his intention to vacate (see Notice of Motion, Exh. G), defendant relinquished possession of the premises on August 31, 2008.

In his complaint, plaintiff seeks damages for defendant's failure to give written notice of his intent to renew the sublease, as well as for defendant's failure to pay rent for the period of March through August 2008. Plaintiff alleges several alternative theories, under which he is entitled to damages, regarding defendant's extension of his occupancy from March 2003 through August 2008.

First, plaintiff alleges that by defendant remaining in the premises beyond the expiration of the initial term of the sublease and until August 31, 2008, as well as paying rent thereon through February 2008, which rent was accepted by plaintiff, defendant exercised both the first and second options to renew the sublease. Under that theory, plaintiff seeks all rent owed through the end of the second five-year renewal term, i.e., February 28, 2013.

Alternatively, plaintiff alleges that, despite defendant's failure to give written notice of his intent to continue occupying the premises, by remaining in the premises and paying rent for every month through February 2008, defendant exercised the first five-year renewal option. Plaintiff further argues that, because defendant failed to pay rent after February 29,

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2008, the sublease terminated on that date (defendant thus failed to exercise the second five-year option), and the liquidated damages provision of Article 43 of the Sublease Rider was triggered. Plaintiff contends that, after the termination of the five-year renewal term in February 2008, defendant became a month-to-month tenant and owed plaintiff "a monthly [r]ent equal to ... twice the [r]ent paid by [defendant] in the month preceding the termination date." See Notice of Motion, Exh. B.

Under a third theory, plaintiff alleges that, because defendant never exercised either of the five-year renewal options in writing, plaintiff is entitled to liquidated damages (pursuant to Article 43 of the Sublease Rider) for the entire period from March 1, 2003 through August 31, 2008.

Defendant avers, however, that he does not owe plaintiff any rent, liquidated damages, or use and occupancy because he was fraudulently induced by plaintiff to sign the sublease. According to defendant, plaintiff committed fraud, because plaintiff knew that defendant's intention to occupy the premises as a commercial laboratory violated the proprietary lease, but never informed defendant of this fact or provided him with a copy of the proprietary lease.

Additionally, defendant seeks the return of his \$6,000 security deposit, as well as \$100,000 in damages for equipment that he lost as the result of plaintiff's alleged fraud. In his

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first amended verified answer, defendant asserts other affirmative defenses, including: failure to mitigate damages, novation, estoppel, failure to maintain the fire system and fire hazards, waiver, and lack of clean hands.

Discussion

In the instant motion and cross motion, both plaintiff and defendant seek summary judgment. To obtain such relief, each movant must make a prima facie showing of entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). A summary judgment motion may only be granted where it "clearly appear[s] that no material and triable issue of fact is presented" *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when an issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Once a showing of entitlement to summary judgment "has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003).

The sublease states in article 2nd, "[t]enant shall use and occupy demised premises for no other purpose than Medical

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Practice: Pathology Laboratory Practice." Article 30 of the Sublease Rider, provides in pertinent part: "WHERE THERE IS A CONFLICT OR INCONSISTENCY BETWEEN THE TERMS OF THE PRINTED SUBLEASE, RIDER ANNEXED THERETO OR THE AFOREMENTIONED PROPRIETARY LEASE, THE TERMS OF THE PROPRIETARY LEASE WILL GOVERN AND BE BINDING. THE UNDERTENANT SHALL BE BOUND BY THE PROPRIETARY LEASE AND THE HOUSE RULES AS AMENDED FROM TIME TO TIME."

Defendant avers that he was not informed that the proprietary lease contained a "Professional Apartment Amendment to Stimson Owners Corp. Proprietary Lease," which states that "[t]he permitted use of the apartment shall not be deemed to include a ... commercial laboratory." Defendant asserts that despite numerous requests, he was not given a copy of the proprietary lease, and had he received such a copy, he would have been aware that his intended use of the premises would have violated the terms of the proprietary lease and he would not have signed the sublease. Defendant alleges fraud in plaintiff's actions.

Plaintiff maintains, however, that any fraud defenses to the instant action are barred by the six-year statute of limitations. Defendant responds that he asserted his claim within two years of the discovery of the fraud, and that, therefore, any such claim is not barred. Further, defendant contends that plaintiff is estopped from employing this defense.

"In contract cases, the cause of action accrues and the Statute of Limitations begins to run from the time of the breach." *John J. Kassner & Co., Inc. v City of New York*, 46 NY2d 544, 550 (1979). Fraud claims must be asserted either within six years of the date of the alleged fraud (see CPLR 213 [8]) or two years from the date of its discovery (see CPLR 203 [g]).

Defendant asserts that he did not become aware that the proprietary lease did not allow him to operate a commercial laboratory until 2007, when he began receiving letters from the cooperative management company that there were issues regarding the premises' air conditioners. According to defendant, it was at that point that he first learned that the original approval of his sublease by the cooperative's board of directors may not have included approval of his commercial laboratory.

Pursuant to CPLR 203 (g), "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, ... the action must be commenced within two years after such actual or imputed discovery ..., computed from the time the cause of action accrued, whichever is longer."

Plaintiff maintains, however, that even if defendant asserted his fraud defense within two years of his 2007 discovery, defendant's claim is barred because he could have,

with reasonable diligence (within the meaning of CPLR 203 [g]), discovered the fraud within six years of the alleged breach.

"The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred. ... Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute'" *Sargiss v Magarelli*, 12 NY3d 527, 532 (2009), quoting *Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 (1957).

Defendant maintains that, even if he did not assert his fraud claim within two years of discovery or exercise reasonable diligence, plaintiff's affirmative wrongdoing created an equitable bar to enforcing the statute of limitations.

"The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense. ... It is ... fundamental to the application of equitable estoppel for [claimants] to establish that subsequent and specific actions by [the wrongdoer] somehow kept them from timely bringing suit." *Zumpano v Quinn*, 6 NY3d 666, 673, 674 (2006). A claimant must establish that the action was brought within a reasonable time after the facts giving rise to the estoppel ended. See *Fuchs v New York Blood Center, Inc.*, 275 AD2d 240 (1st Dept), lv denied 95 NY2d 769 (2000).

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Whether or not defendant asserted his fraud counterclaim within the statute of limitations or whether he asserted his claim within a reasonable time after the facts giving rise to estoppel ended is of no moment, however, as defendant has failed to meet all the elements of a fraud claim, and, therefore, his first and second counterclaims need be dismissed.

Defendant frames his fraud counterclaims in terms of fraudulent inducement and/or fraudulent concealment.² Such claims must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury. See *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); see also *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 (1996).

Defendant cannot show any resulting injury from the claimed fraud. He got the benefit of the entire term of the lease, regardless of the use clause in the proprietary lease, since he actually operated the premises in the manner he desired without any interference by the board or anyone else for that matter. According to Jonathan Sanders (Sanders), the current cooperative board of directors' president, "[f]or seven years, the Board was

²Generally, claims for fraudulent concealment require a duty to disclose material information (see *Jana L. v West 129th Street Realty Corp.*, 22 AD3d 274 [1st Dept 2005]), which arises when the alleged perpetrator is either a fiduciary or there is a confidential relationship between the parties. See *Dembeck v 220 Cent. Park South, LLC*, 33 AD3d 491 (1st Dept 2006).

fully aware of [d]efendant's use of the space as a medical laboratory." See Reply Affirmation, Sanders Affidavit, ¶ 7. Additionally, there is no question that defendant's sublease was approved shortly after it was signed with the statement in Article 2nd that defendant was to occupy the premises as "Medical Practice: pathology Laboratory Practice." Finally, defendant remained in the premises for more than seven years without being evicted or even threatened with eviction by either plaintiff or the cooperative. Although he claims to have lost equipment valued at up to \$100,000 by having to vacate the apartment, there is no evidence that anyone was forcing him or even wanted defendant to vacate the premises in August 2008.

Further, there is no question that at the time he negotiated and signed the sublease, defendant was represented by an attorney, Ares D. Axiotis (Axiotis). See Affirmation in Opposition, Axiotis Affirmation.

Because defendant has failed to prove any injury as the result of plaintiff's alleged fraud, consideration of statute of limitations issues of fact is unnecessary. Defendant's affirmative defenses relating to fraud and his counterclaims of fraud are hereby dismissed.

Further, the statute of limitations on a claim of reformation based upon mistake is six years, accruing on the date of the mistake. See CPLR 213 (6). Defendant had the document

containing the "mistake" in his possession for more than seven years. He has not proffered any evidence to demonstrate the due diligence required pursuant to CPLR 203 (g) to toll the statute of limitations, therefore, that portion of the first counterclaim that seeks to reform the sublease is dismissed.

Having upheld the validity of the underlying lease, the court further holds that defendant is answerable to plaintiff in damages for having remained in occupancy of the premises from March 2008 until the date he ultimately vacated without paying and rent and/or use and occupancy.

As to the damages, plaintiff gives three alternative theories of recovery. In the first, defendant was a holdover month-to-month tenant for the entire period from March 2003 through August 2008, and, therefore, the liquidated damages clause in Article 43 of the Sublease Rider was triggered against defendant for that entire period.

In the second, plaintiff argues that defendant exercised the renewal option for the first five-year extension through February 29, 2008, but, when defendant did not vacate the premises on that date nor pay any further rent, the liquidated damages clause in Article 43 of the Sublease Rider was triggered for the period from March 1, 2008 through August 31, 2008.

Finally, the third theory of recovery is that defendant exercised both of the five-year options to renew when he

continued to occupy the premises beyond the end of the previous sublease term, and, therefore, owes rent for the entire five-year renewal term from March 2008 through February 2013.

For the reasons stated below, this court holds that the undisputed facts of this case establish that defendant renewed the sublease for one five year term after the initial sublease term expired on February 28, 2003, and thereafter he remained in possession as a month-to-month subtenant from March 1, 2008 through August 1, 2008.

Article 27 of the Sublease Rider, entitled, "LEASE PERIOD AND OPTION TO RENEW," provided that "within 90 days and not more than 75 days prior to the termination date of the initial term, UNDERTENANT shall provide written notice to OVERTENANT that UNDERTENANT intends to exercise his option to extend the Sublease for a five-year lease term."

It is uncontested that defendant did not provide plaintiff with the written notice required in Article 27.

Although plaintiff alleges that defendant agreed to the first five-year renewal term by continuing his occupancy and paying rent, and that plaintiff waived the requirement that notice of defendant's intention to renew be in writing, defendant maintains that he did not renew the sublease in March of 2003, and instead, by operation of law, became a month-to-month tenant.

Defendant points to Real Property Law § 232-c to support his

position. That section, entitled "Holding over by a tenant after expiration of a term longer than one month; effect of acceptance of rent," states:

[w]here a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.

Although the right of a tenant to renew a lease is circumscribed by the terms of the agreement (see *Dime Sav. Bank of New York, FSB v Montague Street Realty Assocs.*, 90 NY2d 539 [1997]), and "notice exercising an option is ineffective if not given within the time specified" (*J.N.A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 NY2d 392, 396 [1977]), "[w]hen rent is accepted with knowledge of particular conduct which is claimed to be a default, the acceptance of such rent constitutes a waiver by the landlord of the default." *Atkin's Waste Materials, Inc. v May*, 34 NY2d 422, 427 (1974). In other words, if a landlord opts not to terminate the tenancy, "and accepts rent with knowledge of the tenant's violation then the acceptance evidences his waiver and an election to continue the relationship." *Jefpaul Garage Corp. v Presbyterian Hosp. in City of New York*, 61 NY2d 442, 448

(1984).

Although such a waiver can be precluded by an express "no-waiver provision" in a lease or sublease (see *TSS-Seedman's, Inc. v Elota Realty Co.*, 72 NY2d 1024 [1988]), a no-waiver clause can itself be waived where there has been a knowing acceptance of rent over a period of time without any effort by a landlord to terminate the lease. See *Lee v Wright*, 108 AD2d 678 (1st Dept 1985).

It is uncontested that a "no-waiver provision" was included within Article 18th of the sublease. The pertinent portion of that waiver is as follows: "[t]he failure of the Landlord to insist upon a strict performance of any of the terms, conditions, and covenants herein shall not be deemed a waiver of any rights or remedies that Landlord may have."

The plaintiff here has specifically stated in one of his theories that, as respects the first five-year renewal term, he waived the requirement of written notice. See Notice of Motion, Plaintiff Affidavit, ¶ 7, note 3. Clearly the conduct of the parties is consistent with the claim of waiver. For the entire five year period following the initial term of the sublease, the parties both behaved as if the sublease had been renewed. The court holds that, as a matter of law, defendant renewed his sublease for the first five-year renewal term.

This court notes that the use of Real Property Law § 232-c

by defendant, as he proposes, would subject him to the holdover provisions provided for in the sublease and thereby to tremendous penalties.

If, as defendant avers, he did not intend to renew the sublease for a five-year term, under New York law, effective March 1, 2003, the sublease was terminated and a holdover month-to-month subtenancy was created by law (see *Matter of Jaroslow v Lehigh Valley RR. Co.*, 23 NY2d 991 [1969]; see also *Zobe, L.L.C. v United Northern Bancshares, Ltd.*, 251 AD2d 237 [1st Dept 1998]), subject to the same terms and subject to the same covenants as were provided for in the sublease. See *City of New York v Pennsylvania RR. Co.*, 37 NY2d 298 (1975); see also *James Pinto Photography, Ltd. v Sheppard*, 13 Misc 3d 292 (Civil Ct, Kings County 2006).

Those terms and covenants include Article 43 of the Sublease Rider, entitled "HOLDOVER." The pertinent portion of which states as follows:

If UNDERTENANT ... shall continue to occupy the ... Premises after the termination of this Lease, without the prior written consent of the OVERTENANT, UNDERTENANT at the option of OVERTENANT, shall be deemed to be occupying the ... Premises as a UNDERTENANT from month to month, at a monthly Rent equal to the [sic] twice the Rent paid by UNDERTENANT in the month preceding the termination date.

Although Article 43 of the Sublease Rider is not explicitly identified as a liquidated damages clause, it provides for an

estimate of the extent of damages sustained as the result of a breach in the amount of double the rent.

"Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy." *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424 (1977). As to the amount, where it "bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation," it is enforceable. *Id.* at 425; see also *Crown It Services, Inc. v Koval-Olsen*, 11 AD3d 263 (1st Dept 2004). This Department has previously held that a liquidated damages clause that provides for a penalty of double the previous rent is not unreasonable. See *Tenber Associates v Bloomberg L.P.*, 51 AD3d 573 (1st Dept 2008); see also *319 Fifth Ave. Realty v 319 Smile Corp.*, 21 Misc 3d 139(A), 2008 Slip Op 52348(u) (App Term, 1st Dept 2008).

Further, and most damaging to defendant, is the First Department rule that, despite a landlord's acceptance of the rent for a long period, plaintiff is not precluded from invoking a liquidated damages clause for that period even months after the month-to-month tenancy expired. See *Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 AD3d 338 (1st Dept 2006).

Therefore, even though defendant contends that he did not renew the sublease after February 28, 2003, it is an argument

against his own interest, and one that this court does not accept. As noted above, plaintiff states in his affirmation that he agreed to waive the written requirement for defendant to renew the first five-year extension. This was manifested by his acceptance of defendant's offer of rent for the period March 1, 2003 through February 29, 2008.

The same circumstances, that constituted plaintiff waiver of notice during the first five-year renewal term, do not apply to the to the second five-year renewal term, as no rent was ever offered by defendant. *Jefpaul Garage Corp. v Presbyterian Hosp. in City of New York*, 61 NY2d 442, *supra*. Therefore, pursuant to Real Property Law § 232-c, effective March 1, 2008, defendant became a month-to-month subtenant, subject to the provisions of the sublease, including Article 43. The actual amount of damages, which includes double the rent and may or may not include any extra monies that were required to be paid to the cooperative corporation or the defendant's portion of taxes and electric overages, is referred to a Special Referee to hear and report back tot he court.

In addition, the Special Referee is charged with determining the portion of the defendant's \$6,000 security deposit that is to be offset against the amount of damages.

Pursuant to Article 14th of the sublease, defendant's security deposit "shall be returned ... provided Tenant has fully

and faithfully complied with all of the said terms, covenants and conditions." Plaintiff will be given the opportunity to offer evidence as to whether defendant has fully and faithfully complied with the sublease that expired on February 29, 2008.

As to defendant's second counterclaim for \$100,000 in compensatory damages for lost equipment, defendant admits that he was a month-to-month subtenant starting on March 1, 2008. He contends that he moved out of the premises because of the instability of being a month-to-month subtenant and that, in essence, the equipment would be worthless at another location due to New York State's laboratory licensing requirements. Defendant, however, has not proffered any evidence as to why he did not remain in the premises and use the equipment for as long as he could, given that he was not being evicted by either the plaintiff or the cooperative. Neither did defendant proffer any evidence regarding any attempts to sell such equipment or any experts' affidavits attesting to the fact that such equipment was worthless if moved. Therefore, that portion of defendant's counterclaim for \$100,000 is dismissed.

That portion of defendant's second counterclaim that seeks punitive damages is also dismissed. Punitive damages are not generally awarded in private actions for breach of contract. See *Apfel v Prudential-Bache Securities, Inc.*, 183 AD2d 439 (1st Dept 1992), *affd as mod* 81 NY2d 470 (1993). In any event, defendant

has not even prevailed in his underlying claim; thus there is no basis for an award of punitive damages.

Defendant's claim for sanctions is also denied. Defendant further asserts that, because one of the pages in one of the copies of the sublease proffered to the court was never in the original contract between the parties, defendant has perpetrated a fraud against both defendant and this court.

Plaintiff's attorney, Jennifer Ecker (Ecker), has affirmed that the inclusion of the "Professional Apartment Amendment to the Stimson Owners Corp. Proprietary Lease" within Exhibit F to the Notice of Motion was a clerical error. Ecker admits that this page was not a part of the sublease signed between the parties, but states that it was inadvertently included by one of her clerical staff in the papers proffered to support plaintiff's motion. See Plaintiff's Reply Affirmation, Ecker Affirmation, ¶¶ 3-8.

Defendant has not proffered any evidence that the inclusion of the "Professional Apartment Amendment to the Stimson Owners Corp. Proprietary Lease" in a single document was intended to deceive the court or defendant. In fact, another copy of the sublease, which does not contain this extra page, is also included within the exhibits to plaintiff's motion papers. See Notice of Motion, Exh. B.

Absent evidence that plaintiff intended to defraud either

the court or the defendant with the inclusion of this extra page in one copy of the lease, that portion of defendant's cross motion that seeks to refer to a Special Referee the issue of sanctions and an award of attorneys' fees for the inclusion of this page is denied.

Finally, both plaintiff and defendant seek attorneys' fees in this action. Both base their claim upon Article 35 of the Sublease Rider, entitled "Indemnification." Under that section,

UNDERTENANT agrees to indemnify and defend OVERTENANT and hold OVERTENANT harmless from any and all loss, cost, liability, damage and expense, including, but not limited to, penalties, fines and attorneys' fees incurred in connection with or arising from any cause in, on or about the premises, either present or future, including, but not limited to: (i) any failure by OVERTENANT to observe or perform any of the obligations under this lease; (ii) the use or occupancy or manner of use or occupancy of the demised Tenant; (iii) any condition, design or construction of the Demised Premises or the building of which the Demised Premises are a part, or any occurrence or happening in or on the Demised Premises from any cause; or (iv) any negligence or misconduct, whether prior to, during or after the term of this Sublease of OVERTENANT or any person or entity claiming through or under UNDERTENANT or any contractor, agent, employee, invitee, or licensee of the UNDERTENANT in or about the Demised Premises or the building of which the Demised Premises are a part; and (v) any maintenance, repairs, replacements, additions, alterations, substitutions and installments made to the Demised Premises and the building of which the Demised Premises are a part.

None of the conditions for the recovery of attorneys' fees under Article 35 exists in the instant action. Absent any of those conditions, neither plaintiff nor defendant is entitled to an award of attorneys' fees.

As defendant has not proffered any evidence to this court

regarding any of his other affirmative defenses, all other affirmative defenses are dismissed. Additionally, because plaintiff is granted summary judgment on liability herein, that portion of defendant's cross motion that seeks discovery is denied as unnecessary.

Order

Accordingly, it is hereby:

ORDERED that plaintiff's motion for summary judgment is granted, only to the extent of granting judgment on liability as to subsection (i) of the first cause of action, as well as liability on the second and third causes of action, and is otherwise denied; and it is further

ORDERED that defendant's affirmative defenses and counterclaims are dismissed; and it is further

ORDERED that defendant's cross motion is denied; and it is further

ORDERED that the issues of: (1) the amount of damages to be paid under Article 43 of the Sublease Rider for the period of March 1, 2008 through August 31, 2008; (2) the amount of damages representing tax increases and electric bills due and owing; and (3) the amount to be offset out of defendant's \$6,000 security deposit are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the

Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the issues referred to the Special Referee are held in abeyance pending the receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this Order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: New York, New York
September 17, 2010

FILED
SEP 21 2010
NEW YORK
COUNTY CLERK'S OFFICE
ENTER: _____

J.S.C.

FILED
SEP 21 2010
COUNTY CLERK'S OFFICE