

Purchase Prods., Inc. v Fifth Ave. Partners, L.P.

2011 NY Slip Op 33899(U)

November 22, 2011

Supreme Court, New York County

Docket Number: 651503/2010

Judge: Judith, J. Gische

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

HON. JUDITH J. GISCHÉ

PRESENT: _____

PART 10

Index Number : 651503/2010

PURCHASE PRODUCTIONS, INC.

INDEX NO. _____

vs

FIFTH AVENUE PARTNERS, L.P.

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. 002

DISMISS

MOTION CAL. NO. _____

E
12/11/11
JC

The following papers, numbered _____ motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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Dated: 11/22/11

HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
Purchase Productions, Inc.,

Plaintiff (s),

-against-

Fifth Avenue Partners, L.P.,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 651503/2010

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

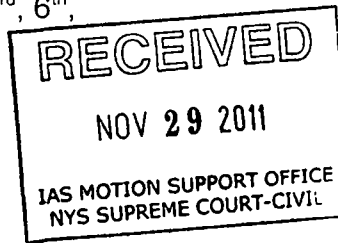
Papers	Numbered
Fifth Avenue n/m (3211, 3212) w/AJN affirm, exhs	1
Purchase's opp w/ JS affid, PCD affirm (sep backs) exhs	2,3,4
Fifth Avenue reply w/DBR affirm, exhs	5
Stips of Adjournment and Proof of service	6

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

GISCHE J.:

Plaintiff Purchase Productions, Inc. ("Purchase" sometimes "tenant") has commenced this action against its landlord Fifth Avenue Partners, L.P. ("Fifth Avenue" sometimes "landlord") for property damage, rescission of its lease and related relief. The landlord has answered the complaint and served an amended answer to interpose counterclaims ("answer") against the tenant for unpaid rent and related declaratory relief. The tenant has replied, asserting affirmative defenses.

Presently before the court is landlord's motion for dismissal of the tenant's complaint consisting of 11 causes of action ("COA"), dismissal of the tenant's 3rd, 6th,



7th, 8th, 9th and 10th affirmative defenses (“AD”) asserted in its reply to counterclaims and summary judgment on its counterclaims. Although the note of issue has not yet been filed, issue has been joined on the counterclaims. Therefore, summary judgment relief is available (CPLR § 3212 [a]; Myung Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept 2001]).

Since the landlord seeks dismissal of, not summary judgment on, tenants’ complaint based upon CPLR 3211 [a] [1] and/or [7], the court must accept the facts alleged by the tenant in the complaint as true, accord the plaintiff/tenant the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]). This law is also applicable in deciding the landlord’s motion to dismiss the tenant’s affirmative defenses. However, on landlord’s motion for summary judgment on its counterclaims, the landlord has the burden of setting forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]).

The following facts and arguments are considered:

Facts and Arguments

On or about January 9, 2003 the parties entered into a written agreement of lease for rental for the premises located at 19 West 21st Street, Suite 706, New York, New York 10010 (“premises”). The lease was for term of five years from February 1, 2003 until January 31, 2008 (“lease”). Thereafter, the parties agreed to modify the lease and did so in a written lease modification and extension agreement dated

December 4, 2007, which modified and extended the lease through January 31, 2013 (“lease extension”) (hereinafter, references to the “lease” shall mean the lease and lease extension, unless otherwise provided).

Tenant contends that there were leaks at the premises several times during its tenancy, the earliest occurring in 2005, and the most severe occurring the evening of July 13, 2010, when the premises were flooded and rendered unusable. According to plaintiff, the flooding occurred because the defendant did not promptly act to fix a leak in the men’s room on the 7th floor that one of its employees reported to the landlord on July 13th. Plaintiff contends that when its employees arrived the next day, on July 14, 2010, the entire contents of its office were damaged and/or destroyed, causing property damage of at least \$748,495.00.

Following the flood, plaintiff’s president, James Scolaro (“Scolaro”) sent defendant a letter stating that the were premises were “uninhabitable and dangerous” and that this “leaves us no choice but to vacate the premises immediately, pending an audit to be conducted by the building’s insurance company. The 7th Floor¹ now considers our lease with Fifth Avenue to be null and void.” Upon hiring a private company to inspect the premises, plaintiff discovered it was contaminated with mold and plaintiff notified defendant that it was vacating the premises permanently and turning over the keys effective July 23, 2010. Thereafter, the landlord commenced a non-payment proceeding against the tenant in Civil Court, New York County, obtaining a judgment of possession and warrant of eviction. The tenant commenced this action

¹Plaintiff does business under the name “The 7th Floor.”

in September 2010.

The disputes between the parties are broadly categorized as follows: 1) whether the premises were properly surrendered by the tenant; 2) which party was contractually responsible to repair the demised premises, if in fact it was flooded; 3) whether the landlord had a duty to mitigate damages; 4) whether the tenant is entitled to a rent abatement; 5) whether there was simply a leak or a more serious flood in the demised premises and; 6) whether the tenant is entitled to rescission of the lease, given the circumstances which include the ongoing problem with leaks. Whereas tenant claims the landlord's actions negate any further obligation on its part to pay rent and additional rent under the lease, the landlord seeks to enforce rent under the lease through 2013. After obtaining a warrant of eviction in Civil Court, the landlord obtained a new commercial tenant. The rent that the new tenant is paying is less than plaintiff was paying and the new lease is for a shorter term (3 years).

Plaintiff has alleged the following causes of action in its complaint: money damages to personal property approximately \$748,495 plus additional expenses of \$14,243, based upon the defendant's failure to maintain the premises in "a condition that was fit and suitable for commercial purposes, which constitutes a material failure of consideration" (1st COA), breach of the implied warranty of fitness or suitability for commercial purposes in the lease, (2nd COA), breach of the implied covenant of quiet enjoyment (3rd COA), breach of the express covenant of quiet enjoyment in the 23 paragraph of the lease (4th COA), rent abatement (5th COA), failure to remediate (6th COA), improper response by landlord to tenant's surrender (7th COA), failure to maintain the premises in compliance with all laws (8th COA), rescission of the lease

because of landlord's failure to make repairs (9th COA), nuisance (10th COA) and damages for property loss and business relocation (11th COA).

The following counterclaims are asserted by the defendant in its answer: a money judgment for rent and additional rent due and owing through the end of the extended lease in the amount of \$83,659 (1st, 2nd, 3rd CC), a declaration that plaintiff's attempt to surrender the premises is insufficient as a matter of law (4th CC), a declaration that plaintiff, not defendant, has breached the lease by not making repairs (5th CC), a declaration that plaintiff is not entitled to any reduction in the rent and that defendant is not liable to plaintiff in connection with the water damages (6th CC) and legal fees of \$8,500 (7th CC).

In reply to the counterclaims, plaintiff has asserted the following affirmative defenses ("AD"), which the landlord contends have no merit or do not state an available defense: tenant has complied with any and all contractual obligations (3rd AD), failure to mitigate damages (6th AD), failure to comply with contractual obligations and breach of the express and implied warranties owed to plaintiff (7th AD), res judicata because of the nonpayment proceeding (8th AD), constructive eviction (9th AD), and surrender by operation of law (10th AD).

Plaintiff alleges that it properly surrendered the premises to the landlord when it notified the landlord in writing of its surrender, effective July 23, 2010, and turning over the keys to the premises. Plaintiff maintains further that the landlord did not object to the surrender (or reply at all) but acted as if it had regained possession of the premises by proceeding to make repairs, without consulting the tenant or notifying the tenant when the repairs were completed. It was only when the tenant received the landlord's

letter dated November 23, 2010 (after the tenant commenced this action), that the tenant first learned the landlord did not consider the premises properly surrendered. Thus, tenant claims the landlord's "rejection" was untimely, driven by litigation and without any merit. Tenant asserts further that the landlord, not the plaintiff, is obligated to make repairs to the drainage pipes and that the landlord's failure to maintain this structure was a proximate cause of its property damage. According to plaintiff, the tenant's payment of rent was in exchange for and entitled it to the express right to use the premises for general offices and, therefore, the leaks, flooding and mold materially prevented the tenant's intended use of the premises (i.e. fitness for commercial purpose).

Plaintiff alleges further that the leaks and flood were "casualties" within the meaning of the lease, entitling to an abatement in rent and that it complied with the notice requirements of the lease by sending to the landlord its July 14, 2010 letter, stating that its offices had been flooded. Plaintiff states that upon being notified of the flood, the landlord was required, but failed, to repair the premises under Article 9 (d) of the lease.

In support of the landlord's motion, defendant's counsel first states that he is only defending the landlord on the "landlord-tenant" causes of action and that the landlord "takes no position regarding the merits of Tenant's negligence/property claims" because the landlord is represented by a different law firm on those non-landlord/tenant claims.

Defendant urges the court to dismiss the 1st and 2nd COAs pursuant to CPLR 3211 because plaintiff does not have a claim for implied warranty of fitness or suitability for commercial purpose. Defendant argues that these principles only apply to

residential, not commercial property and, in any event, the premises were leased to the tenant in an "as is" condition and, therefore, any claim that the lease fails for lack of consideration is without merit.

Next, defendant argues that Article 23 of the lease requires that the tenant pay all rent (i.e. have no arrears) as a condition precedent to it bringing a claim for breach of the covenant of quiet enjoyment. The landlord contends the tenant was in default of its rent obligations because it stopped paying rent in May 2010, before the flooding occurred and this action was commenced. Thus, defendant claims the 3rd and 4th COAs should be dismissed for that reason. According to plaintiff's principal, however, the rent was up to date and the tenant has provided copies of checks for rent paid through June 2010.

The landlord denies that the tenant is entitled to any rent abatement, based upon the provision of Article 4 of the lease. Article 4 states that:

Except as specifically provided in Article 9 or elsewhere in this lease there shall be no allowance to the Tenant for a diminution of rental value and no liability on the part of the Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others for making or failing to make repairs, alterations, additions or improvements in or to any portion of the Building or the Demised Premises or in and to the fixtures, appurtenances or equipment thereof.

Article 9 (a), in relevant part, provides that if the premises or any part thereof are "damaged by fire or other casualty" the tenant is obligated to notify the landlord but the lease continues in full force and effect. Article 9 (b) provides, in relevant part, that the premises "shall be repaired by and at the expense of Owner and the rent, until such repair shall be substantially completed, shall be apportioned from the day following the

casualty according to the part of the premises which is usable.” Article 9 (c) pertains to situations where the “premises are rendered wholly unusable by fire or other casualty” In those situations, the rent “shall be proportionately paid up to the time of the casualty and thenceforth cease until the date when the premises shall have been repaired and restored by Owner . . .” Article 9 (d) provides that unless the owner serves a termination notice on the tenant, the owner “shall make the repairs and restorations under the conditions (b) and (c) hereof, with all reasonable expedition ...” According to landlord, the premises were not flooded, at worst, there was a water leak into the premises and, therefore, the provisions of Article 9 are inapplicable.

Next, landlord argues that the tenant’s actions – unilaterally deciding the premises were damaged or unusable, moving out and declaring the lease null and void – are a breach of the notice requirements set forth in Article 9 (a) and, therefore, the tenant has waived any rights it may have under Article 9 for a rent reduction. Landlord argues further that the 5th and 6th COAs should be dismissed because under Article 46.6, it is the tenant – not the landlord – who is responsible for making all nonstructural repairs to the premises, including “all interior repairs.”

Article 25 of the lease provides that “no act or thing done by Owner or Owner’s agents during the term hereby demised shall be deemed an acceptance of a surrender of said premises and no agreement to accept such surrender shall be valid unless in writing signed by Owner...the delivery of keys to any such agent or employee shall not operate as a termination of the Lease or a surrender of the premises.” According to the landlord, plaintiffs 7th COA should be dismissed because the landlord rejected the tenant’s “surrender” of the lease on November 23, 2010.

Defendant argues that Article 6 obligates the tenant -- not the landlord -- to maintain the premises "in compliance with all laws," therefore the tenant's 8th COA is without merit. According to the landlord, the 9th COA for rescission of the lease is not only without merit, it is time barred because the lease was made January 9, 2003 but this action was not commenced by tenant until 2010, more than seven (7) years later.

Defendant denies it created a nuisance or that the facts alleged support such a claim (10th COA) because the landlord did not intentionally flood the premises or create the condition alleged. Defendant argues the 11th COA should be dismissed insofar as plaintiff seeks damages for business interruption/relocation because the tenant did not comply with Article 13 of the lease, which reserves to the landlord the right to make repairs.

Discussion

The implied warranty of fitness for a commercial purpose has been analogized to the implied warranty of habitability. It is well established law that the implied warranty of habitability does not apply to commercial spaces (Rivera v. JRJ Land Property Corp., 27 A.D.3d 361 [1st Dep't 2006]). Although one lower court has decided that there "ought to be and is an implied warranty of fitness for commercial purposes" where commercial property is concerned (40 Associates, Inc. v. Katz, 112 Misc. 2d 215 [City Civ. Ct. 1981]), that decision stands alone and has not been followed (Rivera v JRJ Land Prop. Corp., 27 A.D.3d 361 [1st Dept.,2006]; Polak v Bush Lumber Co., 170 A.D.2d 932 [3rd Dept 1991]; Bomze v. Jaybee Photo Suppliers, Inc., 117 Misc 2d 957 [AT 1st Dept. 1983]; Dell, Inc. v GJF Construction Corp. 2007 NYSlipOp 33996 (U) [Sup Ct., N.Y. Co. 2007] *n.o.r.*, DHB Industries, Inc. v. West-Post Management Co., 9 Misc.

3d 1130(A) [Sup Ct., N.Y. Co. 2005]). Therefore, accepting the plaintiff's facts as true and according the plaintiff/tenant the benefit of every possible inference, plaintiff does not have a cause of action against the defendant for breach of an implied warranty of fitness or suitability for commercial purposes. Therefore, defendant's motion to dismiss the 1st and 2nd causes of action (CPLR 3211 [a][7]) is granted and those causes of action are hereby severed and dismissed.

The tenant's 7th AD is that "defendant has failed to comply with contractual obligations and breached express and implied warranties and conditions owed to plaintiff." That aspect of the 7th AD which raises the defense of breach of express and implied warranties is hereby stricken. The rest of the 7th AD is addressed separately later in this decision.

A breach of the covenant of quiet enjoyment cause of action requires that the tenant pay rent for the entire time it remained in possession (Dance Magic, Inc. v. Pike Realty, Inc., 85 A.D.3d 1083 [2nd Dept 2011]). Although defendant contends the plaintiff was in arrears when the alleged flooding occurred and, therefore, does not have a cause of action for breach of the covenant of quiet enjoyment, plaintiff denies this fact, not only through the sworn affidavit of its president (Scolaro) which amplifies the complaint, but also through the presentation of checks showing the tenant paid rent through June 2010, shortly before the flood is alleged to have occurred. These facts support the cause of action pleaded by plaintiff, thereby defeating defendant's motion for the dismissal of the 3rd and 4th causes of action based upon CPLR 3211 (see Duane Reade v Reva Holding Corp., 30 A.D.3d 229 [1st Dept 2006]).

Plaintiff also defeats defendant's motion for the dismissal the 5th, 6th and 7th

COAs in the complaint which are for rent abatement, failure to remediate and improper response by the landlord to its surrender. Plaintiff's facts that the demised premises were flooded, the tenant promptly notified the landlord of the flood once it was discovered, that the premises were partially damaged/rendered unusable as a result thereof support the tenant's claim that, under the lease, the owner is obligated to make repairs at its own expense.

To the extent, however, that the tenant has asserted any claim for constructive eviction as a cause of action or raised it as an affirmative defense (9th AD), that claim is hereby severed and dismissed and the 9th affirmative defense is hereby stricken. The tenant expressly waived its right to surrender possession pursuant to RPL § 227 in Article 9 (f) of the lease and is, therefore, limited to the remedies set forth in the lease (Dance Magic, Inc. v. Pike Realty, Inc., supra).

Arguments by landlord, that the tenant did not properly surrender the lease as it was required to do in order to trigger the remedies available under Article 9, ask the court to resolve factual disputes. On a motion to dismiss, the court's function is simply to decide whether the complaint states a cause of action, not whether it will be successful. Although issue was joined by defendant, defendant has not moved on the merits of the complaint, but chosen to attack it as if it were at the pleading stage. Therefore, the court accepts the tenants facts, which are that it promptly notified the landlord by fax on July 14, 2010 of the flood in the demised premises, followed by further correspondence dated July 23, 2010 surrendering the premises. The court also accepts as true Scolaro's statements that after he sent the July 23, 2010 surrender notice, the landlord acted as though it had possession and control of the premises by

doing such things as making repairs without consulting or advising the tenant. These facts support tenant's claim, that it substantially complied with the notice requirements of Article 42 of the lease and/or the landlord waived that requirement and that the landlord accepted the tenant's surrender of the demised premises.

Defendant's motion for summary judgment on its 4th, 6th and 7th counterclaims which are, respectively, for declarations the tenant improperly surrendered the premises, the tenant is not entitled to a reduction in rent and that the landlord is not liable to plaintiff in connection with the water damage and for legal fees, is also denied as landlord has not met its burden of proving it is entitled to summary judgment in its favor, as a matter of law. These counterclaims cannot be teased apart from the tenant's rent based and breach of contract claims in its complaint.

Under Article 6 of the lease, "Tenant shall, at Tenant's sole cost and expense, promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments..." The issue of which party to a lease is obligated to make repairs required by a governmental body at the demised premises depends on the intentions of the parties as expressed in the lease, interpreted in light of the surrounding circumstances (Collegetown of Ithaca v Friedman, 110 A.D.2d 955 [3rd Dept 1985]). Here, the tenant claims the problem was with a pipe and that the obligation to fix the plumbing for the building lies with the landlord. The landlord also has its own obligations to comply with building codes, etc. Thus, the presence of this particular tenant obligation in the lease does not mean tenant has no claim against the landlord. Therefore, defendant's motion to dismiss the 8th cause of action against the landlord ("failure to maintain the premises in compliance with all laws") is resolved in

favor of the tenant and the motion is denied. For the same reasons, the landlord has not proved it is entitled to summary judgment on its 5th CC which is for a declaration that it did not breach the lease by not making repairs to such things as the plumbing.

The 9th cause of action, for rescission of the lease, is hereby severed and dismissed. A claim for rescission is stated where it is claimed that, because of fraud, misrepresentation, or mistake, "there is an absence of the requisite 'meeting of the minds' to the contract" (Surlak v Surlak, 95 A.D.2d 371, 380 [2nd Dept. 1983] *app dismiss* 61 NY2d 906 [1984]) A unilateral mistake, standing alone, does not suffice as a predicate for relief (Angel v. Bank of Tokyo-Mitsubishi, Ltd., 39 A.D.3d 368 [1st Dept 2007]). Furthermore, the lease, as extended, was made in 2003, but this action was commenced more than seven (7) years after the execution of lease. Therefore, this cause of action is also dismissed as untimely (CPLR § 213; 35 Park Ave. Corp. v Campana, 48 N.Y.2d 813 [1 Dept. 2007]).

To properly state a claim for private nuisance, the pleader must allege a "recurrence of objectionable conduct" (Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 124 [2003]). The "objectionable conduct" alleged here are repeated leaks into the demised premises. Accepting these facts as true and according the plaintiff/tenant the benefit of every possible inference, plaintiff has pleaded a claim for private nuisance, thereby defeating the defendant's motion to dismiss the 10th COA for nuisance (Duane Reade v. Reva Holding Corp., 30 A.D.3d 229 [1st Dept 2006]).

The defendant's motion for dismissal of the 11th COA for business relocation action is denied because plaintiff has pleaded facts supporting this claim and there is a dispute whether the landlord is obligated under the lease for the repairs allegedly

needed to the demises premises.

According to defendant, the 6th AD (failure to mitigate damages) should be dismissed because a landlord has no duty to mitigate damages and it can enforce the full, unpaid rent through the end of the lease term. This argument is based upon the legal principles set forth in Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 87 N.Y.2d 130 [1995]. In Holy Properties, the court held that when a tenant abandons the premises prior to expiration of the lease, the landlord has three options: (1) it can do nothing and collect the full rent due under the lease, (2) it can accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it can notify the tenant that it is entering and reletting the premises for the tenant's benefit which will result in the rent collected being apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation (Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., supra).

Article 77 of the parties' lease provides as follows:

Owner shall use reasonable efforts to mitigate its damages in the event of Tenant's default and a termination of this Lease, provided however, it is agreed that (i) Tenant shall reasonably cooperate with Owner in any such efforts, (ii) Owner shall have no obligation to lease or relet the Demised Premises at less than a market Rent for a less term of less than five (5) years, pursuant to Owner's standard lease form, and (iii) in no event shall Owner be required to lease or relet the Demised Premises before any other available space or unit in the building.

Thus, although under the lease the landlord has no obligation to lease or relet

the premises for less than "market rent" for a lease term of less than five (5) years, the landlord has a contractual duty to mitigate damages. Here, the landlord relet the premises in December 2010 for two-thirds of the plaintiff's rent and then for only a three (3) year period. Plaintiff has defeated defendant's motion for summary judgment by raising triable issues of fact whether the defendant made good faith efforts to meet its contractual duty to mitigate damages. Therefore, the landlord's motion to strike the 6th AD is denied.

Defendant's motion for the dismissal of the tenant's 3rd AD (compliance with contractual obligations) is denied because this is an available defense to the landlord's counterclaims for unpaid rent and for a declaratory judgment that plaintiff's attempt to surrender the premises was insufficient, as a matter of law (i.e. the 4th CC).

To the extent, however, that in the 7th AD tenant raises the defense of breach of the implied and express warranties owed to plaintiff, defendant's motion for the dismissal of that aspect of the 7th AD is granted for reasons more fully addressed in connection with plaintiff's 1st, 2nd, 3rd and 4th COA's elsewhere (supra) in this decision, otherwise the motion to dismiss the 7th AD is denied.

The 8th AD asserts the defense of *res judicata*. The doctrine of *res judicata* is a broad concept holding that a party, or one who is in privity with the party, is precluded from re-litigating claims already decided in a prior proceeding (Ryan v. New York Telephone Co., 62 NY2d 494 [1984]; Gramatan Home Investors v. Lopez, 46 NY2d 481 [1979]). As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different relief" (O'Brien v City of Syracuse,

54 NY2d 353, 357 [1981]; In re Reilly v. Reid, 45 NY2d 24, 30 [1978]). This is not an available defense to the landlord's claim for unpaid rent, since the matters litigated in the Civil Court action were of a limited scope. In the Civil Court the landlord sued for non-payment. The tenant did not appear in that proceeding and the landlord obtained a judgment of possession and warrant of eviction, but no money judgment. Therefore, the landlord's motion to strike the 8th affirmative defense is granted and it is hereby stricken.

The court has already addressed (*supra*) why the constructive eviction affirmative defense (9th AD) is an unavailable defense and the landlord's motion to strike the 9th AD is granted and that defense is hereby stricken.

The 10th AD is for surrender by operation of law. For reasons expounded in connection with the motion to dismiss the 7th COA in the complaint, this defense is available to the tenant and the landlord's motion to dismiss same is denied.

Landlord for the first time raises arguments in its reply that Article 9 of the lease is inapplicable, because Article 9 (e) of the lease obligates each party to look to its own insurance carrier for recovery of loss. Landlord also argues for the first time that the tenant repudiated the lease by treating it as null and void, entitling the landlord to a judgment for all rent due through the expiration of the lease. Arguments raised for the first time in reply ought not be considered by the court (Azzopardi v American Blower Corp., 192 A.D.2d 453 [1st Dept., 1993]). Furthermore, these arguments go to the merits of the tenant's claims which the court does not examine on a motion to dismiss. In any event, to the extent the arguments are directed in support of the landlord's motion for summary judgment on its counterclaims, the arguments are unhelpful as they do not

establish the landlord is entitled to judgment in its favor as a matter of law. There are numerous triable issues of fact that must be resolved before the court can apply the law.

Other arguments that the landlord was not negligent, because the flood was unforeseeable, blur the landlord's own claim that it is "only" taking a position on the landlord-tenant claims in the complaint. It is also well established law that the issue of foreseeability generally presents a triable issue of fact for the jury to decide (see Ortiz v Wiis Realty Corp., 66 A.D.3d 429 [1st Dept. 2009]).

Recapitulation

The landlord's motion is granted in part and denied in part as follows:

1st and 2nd COAs (fitness for commercial purpose, etc) - motion granted: severed and dismissed

3rd and 4th COAs (covenants quiet enjoyment) - motion denied

5th, 6th, 7th COAs (rent abatement, failure to remediate, improper response by landlord to surrender - motion denied

8th COA (failure to maintain premises in compliance with all laws) - motion denied

9th COA (rescission of lease) - motion granted: severed and dismissed

10th COA (nuisance) - motion denied

11th COA (damages for loss of business, etc) - motion denied

1st, 2nd, 3rd CC (rent based claims, declaratory judgment) - motion denied

4th CC (declaration re: improper surrender of premises) - motion denied

5th CC (declaration re: repairs) - motion denied

6th CC (declaration re: tenant not entitled to reduction in rent) - motion denied

7th CC (legal fees) - motion denied

3rd AD (tenant has complied with lease etc.) - motion denied

6th AD (failure to mitigate) - motion denied

7th AD (landlord's failure to comply with lease etc.) - motion granted in part and denied in part.

8th AD (res judicata) - motion granted: defense stricken

9th AD (constructive eviction) - motion granted: defense stricken

10th AD (surrender by operation of law) - motion denied.

Conclusion

The motion by the landlord is granted in part and denied in part in accordance with the foregoing decision and order.

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
 November 22, 2011

So Ordered:



Hon. Judith J. Gische, JSC