Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

x

NAZRISHO & ASSOCIATES, P.C. (PREVIOUSLY KNOWN AS SIPSAS & NAZRISHO, P.C.), LLC,

Plaintiff,

- against -

KOSTAS & E, LLC, KOSTANTINOS ARGYRIS (A/K/A KOSTADINOS OR KOSTAS ARGYRIS), ELENI ARGYRIS AND ALEXANDROS ARGYRIS,

Defendants.

x

Index Number 26633 2009

Motion Date March 16, 2011

Motion Cal. Number 19

Motion Seq. No. 2

The following papers numbered 1 to 13 read on this motion by defendants for an order granting (1) summary judgment dismissing the complaint; (2) granting defendants leave to amend the first counterclaim on an ongoing basis to reflect the amount due and owing; (3) severing the second counterclaim; (4) declaring the third counterclaim moot; (5) granting summary judgment on the fourth counterclaim and setting the matter down for hearing in order to determine the amount of attorney's fees; and (5) imposing sanctions on the plaintiff, its principals and attorney pursuant to 22 NYCRR 130-1.1 and 1200.23. Plaintiff cross-moves for an order dismissing defendant Argyris' second, third, fourth, fifth and sixth affirmative defenses, pursuant to CPLR 3211(a)(3)(6) and (b), and dismissing defendant Argyris' counterclaims pursuant to CPLR 3212.

	Papers Numbered
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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff filed a new note of issue in this action on September 3, 2010, in compliance with the so-ordered stipulation dated July 9, 2010. Since defendants' motion for summary judgment was timely served on October 28, 2010, and plaintiff's cross motion was timely served on December 3, 2010, they will be determined on the merits (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]).

Background:

Plaintiff Nazrisho & Associates, P.C. (previously known as Sipsas & Nazrisho, P.C.) is a law firm. Defendant Kostas & E, LLC is the owner of improved real property known as 33-19 30th Avenue, Astoria, New York. Defendant Kostantinos Argyris, also known as Kostadinos, or Kostas Argyris, is a managing member of Kostas & E, LLC. Defendant Eleni Argyris is a member of Kostas & E, LLC. Plaintiff alleges that Alexandros Argyris is, or was, a member or managing member of Kostas & E, LLC.

In 2001 Kostas & E, LLC purchased the subject building, at which time it contained five commercial units on the ground floor, and two residential units on the second floor. In 2005, the residential tenant vacated the front unit on the second floor, and the owner listed said rental premises with a realtor. "Costas & E, LLC [sic]," as owner, entered into a lease agreement, dated September 22, 2005 with Sipsas & Nazrisho, P.C., as tenant for the lease of the second floor "front" unit for use as a law office. This preprinted "standard form office lease," together with a 26 page rider, was executed by "Kostas" Argyis, as managing member of Kostas & E, LLC, and Ioannis Sipsas, as vice president of Sipsas & Nazrisho, P.C.

The law firm occupied the second floor front unit from September 2005 until November 2006, when the residential tenants who occupied the second floor "rear" unit

vacated that space. The owner replaced the walls with new drywall, creating partitions; removed a wall and installed a glass wall; removed the oven from the kitchen; installed carpeting and air conditioning; and installed office furniture. Sipsas & Nazrisho, P.C. executed a preprinted "standard form office lease" dated November 1, 2006 for the second floor unit, which names Kostantinos Argyris as the owner and refers to a rider, which is attached to the lease. The lease commenced on November 1, 2006 and terminated on September 30, 2011. Sipsas & Nazrisho, P.C. moved out of the front unit and into the rear unit in November or December 2006, and the 2005 lease and rider were apparently abandoned by the parties.

In April 2009, the Department of Buildings issued two Notices of Violation. Notice of Violation Number 34773218Z states that the occupancy at the time of the violation was commercial, and that the observed violation was "work without a permit. Noted: on 2nd floor did some general construction work-erected and removed partitions, electrical, plumbing, converting apartments into offices. Work 100% complete." The owner was directed to "obtain a permit or restore to prior legal conditions." The notice provided for a hearing on June 2, 2009.

Notice of Violation Number 34773217R states that the occupancy at the time of the inspection was commercial, and that the observed violation was "occupancy contrary to that allowed by the certificate of occupancy or Building Department records. According to DOB records 1st floor should be occupied as store (job #402217828) and the second floor should be residence (job #402312289) - 2 class 'A' units according to HPD #416033. Noted: the 2nd floor occupied as real estate and attorney offices." The property owner was directed to "discontinue illegal use or amend C of O." The notice provided for a hearing on June 2, 2009.

Following the receipt of the Notices of Violations, defendants were informed by the tenant law firm that it would not pay rent until the violations were cured. In May 2009, defendants hired an architect to file an application with the Department of Buildings amending the certificate of occupancy from mixed use to commercial. The owner's plans for conversion were approved on August 10, 2010.

The tenant law firm ceased paying rent in April 2009. On September 23, 2009, defendant Kostantinos Argyris served the tenant law firm with a rent demand, including rent arrears, interest and late fees, totaling $21,289.50. Sipsas & Nazrisho, P.C. vacated the subject premises on November 30, 2009, and sometime thereafter relocated its law office to 8023 Seventh Avenue, Brooklyn New York. The Brooklyn premises were purchased by Mr. Nazrisho and his mother Mira Nazrisho, pursuant to a deed dated October 6, 2009.

Plaintiff commenced the within action on October 5, 2009, and alleges causes of action for breach of contract, promissory estoppel, constructive eviction, loss of business, declaratory judgment, fraud, to "pierce the corporate veil" and unjust enrichment. The complaint incorporates as exhibits the following documents: the deed dated December 13, 2001, transferring the subject real property from Athanasios Sierros to Kostas & E, LLC; the Department of Buildings Notices of Violation dated April 6, 2009, printouts from the Department of Buildings's website pertaining to a complaint with respect to the subject building alleging an "illegal commercial/manufacturing use in a residential zone," and a Department of Buildings memo dated March 10, 1993 regarding Local Law #6/93, the "Padlock Law; a copy of the 2006 lease and rider; a letter from Haris Mamagakis, president of Noesis Designs, dated May 4, 2009; and a copy of the September 23, 2009 rent demand.

Defendants served their answer on October 21, 2009, and interposed seven affirmative defenses and four counterclaims to recover unpaid rent; for anticipatory breach of the lease; for a judgment of possession and warrant of eviction; and to recover attorney's fees. All of the counterclaims seek relief solely as to defendant Kostantinos Argyris.

Plaintiff has served an answer to the counterclaims and interposed eleven affirmative defenses.

Defendants' motion for an order granting summary judgment dismissing the complaint in its entirety, and plaintiff's cross motion to dismiss the second, third, fourth fifth and sixth affirmative defenses:

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Center*, 64 NY2d 851 [1985]; *St. Luke's-Roosevelt Hospital v American Transit Ins. Co.*, 274 AD2d 511 [2000]). Once the moving party has made a prima facie showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223

[1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp., supra*).

Plaintiff, in the first cause of action for breach of contract, alleges that defendants breached paragraphs 2, 15 and 21 of the 2006 lease, and paragraphs 10 and 26(b) of the rider to said lease, with respect to the leased premises' certificate of occupancy. Paragraph 10 of the rider is a tenant's waiver of the right to interpose counterclaims, and therefore cannot form a basis for a claim for breach of the lease.

Paragraph 2 of the 2006 lease provides that the "[t]enant shall use and occupy demised premises for professional offices and for no other purpose." Paragraph 15 of the 2006 lease provides that: "Tenant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises are a part. Tenant has inspected the premises and accepts them as is, subject to the riders annexed hereto with respect to Owner's work, if any. In any event, the Owner makes no representation as to the condition of the premises and Tenant agrees to accept the same subject to violations, whether or not of record."

Paragraph 21 of the 2006 lease provides that: "Neither Owner nor Owner's agents have made any representations or promises with respect to the physical condition of the building, the land upon which it is erected or the demised premises, the rents, leases, expenses of operating or any other manner or thing affecting or related to the premises except as herein expressly set forth and no rights, easements or licenses acquired by Tenant by implication or otherwise except as expressly set forth in the provisions of this lease. Tenant has inspected the building and demised premises and is throughly acquainted with their condition and agrees to take the same "as is" and acknowledges that the taking of possession of the demised premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken, except as to latent defects. All understandings and agreements heretofore made between the parties hereto are expressly merged in this contract, which alone fully and completely expresses the agreement between Owner 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 by the party against whom enforcement of the change modification, discharge or abandonment is sought."

Paragraph 26(b) of the November 1, 2006 rider, located under the heading "Prohibited Uses" provides that "It is specifically understood and agreed that at no time shall the demised premises be used for living, or any other residential purposes."

The above cited paragraphs set forth the tenant's obligations under the 2006 lease and rider. Although some reference is made to the certificate of occupancy, neither the 2006 lease, nor the rider, contain any representations on the part of the landlord with respect to the permitted use under the certificate of occupancy. Plaintiff, therefore, cannot establish a claim for breach of contract based upon the above cited paragraphs of the 2006 lease and rider. To the extent that the complaint alleges a breach of an implied agreement, without specifying any terms, plaintiff cannot maintain such a claim. Therefore, defendants' request to dismiss the first cause of action for breach of contract is granted, and plaintiff's cross motion to dismiss defendants' second affirmative defense is denied.

The second cause of action for promissory estoppel alleges that plaintiff relied on defendants' promise that it would cure the violations, and therefore did not relocate; that the violations were not cured and that plaintiff was forced to move out, and sustained relocation expenses, business losses, and higher costs of establishing a new office.

The doctrine of promissory estoppel may be invoked only where the aggrieved party can demonstrate the existence of a clear and unambiguous promise upon which he or she reasonably relied, thereby sustaining injury. As a general matter, an oral promise will not be enforced on this ground unless it would be unconscionable to deny it (*American Bartenders School, Inc. v 105 Madison Co.*, 59 NY2d 716, 718 [1983]; *Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1997]; *Ginsberg v Fairfield-Noble Corp.*, 81 AD2d 318, 320-321 [1981]).

Here, plaintiff is not seeking to enforce an oral promise made by the defendants. Furthermore, plaintiff's reliance upon an oral promise made by Kostantinos Argyris that the certificate of occupancy would be obtained within a few weeks, as well as Mr. Mamagakis' letter of May 4, 2009, was not reasonable under the circumstances. Mr. Mamagakis stated in his letter that his firm was retained as the architect of record with respect to the conversion of the existing second floor to professional offices subject and that he anticipated "approved plans to be issued within the next few weeks and a new C of O thereafter." Mr. Mamagakis made no promises as to when a certificate of occupancy would be issued. In addition, the time frame for the issuance of a new or amended certificate of occupancy was not within the defendants' control. Therefore, plaintiff's claimed reliance upon defendants' alleged oral statements that the certificate of occupancy would be obtained by July 2009, was unreasonable, as a matter of law. That branch of defendants' motion which seeks summary judgment dismissing the second cause of action is granted, and plaintiff's cross motion to dismiss defendants' third affirmative defense is denied.

The third cause of action for constructive eviction alleges that defendants commenced construction of professional offices in 2006 without proper permits and "against the

certificate of occupancy for the 2nd floor office space," that defendants fraudulently and in wanton disregard of the zoning and building code filed false permit applications; that defendants' actions caused the premises to become dangerous, detrimental to life, health and safety and unfit for continued commercial occupancy; and that the defendants failed to remedy the conditions on a timely basis, causing plaintiff's to be constructively evicted.

To establish a claim for constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts by the landlord that "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]; *Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 77 [2010]). Here, there is no evidence that the work performed by the defendant owner in 2006, was defective in any manner or violated the building code. Moreover, its is for the Department of Buildings, and not the plaintiff, to determine whether the owner's 2006 work permit application was improper. Finally, as plaintiff remained in possession of the demised premises for more than two years after the work was first performed, and thereafter for some seven months after the notices of violation were served, no constructive eviction occurred (*see Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 83 [1970]). Therefore, defendants' request to dismiss the third cause of action is granted, and that branch of plaintiff's cross motion which seeks to dismiss the fifth affirmative defense is denied.

The fourth cause of action for loss of business is dismissed, as there is no evidence that plaintiff's business was interrupted or that it was forced to relocate its law offices. Plaintiff was aware of the April 6, 2009 Notices of Violation at the time they were served, and remained in occupancy for another seven months. It is noted that during that time period Mr. Nazrisho and his mother purchased real property in Brooklyn, and that plaintiff law firm relocated to the Brooklyn property shortly after it vacated the subject premises on November 30, 2009.

Plaintiff's fifth cause of action for declaratory judgment seeks a declaration to the effect that the 2006 lease is null, void and not enforceable, and also seeks to recover the rental payments made from November 1, 2006 to April 2009. Plaintiff seeks a declaration to the effect that the rent demand of September 23, 2009 is unenforceable and null and void. This action is predicated upon defendants' alleged fraudulent representation "that the lease for professional offices was valid and that the premises were suitable for commercial use, when defendants knew that the premises were only suitable for residential purposes and that the certificate of occupancy forbids such illegal commercial tenancy," and further, that the November 1, 2006 lease is invalid because the property is owned by Kostas & E, LLC, and defendant Kostantinos Argyris represented himself as the owner of the building.

It is undisputed that the 2005 lease and rider was drafted by an attorney retained by Kostas & E, LLC. Mr. Nazrisho, an attorney, testified at his deposition, that with respect to the 2006 lease and rider, that the landlord determined the amount of rent for the rear second floor unit, and that at the direction of Kostantinos Argyris, he made a copy of the 2005 lease and rider, which were to be used as the 2006 lease and rider. However, Mr. Nazrisho, in copying the 2005 rider, omitted pages 4, 13, 21, 22, 24, 25 and 26. The rider executed by plaintiff on November 1, 2006 retains the language previously used by the parties, and specifically refers to the lease between "Costas & E, LLC [sic] as landlord and Sipsas & Nazrisho, PC as tenant, dated "September _____, 2005." The signature page of the rider to the 2006 lease is dated November 1, 2006, and contains the word "LANDLORD," followed by a large blank space. Beneath the blank space is the word "By," a blank signature line, and the typed name, "Kostandinos Argyris." Said rider is not executed by Mr. Argyris, or by any other person on behalf of the owner.

The preprinted 2005 lease form, includes the names of Kostas & E, LLC, (as owner) and Sipsas & Nazrisho, P.C., (as tenant), as well as other terms, all of which are type-written. The preprinted 2006 lease includes the hand-written name of "Kostadinos" Argyris,(as owner), while the name of Sipsas & Nazrisho, P.C., (as tenant) is type-written. Mr. Argyris executed the 2006 lease without indicating whether he was acting on behalf of Kostas & E, LLC.

Paragraph 1 of the rider to the 2006 lease provides that "to the extent that any provisions of any Rider to this are in any inconsistent or in conflict with any of the preceding provisions of the Lease, or of the rules and regulations appended to this Lease, regardless of whether or not such inconsistency is expressly noted, the provisions of the Rider shall be controlling.

Paragraph 27 of said rider states that: "It is specifically understood and agreed that this Lease is offered to the Tenant for signature by the managing agent of the Building solely in its capacity as such agent and subject to the Landlord's acceptance and approval and that the Tenant has hereunto affixed its signature with the understanding that the said Lease shall not in any way bind the Landlord or its agent until such time as the Landlord has approved said Lease and same is fully-executed and delivered to Tenant by an authorized agent of Landlord."

Kostantinos Argyris, at his deposition referred to himself as the owner of the subject premises, and stated that when he changed the name of the owner on the 2006 lease to "Kostadinos" Argyris, he did not obtain Kostas & E, LLC's permission to do so. However, he also stated that the subject building is owned by Kostas & E, LLC; that he is the managing member of said limited liability company; that he and his wife Eleni Argyris are the only

members of Kostas & E, LLC; and that his son Alexandros Argyris is not a member of the limited liability company. It is undisputed that Sipsas & Nazrisho P.C. issued rent checks payable to Konstantinos Argyris. Mr. Argyris testified at his deposition that Kostas & E, LLC maintained accounts at two banks; that he deposited said rent checks in the accounts of Kostas & E, LLC; and that he never deposited said rent checks in his, his wife's, his son's or any other individual's personal accounts.

Mr. Nazrisho testified at his deposition, that at the time his firm occupied the front unit, the rear unit was occupied by "some people from Brazil," but that he did not know if they were running a business in said premises. He stated that after said tenants moved out, the landlord approached him and suggested that the law firm move across the hall into the larger rear unit; that the landlord made all of the modifications in the rear unit; and that there were no negotiations with respect to the 2006 lease, although the annual rent was increased. He stated that at the time the law firm took possession of the premises, he did not know if there was a certificate of occupancy which permitted such use, and that he did not conduct any investigation with respect to the certificate of occupancy. He stated that prior to taking occupancy the defendants made oral promises to the effect that the premises could be used for professional use.

Mr. Nazrisho, in his affidavit, states that in the summer of 2005 Kostantinos Argyris approached him and told him that he was planning to convert another unit in the building into commercial space; that he would build partitions, reinforce floor beams, custom build a reception desk and cubicles, install commercial carpeting, build a conference room, install new heating and air conditioning, and furnish the space for a law office. He states that after the construction was completed, the plaintiff law firm and Mr. Argyris executed the 2006 lease. He states that Mr. Argyris always assured the plaintiff that the premises could be used as a law firm. Mr. Nazrisho states that subsequent to the execution of the lease, "it was learned" that the ownership of the premises had not changed from Kostas & E, LLC to Mr. Argyris, and accuses Mr. Argyris of intending to personally benefit by receiving rent payments in his name and minimizing the tax liability of Kostas & E, LLC. He further states that after the notices of violation were issued, he had numerous meetings with Mr. Argyris and his son, and that they assured him that the they would take care of the problem by June 2009; that defendants' architect also sent a letter stating that the violations would be cured within a few weeks; and that after one month without any "prospects" plaintiff informed Mr. Argyris that rent payments would be withheld until the violations were resolved or at lease addressed. He states that in July 2009 he inquired as to the status of the violations, and Mr. Argyris informed him that he had consulted another architect, at which time plaintiffs informed defendants that it could not operate its business in violation of the law and that it would look to relocate. Mr. Nazrisho states that Mr. Argyris consented to plaintiff's

surrendering the premises; that the law firm moved out in November 2009; and that the keys were turned over to another tenant at Mr. Argyris' instruction.

"It is well settled in this State that where a lease was originally invalid for want of title in the lessor, and a subsequent purchaser or the holder of the true title accepts attornment from the lessee under the invalid lease, with knowledge of the terms and conditions of the lease, he validates the lease." (*Anderson v Connor*, 43 Misc 384, 388 [1904]; *see also Ehrlich v Hollingshead*, 275 App Div 742, 742-743 [1949]; *United Realty & Mtge. Co. v Stoothoff*, 133 App Div 245, 246 [1909]; *30 Carmine LLC v Depierro*, 7 Misc 3d 836 [2005]; *see also* Real Property Law § 224). In addition, "[a]n unauthorized execution of an instrument affecting the title to land or an interest therein may be ratified by the owner of the land or interest so as to be binding upon him." (*Diocese of Buffalo*, 91 AD2d 213 [1983] (citing 21 N.Y. Jur. Estoppel, Ratification, and Waiver § 87; *Holm v C.M.P. Sheet Metal*, 89 AD2d 229 [1982]; *30 Carmine LLC v Depierro*, *supra; see also Cohen v Treuhold Capital Group, LLC [In re Cohen]*, 422 B.R. 350, 370-371 [2010]).

The evidence presented establishes that the subject building is owned by Kostas & E, LLC; that the 2006 lease is between Kostantinos Argyris, as owner, and Sipsas & Nazrisho, P.C., as tenant; that Mr. Argyris did not obtain permission from Kostas & E, LLC to put his name on the lease as the owner; that the November 1, 2006 rider to the lease referred to the earlier 2005 lease which named Kostas & E, LLC, as owner, and stated that the lease was offered by the managing agent for the building; that the 2006 rider was not executed by the landlord, or any other person on behalf of the landlord; and that all rental payments made by Sipsas & Nazrisho, P.C. were deposited in the bank accounts of Kostas & E, LLC. Since Kostantinos Argyris is the managing member of a two-member limited liability company, it is inconceivable that Kostas & E, LLC was unaware of the 2006 lease. Furthermore, as Kostas & E, LLC accepted the plaintiff's rent payments for over two years and never repudiated the 2006 lease, the court finds that it ratified the lease.

Turning now to the issue of the certificate of occupancy, neither plaintiff nor defendants have submitted a certificate of occupancy for the subject building. There is no evidence that the occupancy of the second floor of the premises for commercial use violated the applicable zoning resolution. However, it is undisputed that Kostantinos Argyris was aware from the time Kostas and E, LLC purchased the subject building in 2001, that the building's certificate of occupancy only permitted commercial use on the first floor and residential use on the second floor.

The 2006 lease states that the subject premises were to be used only for "professional offices." The fact that the lease recited an intended use that violated the building's certificate of occupancy, and the mere failure of a landlord to obtain a certificate of occupancy before

a commercial tenant's date of occupancy does not, without more, give the tenant the right to terminate the lease (*see Progressive Image Gruppe, Inc. v 162 Charles St. Owners, Inc.*, 272 AD2d 66, 66-67 [2000]; *Jordache Enters. v Gettinger Assocs.*, 176 AD2d 616 [1991], appeal dismissed 80 NY2d 925 [1992]; *Silver v Moe's Pizza*, 121 AD2d 376 [1986]; Warren's Weed New York Real Property § 82.05). The lease will be considered a valid contract if the bar to legal use of the premises is readily correctable and the language used in the lease indicates that the parties intended that the defect be corrected and the premises legally occupied (*see 56-70 58th St. Holding Corp. v Fedders-Quigan Corp.*, 5 NY2d 557 [1959]; *Kosher Konvenience, Inc. v Ferguson Realty Corp.*, 171 AD2d 650 [1991]; *Elkar Realty Corp. v Kamada*, 6 AD2d 155 [1958]; *cf., Two Catherine Street Management Co. v Young*, 153 AD2d 678 [1989]; *Silver v Moe's Pizza, supra*).

Here, although the lease does not contemplate a cure by the landlord, the property owner's managing member agreed to cure the violations, and the subject premises could be legally occupied if the owner obtained an amended certificate of occupancy. However, the court finds that a triable issue of fact exists as to whether the property owner took sufficient steps to correct the violations prior to plaintiff's vacating the premises in November 2009.

Concerning plaintiff's claim that it was defrauded into leasing the premises for a use that was not authorized by the certificate of occupancy, issues of fact exist as to whether defendants made a specific representation concerning permitted uses under the certificate of occupancy, and, if so, whether plaintiff's alleged reliance thereon was reasonable (*see Jordache Enters. v Gettinger Assocs., supra*). Therefore, plaintiff's request to dismiss the fifth cause of action for declaratory judgment is denied. That branch of the plaintiff's cross motion which seeks to dismiss the sixth affirmative defense of attornment is denied.

Plaintiff's request to dismiss the sixth cause of action for fraud is denied, as triable issues of fact exist as to whether defendants Kostantinos Argyris and Alexandros Argyris made specific representations concerning the permitted uses under the certificate of occupancy, and whether they were made with the intent to deceive the plaintiff and to induce it to enter into the 2006 lease.

The seventh cause of action to "pierce the corporate veil" is dismissed. A member of a limited liability company "cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof" (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [2005]; *see also* Limited Liability Company Law §§ 609, 610). Plaintiff seeks to hold individual defendants liable despite this statutory proscription. In order to pierce the "corporate veil," a doctrine applicable to limited liability companies (*see Retropolis* at 210, citing *Williams Oil Co. v Randy Luce E-Z Mart One*, 302 AD2d 736, 739-40 [2003]), plaintiffs bear " 'a heavy burden of showing that the [company] was dominated [by the

owners] as to the transaction attacked and that such domination . . . resulted in wrongful . . . consequences' " (*id.*, quoting *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *see also Matias v Mondo Props. LLC*, 43 AD3d 367 [2007]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Here, plaintiff in its complaint repeats its allegation of fraud with respect to the ownership of the building, and alleges that the individual defendants acted in a manner that was detrimental to the limited liability company and to the plaintiff. Plaintiff's allegations, however, do not form a basis for "piercing the corporate veil." In addition, there is no evidence that Eleni Argyris, a member of Kostas & E, LLC had any interactions of any nature with the plaintiff, or that Alexandros Argyris is a member of Kostas & E, LLC. Finally, as plaintiff is not a member of Kostas and E, LLC, it may not assert what is essentially a derivative action against the individual defendants.

Plaintiff's eighth cause of action for unjust enrichment incorporates all the allegations set forth in the complaint, and alleges that defendants, by accepting rent payments have been unjustly enriched and seeks to recover damages.

It is well settled that "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2004] [internal quotation marks omitted], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145 [2008]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). Unjust enrichment occurs when in "equity and good conscience[,]" a party obtains or possesses value that rightfully belongs to another party (*Parsa v State of New York*, 64 NY2d 143, 148 [1984]; *Marini v Lombardo*, 79 AD3d 932 [2010]).

Mr. Sipsas, in opposition to the defendant's motion, and in support of the claim for unjust enrichment, states in his affirmation, that the subject lease is invalid, and that "[d]amages such as, but not limited to, business losses, attorney fees were not covered by any contract between the parties." The claimed damages, as well as the evidence presented, does not support a claim for unjust enrichment. Therefore, that branch of the plaintiff's motion which seeks to dismiss the eighth cause of action for unjust enrichment, is granted.

Defendants' request for leave to amend the first counterclaim, to sever the second counterclaim, to declare the third counterclaim moot and for summary judgment on the fourth counterclaim, and plaintiff's request to dismiss defendant Argyris' counterclaims pursuant to CPLR 3212:

Defendants' first, second and fourth counterclaims assert claims solely on behalf of Kostantinos Argyris. Since Mr. Argyris is not the owner of the subject real property, and does not assert a derivative claim on behalf of Kostas & E, LLC, he cannot maintain these counterclaims in his own right (*see generally, Tzolis v Wolff*, 10 NY3d 100 [2008]. The court notes that, although the counterclaims are nominally brought by the "defendants," the pleadings fail to properly allege a claim on behalf of the property owner Kostas & E, LLC. Therefore, that branch of defendants' motion which seeks to amend the first counterclaim, to sever the second counterclaim and for summary judgment on the fourth counterclaim is denied, and plaintiff's cross motion to dismiss these counterclaims is granted.

Defendants' third counterclaim to recover possession of the subject premises and for a warrant of ejectment is now moot, as plaintiff vacated the premises after the commencement of this action. Therefore, defendants' request to declare the third counterclaim moot is granted, and plaintiff's request to dismiss the third counterclaim is denied as moot.

Conclusion:

Defendants' request for summary judgment dismissing the complaint is granted as to the first, second, third, fourth, seventh and eighth causes of action, and is denied as to the fifth and sixth causes of action. That branch of defendants' motion which seeks relief on its first, second and fourth counterclaims is denied. That branch of defendants' motion which seeks to declare the third counterclaim moot is granted and that branch of plaintiff's cross motion which seeks to dismiss said counterclaim is denied as moot. That branch of defendants' motion which seeks an order imposing sanctions on the plaintiff, its principals and attorney pursuant to 22 NYCRR 130-1.1 and 1200.23, is denied. Plaintiff's cross motion to dismiss defendant Argyris' second, third, fourth, fifth and sixth affirmative defenses is denied. That branch of plaintiff's cross motion which seeks to dismiss defendant Argyris' first, second and fourth counterclaims is granted.

Dated: June 2, 2011

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J.S.C.