

**Worldwide Dreams, LLC v Empire State Bldg. Co.  
LLC**

2010 NY Slip Op 34104(U)

May 10, 2010

Supreme Court, New York County

Docket Number: 113030/2009

Judge: Richard B. Lowe III

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 56

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WORLDWIDE DREAMS, LLC,

Plaintiff,

Index No. 113030/2009

-against-

EMPIRE STATE BUILDING COMPANY LLC,  
Defendant.  
-----X

**Richard B. Lowe III, J.:**

Defendant Empire State Building Company LLC (ESBC) moves to dismiss all, but the third, of plaintiff Worldwide Dreams, LLC's (WWD) causes of action, pursuant to CPLR 3211 (a) (1), based on a defense founded on documentary evidence, CPLR 3211 (a) (7), for failure to state a cause of action, and CPLR 3211 (a) (5)<sup>1</sup> based on the expiration of the statute of limitations.

**BACKGROUND**

ESBC is the landlord, and WWD is a commercial tenant under a 15-year lease dated February 29, 1996 (the lease), pursuant to a December 31, 1997 assignment of the lease from RGA Accessories, Inc. (RGA) to WWD. WWD was "organized for the purpose of owning and operating the businesses [previously] owned and operated by" RGA and other entities (Nisim aff., ex. B). The leasehold consists of various rooms at 350 Fifth Avenue, better known as the Empire State Building (the building). The lease contains provisions as to how its

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<sup>1</sup>Although the notice of motion only cites CPLR 3211 (a) (1) and CPLR (a) (7), ESBC's supporting memorandum of law seeks to dismiss the second cause of action on statute of limitations grounds.

commencement date would be established (*see* Art. 43 [a]), which date also affected, among other things, the establishment of when a lease year would begin and the lease's termination date. The lease sets forth a base annual rent of \$596,888, and that such base rent would increase in the sixth and eleventh lease years (*id.*, Art. 43 [b]). Under the lease (Art. 17), the tenant's right to quiet enjoyment was conditioned on its payment of rent and performance of all other lease obligations.

ESBC was permitted, under the lease, to add additional amounts to the base rent each year, pursuant to operating expense escalation provisions (Art. 44), if certain expenses for that year were greater than those of the base year, defined as the calendar year of 1997 (Art. 44 [a] [i], [b] [1]), and pursuant to tax escalation provisions (Art. 33), should a particular year's real estate taxes exceed those of the base year's (defined as real estate tax year beginning on July 1, 1996 and ending on June 30, 1997) taxes. Under both escalation articles, the tenant was permitted, within 30 days of receipt of a statement of taxes or expenses, to dispute "their accuracy or appropriateness" (Art. 33 [c] [4]; Art. 44 [b] [2]), but was required to pay the additional sum(s), which were deemed additional rent, during the pendency of such dispute(s). Under the operating expense escalation clause, any such dispute was to be resolved by arbitration (*ibid.*). Also, in connection with operating expense escalations, WWD was, after paying the additional rent, permitted to examine the landlord's books and records with respect to such matters (*ibid.*).

The building contains a for-profit observation deck (the deck), which is a well-known tourist attraction, and a broadcast and antennae platform (the platform) to transmit, among other things, radio, television, broadband and cellular phone signals. The presence of the deck and the

broadcast antennae predate the lease. According to an e-mail from Alex Chin, ESBC's Director of Finance, the deck is operated by an entity which is separate from ESBC, and thus, keeps its own books (Faust aff., ex.1 D). Allegedly, the expenses contained in those separate books were not included when calculating the building's operating expense escalations (*ibid.*). WWD maintains that such entity is an ESBC affiliate (complaint, ¶ 14). The building's broadcasters are tenants and licensees, which are allegedly treated like the building's other commercial tenants (Faust aff., ex. 1 D). The expenses relating to the broadcasters are included in ESBC's expenses (*ibid.*).

As early as 2000, WWD began disputing ESBC's additional rent charges, including the operating expense and real estate tax escalation charges (Faust aff., ex. 1 C). On an unspecified date, WWD began withholding rent and additional rent, thereby causing ESBC to commence, in 2007, proceedings in the Civil Court to recoup the amounts it claimed it was owed, and to evict WWD. The parties signed a stipulation in the Civil Court matter which provided that WWD consented to the entry of a final judgment in the amount of the claimed arrears as of May 31, 2007, of \$1,578,290.29, and to the issuance of a warrant of eviction. Execution of judgment and the warrant of eviction were stayed under the stipulation's terms, which provided, among other things, that WWD was to pay the arrears by certain dates and all current rent and additional rent as billed "on a going forward basis"; that the parties would try to resolve their disputes about rent and additional rents; that WWD would not be entitled to review ESBC's books and records relating to the operating expense escalations until it paid all sums due; that after payment of the claimed arrears, WWD reserved the right to contest, via arbitration, the amounts it paid; and that if WWD defaulted on its obligations under the stipulation, ESBC could execute on the judgment

and warrant of eviction (Faust aff., ex. 1 B).

WWD paid the arrears, pursuant to that stipulation, and began to receive some, but allegedly not all, of the books and records it thereafter requested from ESBC. WWD then sent ESBC a demand for arbitration, dated October 28, 2008, seeking to arbitrate its dispute regarding the operating expenses, claiming that ESBC assessed WWD for expenses not allocable to it; unsubstantiated and inflated expenses; expenses attributable to businesses owned by ESBC or its affiliates; and capital expenses which did not constitute operating costs (Faust aff., ex. 1 K, ¶ 5). WWD further claimed that ESBC was involved in self-dealing and charged WWD inflated labor costs and services invoiced by ESBC's affiliates (*ibid.*).

WWD also sought to arbitrate its real estate tax escalation dispute, ESBC's alleged failure to repair water leaks, which caused many floods over the course of two years, and its claim that ESBC prematurely increased WWD's base rent on July 1, 2006, when the increase allegedly should have commenced on September 1, 2006 (Faust aff., ex. 1 K). In August 2009, the arbitration panel's chairman advised the parties that the dispute over the real estate taxes was not arbitrable under the lease, but that, for the sake of efficiency, the parties should consider allowing the arbitrators to decide that as well, a suggestion which ESBC rejected. The chairman also advised that sufficient information should voluntarily be provided to permit WWD to determine whether it was improperly charged operating expenses, and indicated that, if necessary, information could be provided through the discovery process (Faust aff., ex. 1 L). Apparently, the arbitrators also declined to entertain WWD's claims about the premature base rent escalation and the failure to make repairs.

On about September 8, 2009, ESBC commenced a Civil Court non-payment proceeding

against WWD and its various undertenants for rent and additional rent of approximately \$900,000.00, which allegedly accrued, starting in 2008 through October 6, 2009 (Nisim aff., ex. C). WWD served an answer, in which it denied that it owed the amount claimed (Faust aff., ex. 2).

On September 14, 2009, WWD commenced the instant action, which asserts causes of action sounding in breaches of the lease, based upon allegedly improper real estate tax escalation assessments and the failure to provide documents, which the lease allegedly required ESBC to provide (first cause of action); a breach of the lease based upon a premature base rent escalation (second cause of action); breaches of the lease due to the failure to make repairs and maintain the premises (third cause of action); unjust enrichment (fourth cause of action); “reimbursement” (fifth cause of action); and breaches of the covenant of quiet enjoyment and warranty of habitability (sixth cause of action). The complaint alleged (¶ 40) that WWD had paid, for the period covered by the action, all amounts claimed by ESBC to be due for base rent, operating expenses and real estate tax escalations. ESBC now seeks to dismiss, pursuant to CPLR 3211 (a) (1), 3211 (a) (7) and/or 3211 (a) (5), all causes of action, except the third (failure to maintain and make repairs).

#### DISCUSSION

“On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory”

(*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; see also *Leon v Martinez*, 84 NY2d 83 [1984]). A motion brought pursuant to CPLR 3211 (a) (1) “may be granted where ‘documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law” (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon v Martinez*, 84 NY2d at 88; see also *Foster v Kovner*, 44 AD3d 23, 28 [1<sup>st</sup> Dept 2007]). Documents which are, in essence, indisputable constitute documentary evidence under the statute (*Fontanetta v Doe*, \_AD3d\_, 2010 NY Slip Op 02743 [2d Dept 2010]). Deposition transcripts, affidavits, and trial testimony are not documentary evidence (*id.* at \*5). When a court does not find a movant’s submission “documentary,” it must deny the motion (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3211:10 at 22; *Fontanetta v Doe*, \_AD3d\_, 2010 NY Slip Op 02743 at \*4). “[F]actual claims [that are] either inherently incredible or flatly contradicted by documentary evidence, are not entitled” to consideration on a motion addressed to a complaint’s sufficiency (*Wilson v Hochberg*, 245 AD2d 116, 116 [1<sup>st</sup> Dept 1997]).

#### **Improper Real Estate Tax Escalations/Failure to Provide Access to Books and Records**

Under the first cause of action, WWD claims that ESBC breached the lease by a) assessing improper additional rent charges in the form of real estate taxes, and b) depriving WWD of its right to examine ESBC’s books and records relating to the disputed additional rent charges arising from the real estate taxes.

WWD asserts that the additional real estate taxes were improper for several reasons. Specifically, WWD, while effectively acknowledging that it was aware from the time it assumed the lease that the building’s real estate taxes would be based upon the building’s income, including that earned from its deck and platform (complaint, ¶¶ 10- 21), maintains that it was reasonable for it to assume that the deck and platform would always face stiff competition from those of the World Trade Center, which allegedly had the highest broadcast and antennae

platform in the New York metropolitan area and also had an observation deck. However, it destroyed on September 11, 2001. WWD alleges that, since the destruction of the building's main competitor, ESBC's income from the deck and platform increased, creating a windfall profit for ESBC, which caused the building's taxes to increase. WWD asserts that it is unfair that it has to pay its proportionate share of the increased taxes when only ESBC is reaping the benefits of the increased income. In addition, the complaint (¶ 25) alleges that, since the World Trade Center's destruction, the number of visitors to the deck has significantly increased, and that ESBC renovated it at tenant expense "to satisfy this unexpected growth." The complaint further alleges that the real estate taxes have risen because ESBC stealthily overcharged its tenants and improperly passed on the deck's and platform's operating costs, maintenance charges, and capital expenses to its tenants as operating expenses, which expenses should have been paid by ESBC, and that, consequently, ESBC's net operating income rose, which in turn increased the building's real estate taxes (complaint, ¶¶ 30-31, 47). The complaint also refers to the claim of improper operating expense escalation charges, raised by WWD in the aforementioned arbitration proceeding in which it seeks to recoup \$1,000,000.00 in excess operating costs imposed on it, and observes that the issues to be addressed in the arbitration are interrelated to those raised in the instant action (*id.*, ¶¶ 7, 41). ESBC now seeks dismissal of WWD's claims of improper real estate escalation charges.

The court notes that ESBC's position that WWD lacks standing to assert any claim relating to taxes is without merit. The cases relied on by ESBC are inapposite, since they merely held that the tenant had no standing to commence a tax certiorari proceeding (*see e.g. Matter of Waldbaum, Inc. v Finance Adm'n. of City of New York*, 74 NY2d 128 [1983]). Here, WWD did

not commence a proceeding against the taxing authorities; rather, it commenced an action against its landlord, claiming that it was charged excessive additional rent. Moreover, ESBC did not raise the standing argument in its initial moving papers; rather, it first appeared in ESBC's reply memo of law, depriving WWD of the opportunity to address this new ground (*see Watts v Champion Home Builders Co.*, 15 AD3d 850 [4th Dept 2005]; *Dannasch v Bifulco*, 184 AD2d 415, 416 [1st Dept 1992]).

Nonetheless, to the extent that WWD claims that the tax escalations were improperly assessed because they were attributable to real estate taxes which were the product of increased income from the deck and platform, which was solely due to the destruction of the World Trade Center's platform and deck, rather than to improvements made by ESBC after such destruction, such claims are dismissed. At the time the lease was commenced, the building had a deck and platform, which brought in income which factored into the calculation of real estate taxes. WWD's belief that such income would not significantly increase, based on its incorrect assumption that the building's main competitor would continue to exist, is not a basis upon which to relieve WWD of its obligations under the lease to pay its proportionate share of the real estate tax escalations. There are numerous outside factors which could affect the building's income, and thus its taxes, such as the state of the economy, the relative strength of the dollar as it affects the number of tourists visiting New York, whether there is a shortage of available office space the area, the erection of competing new buildings, and changes in broadcasting/cell phone transmitting technology. The cases relied upon by WWD are inapplicable because they involve escalating real estate taxes caused by the landlord's substantial improvement of the

premises, which benefitted only the landlord (*see e.g. Credit Exchange, Inc. v 461 Eighth Ave. Assoc.*, 69 NY2d 994 [1987]; *223 West Corp. v B & D Leistner Prop.*, 21 AD3d 810 [1<sup>st</sup> Dept 2005]). In the instant case, WWD's claims of increased taxes due solely to the destruction of the World Trade Center's deck and platform arise out of extrinsic factors, which were not caused by ESBC, and therefore do not give rise to a claim (*Welch v Phillips*, 224 Mass 267, 268 [1916] [unanticipated change in the tax law, which the parties to the lease did not contemplate<sup>2</sup> and resulted in a "seemingly inequitable result" to the tenant, did not relieve tenant of the contractual obligation to pay the taxes]; *Gold Medal Stamp Co., Inc. v Carver*, 359 Mass 681, 685 [1971] [which distinguished the landlord's unilateral acts, which increased the tenant's tax burden, from the extrinsic cause cited in *Welch v Phillips*, 224 Mass at 267]; *see also CBS, Inc. v P.A. Bldg. Co.*, 200 AD2d 527 [1<sup>st</sup> Dept 1994] [clear escalation clause is valid, even if result to tenant is economically harsh]). Thus, to the extent that WWD's first cause of action is based on an increase in taxes caused only by the elimination of the World Trade Center's deck and platform, that claim is dismissed.

However, at this juncture in the action, before discovery has commenced, dismissal is not warranted as to the balance of the complaint's breach of contract claims, based on allegations that the real estate tax escalations were inflated due to improper operating cost escalations and by improvements to the deck which were made to accommodate the increased tourist business (complaint, ¶ 25). A reasonable inference can be drawn that the income thereby increased,

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<sup>2</sup>WWD's claim that the destruction of the World Trade Center's deck and platform were unforeseeable is somewhat questionable in light of the fact that the World Trade Center was bombed by terrorists in 1993, about three years before the lease was executed.

thereby increasing the taxes (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

While ESBC urges that the lease's clause allowing WWD to dispute the "accuracy or appropriateness" (lease, Art. 33 [c] [4]) does not permit WWD to challenge additional rent arising from the real estate taxes on the grounds urged by WWD, there is nothing in the lease to establish that, as a matter of law, this is so. The lease permits WWD to challenge the accuracy and appropriateness of operating expenses, and to inspect ESBC's books and records in that regard. WWD claims that it, not to mention other tenants, was overcharged \$1,000,000.00 in operating expenses. If WWD were to establish its operating expense overcharge claim in the pending arbitration proceeding, presumably, such overcharges increased the building's real estate taxes, and the additional rent relating to it, by increasing the building's net income. Since the operating expenses can be challenged, there is no reason to read the lease as precluding a challenge to the additional rent arising from the real estate taxes, which were allegedly based, in part, on the improper shifting of operating expenses from ESBC to WWD.

Additionally, to the extent that the complaint's first cause of action is based on improvements to the building which were allegedly made by ESBC for its sole benefit and, as can be inferred from the complaint, increased the real estate taxes, such claim is sustainable (*Credit Exchange, Inc. v 461 Eighth Ave. Assoc.*, 69 NY2d at 997; *223 West Corp. v B & D Leistner Prop.*, 21 AD3d at 811 [increased taxes resulting from improvements to the commercial property benefitting solely the landlord, ordinarily cannot be passed on to the tenant]; *see also Black Star Pub. Co., Inc. v 460 Park Assoc.*, 137 Misc 2d 414 [Sup Ct, NY County 1987]; *Bryant Park Building, Inc. v Acunto*, 133 Misc 225 [Mun Ct, NY County 1928]; *Gold Medal*

*Stamp Co., Inc. v Carver*, 359 Mass at 685 [tax escalation clause should generally be construed based on the conditions of the premises existing when tenant occupied them, and therefore, under the facts of the case, it would not have been the intention of the contracting parties to impose on tenant tax escalations caused by extraordinary and unforeseen alterations and improvements to the property made by landlord]). ESBC's claim that this law only applies when floors are added to a building is without merit. The Court of Appeals in *Credit Exchange* (69 NY2d at 997) did not limit its holding to the situation where floors were added. Rather, it held that usually it was not the goal of tax escalation clauses to impose on tenants real estate taxes arising from improvements which benefit only the landlord, "such as the addition of two floors [emphasis added]"; see also *Black Star Pub., Inc. v 460 Park Assoc.*, 137 Misc 2d at 414. Here, where it is unclear what improvements were made, and whether they were extraordinary, reasonably foreseeable, benefitted only ESBC, and increased the building's income and thus, its real estate taxes, it would be inappropriate, at this point in the action, to dismiss WWD's claims that ESBC breached the lease by improperly charging real estate tax escalations due to increased net income caused by improvements made by ESBC.

Regarding the first cause of action's claim of a breach of the lease stemming from ESBC's alleged failure to provide books and records relating to the real estate taxes, the complaint (¶ 8) alleges that ESBC has failed to provide access to "all" of the records to which WWD is entitled under the lease relevant to the overcharges, but that with the records thus far provided, WWD's accountant has determined that ESBC improperly overcharged WWD close to \$1,000,000.00 in operating expenses. WWD also asserts that the lease requires ESBC to provide

it with reports on the tax burden, “ including real estate tax appeals and related documents” (complaint, ¶ 37), and that, although it has requested records relating to the real estate tax burden and the bases for the tax assessments and the results of any tax appeal, ESBC has failed to provide the requested documentation (*id.*, ¶¶ 37-39).

Under the lease’s tax escalation article (Art. 33 [c] [1]), ESBC is required, before or after the start of each comparative year, to furnish WWD with a statement of the real estate taxes payable during the base tax year, and, if the comparative year’s taxes exceed those of the base year, WWD is required to pay its proportionate share of the increase (*id.*). Implicit in this is that ESBC would have to provide a statement of the taxes due in the comparative year. Article 33 (c) (4) provides that statements required to be provided, as previously indicated in the article, must be certified by the landlord. Those statements constitute a final determination with respect to the periods set forth therein, unless within 30 days of their being furnished to WWD, it disputes the statement’s accuracy or appropriateness (*ibid.*). If WWD pays the additional rent, and thereafter, the landlord receives a tax reduction because of legal proceedings, a settlement or for other reasons, ESBC is simply required to refund WWD its proportionate share of the refund,<sup>3</sup> minus ESBC’s expenses (Art.33 [c] [3]). There is no indication anywhere in the lease’s tax escalation article that ESBC was required to provide WWD with reports on the tax burden, tax appeal documents, or its records showing how it calculated its net income. The lease did, however, provide that WWD could examine ESBC’s books and records with respect to operating expenses

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<sup>3</sup>It appears to be undisputed that ESBC filed tax certiorari proceedings for 2002-2010, but that such proceedings have not yet been resolved.

(Art. 44 [b] [2]), and WWD maintains that all of those records have not been provided. Since the record and books under Article 44 are relevant to the building's taxes, WWD has stated a cause of action with respect to ESBC's alleged breach of the lease flowing from the claimed failure to provide such records. Accordingly, the branch of ESBC's motion which seeks to dismiss WWD's claim that ESBC breached the lease by failing to provide documents is denied.

*Breach of Contract- Premature Base Rent Escalation*

The complaint's second cause of action alleges that ESBC breached the contract by assessing the base rent escalation charge two months prematurely by incorrectly assuming that the rent year began on July 1, instead of September 1, 2006, thereby wrongfully assessing WWD \$33,826 (complaint, ¶¶ 49-51, 61-64). ESBC seeks dismissal of this cause of action on the ground that it is barred by the six-year breach of contract statute of limitations. In particular, ESBC alleges that the dates on which the base rent were to escalate was a function of the lease's commencement date, which was set when the lease began in 1996 (ESBC's memo of law, at 20-22). ESBC maintains that WWD cannot, through this action, challenge the commencement date 13 years later. Alternatively, ESBC claims that if WWD, as the lease's assignee, was ignorant of the lease's commencement date, until it was notified of the base rent's first escalation in July 2002, its time to challenge the commencement date is still barred by the six-year statute of limitations.

The general rule is that the burden of establishing that a claim is time-barred is on the movant (*Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]). ESBC has failed to meet its prima facie burden, because it has not established, by any competent evidence, the date

when the lease commenced, in accordance with the lease's provisions for establishing the commencement date, which in turn affects when a lease year commences, which determines when the base rent escalates (*see* lease, Art. 43 [A]). No evidence is offered by ESBC as to when WWD's predecessor in interest was notified by ESBC as to the fixing of the commencement date, as ESBC was required to do under the lease (*id.*). That ESBC allegedly first escalated the base rent in July 2002 (and again, there is no competent evidence offered by ESBC that it did so in July 2002) still would not determine the lease's commencement date, since the base rent may have been erroneously escalated in July 2002. Therefore, ESBC's application to dismiss the second cause of action is denied.

*Unjust Enrichment and Reimbursement*

Under the fourth cause of action, plaintiff claims that ESBC has been unjustly enriched because it has collected a) improper base rent escalations, b) additional rent overcharges which exceed the amounts ESBC is entitled to collect and c) "additional rent charges which greatly exceed the costs that the Lease's additional rent charges are intended to reimburse" (complaint, ¶ 71). The fifth cause of action alleges that WWD is entitled to be reimbursed for amounts it paid "in contravention of the Lease" (*id.*, ¶ 75). The branches of ESBC's motion which seek to dismiss these causes of action are granted, and those causes of action are dismissed, since it is readily apparent, including from the wording of these two causes of action, that these claims arise out the lease, and are therefore duplicative of WWD's first and second causes of action. Moreover, a claim for unjust enrichment, which sounds in quasi contract (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246 [1<sup>st</sup> Dept 2009]), does not lie where a valid contract covers

the matter (*Clark-Fitzpatrick, Inc. v Long Island R.R., Co.*, 70 NY2d 382, 388 [1987]; *Stark v City of New York*, 31 AD3d 530, 531 [2d Dept 2006]; *Tag 380, LLC v Ronson*, 8 Misc 3d 1027[A], 2005 NY Slip Op 51323[U] [Sup Ct, NY County 2005]) .

*Warranty of Habitability/Breach of the Covenant of Quiet Enjoyment*

WWD's sixth cause of action actually consists of two causes of action sounding respectively in breaches of the warranty of habitability and the covenant of quiet enjoyment, and are related to plaintiff's third cause of action, which is not the subject of the instant motion to dismiss, and which alleges that ESBC breached the lease by failing to make required repairs and maintain the building, despite repeated requests, thereby resulting in water leaks, floods since 2005, and odors "which constructively and/or actually denied [WWD] access to and use of portions of its office space" (*id.*, ¶¶ 52-56, 65-69).

To the extent that plaintiff's sixth cause of action asserts a cause of action for breach of the warranty of habitability, such cause of action is dismissed, since that warranty does not apply to commercial leases (*Rivera v JRJ Land Property Corp.*, 27 AD3d 361, 364 [1<sup>st</sup> Dept 2006]). This leaves the branch of ESBC's motion to dismiss WWD's breach of the covenant of quiet enjoyment cause of action, which is predicated on an actual or constructive partial eviction.

A breach of the covenant of quiet enjoyment requires that a landlord's conduct "preclude the tenant from the beneficial enjoyment of the premises" (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120 [1958]). The tenant is required to "show an ouster, or if the eviction is constructive, an abandonment of the premises" (*id.* at 121). Where a lease contains a

provision requiring the payment of rent as a condition precedent to the tenant's right to a covenant of quiet enjoyment, that condition must be fulfilled (*id.*).

An actual eviction arises "only when the landlord wrongfully ousts the tenant from physical possession of the leased premises. There must be a physical expulsion or exclusion" (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82 [1970]). The actual eviction need not be total; it may be partial (*id.* at 84).

An eviction is constructive where there is no physical exclusion or ouster, but where the landlord's improper acts result in a substantial and material deprivation of the tenant's "beneficial use and enjoyment of the premises" (*id.* at 83). A constructive eviction can also be partial where the tenant has abandoned only a portion of the leased premises, due to the landlord's wrongful acts (*Minjak Co. v Randolph*, 140 AD2d 245 [1<sup>st</sup> Dept 1988]). A tenant which has been partially constructively evicted may commence an action against a landlord asserting such a claim (*see Appliance Giant, Inc. v Columbia 90 Assoc., LLC*, 8 AD3d 932 [3d Dept 2004]; *KRU, Inc. v 1000 Massapequa, Inc.*, 238 AD2d 314 [2d Dept 1997]; *Oresky v Azzouni*, 232 AD2d 463 [2d Dept 1996]; *Bernard v 345 East 73<sup>rd</sup> Owners Corp.*, 181 AD2d 543 [1<sup>st</sup> Dept 1992]; *Herbert Paul, CPA, PC. v 370 Lex, L.L.C.*, 6 Misc 3d 1031[A]; 2005 NY Slip Op 50258[U] [Sup Ct. NY County 2005]).

ESBC asserts that this cause of action must be dismissed because the complaint fails to allege that WWD was ousted from or abandoned any portion of the leased premises, as a result of the water conditions. ESBC further asserts that, since payment of all required rent is a condition precedent to WWD's breach of its covenant of quiet enjoyment claim, and since there

is no dispute that WWD was behind in paying its rent and additional rent beginning in 2008, in an amount in excess of \$800,000.00, which caused ESBC to commence the aforementioned 2009 non-payment proceeding, WWD cannot maintain this cause of action. ESBC adds (reply memo, at 15) that WWD's concession in its opposing memo of law (at 9) that it had withheld rent and additional rent in 2008, establishes that the condition precedent has not been met.

In response, WWD asserts that its allegation that, as a result of the water conditions, floods, and odors, it was constructively and actually denied access to and use of parts of its space, should be liberally construed to allege that it was ousted from portions of its rented space. Additionally, WWD claims in its opposing memorandum of law that ESBC improperly argues that WWD cannot assert a breach of the covenant of quiet enjoyment because there is allegedly no dispute that WWD is in arrears with respect to its rent and additional rent for 2008. In this regard, WWD observes that the claims made by ESBC in the non-payment petition, attached to its moving affirmation, are not facts but merely allegations, and that, in any event, it has counterclaimed in the non-payment proceeding, asserting that it is not responsible for the amounts allegedly owed, since the charges were improperly inflated, and because ESBC's breaches of the lease relieved it of its payment obligations.

To the extent that ESBC seeks dismissal of this cause of action on the ground that WWD failed to comply with a condition precedent to its entitlement to the covenant of quiet enjoyment, in that WWD allegedly failed to pay rent and additional rent, such argument is unavailing. First, the complaint in this action alleges that all rent and additional rent have been paid. Second, the copy, appended to ESBC's moving papers, of the complaint in its 2009 non-payment proceeding,

and WWD's allegations in its memo of law, do not constitute documentary evidence within the intendment of CPLR 3211 (a) (1). Third, it has not been conclusively established, via documentary evidence on this motion, that WWD withheld rent and additional rent before it was allegedly constructively evicted (*see e.g. Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d at 120; *Baitzel v Rhinelanders*, 179 App Div 735 [1<sup>st</sup> Dept 1917]).

This leaves ESBC's claim that this cause of action must be dismissed for failure to allege an ouster from or abandonment of portions of the premises. There is no allegation that ESBC actually physically ousted or excluded WWD from those parts of the premises which were flooded; thus, no actual eviction has been pled. However, viewing the complaint in the light most favorable to WWD, and giving it the "benefit of every possible favorable inference" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414), the allegation that numerous floods, since 2005, and related odor conditions, denied WWD access to and use of parts of its office space is sufficient to state a claim for partial constructive eviction (*see Majen Realty Corp. v Glotzer*, 61 NYS2d 195, 197 [Mun Ct, Bronx County 1946] ["non-use and inability to use a portion of the premises ... will be considered a surrender of possession of that portion constituting a partial constructive eviction"]). Whether the flooding incidents and their sequelae were intermittent, minor, and fleeting or whether they were persistent, substantial, and prolonged, can be ascertained during discovery. Accordingly, ESBC's application to dismiss the breach of quiet enjoyment cause of action is denied.

**CONCLUSION**


Accordingly, it is

ORDERED that Empire State Building Company LLC's motion to dismiss is granted only to the extent that the claims for unjust enrichment (fourth cause of action) and "reimbursement" (fifth cause of action) are dismissed. Further, that portion of the sixth cause of action which asserts breach of the warranty of habitability, and that portion of the first cause of action which asserts that the real estate escalation clause was breached because of the additional rent assessments from real estate taxes arising solely from the destruction of the World Trade Center's deck and platform, rather than from improvements made by ESBC after that destruction, are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: May 10, 2010

ENTER:

  
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HON. RICHARD B. LOWE, II  
J.S.C.