SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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44 SENECA GLEN CORP.,

Plaintiff,

- against -

EMPIRE WINDOW DESIGNS, INC. and CATHERINE DiRESTA,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 14777/11
Motion Seq. No.: 01
Motion Date: 02/09/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, and Exhibits	1
Affidavit in Opposition and Exhibits	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting it summary judgment and striking defendants' Verified Answer with Counterclaims. Defendants oppose plaintiff's motion.

This is an action for payment of rental arrears owed on a property located at 3956 Merrick Road, Seaford, New York 11783. Plaintiff commenced the instant matter by filing a Summons and Complaint on or about October 14, 2011. Issue was joined on or about November 8, 2011.

On or about November 24, 2006, plaintiff entered into a three year lease agreement with

defendants whereby defendants promised to pay monthly rent in the total amount of $36,000.00 from December 1, 2006 through November 30, 2007, in the total amount of $37,008.00 from December 1, 2007 through November 30, 2008 and in the total amount of $38,192.00 from December 1, 2009. *See* Plaintiff's Affirmation in Support Exhibit B. Defendant Catherine DiResta ("DiResta") personally guaranteed the lease. *See id.*

Plaintiff contends that defendants have defaulted under the lease agreement by failing to pay rent in the amount of $40,558.96, which remains past due and owing. Plaintiff contends that it has made demand of defendants to make payments on the account and has made demand for the entire balance due and owing, but defendants have failed and refused to make said payments as demanded. Plaintiff submits that it had its insurance company, Travelers, inspect the subject premises and that the insurance company's inspector found no damage to said premises, nor to defendants' property.

Plaintiff argues that the Verified Answer interposed by defendants "raises no issue of fact or law whatsoever, much less is sufficient to defeat Plaintiff's motion for summary judgment." Plaintiff further argues that defendants' affirmative defenses must be dismissed as they are devoid of both legal and factual merit. First, plaintiff asserts that the property leased by defendants was a commercial store space and, therefore, the warranty of habitability does not apply. Accordingly, defendants' affirmative defense for breach of the warranty of habitability is legally devoid and should be stricken. Second, plaintiff claims that defendants failed to provide any evidence to support the alleged breach of the covenant of quiet enjoyment. Plaintiff states that to establish a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction. Plaintiff contends that defendants failed to allege that they abandoned the premises or that they abandoned the property due to the constructive eviction. Next, plaintiff argues that the doctrine of laches does not apply as the instant matter was commenced well within the six year statute of limitations period in which to file suit. In the same vein, defendants' assertion that plaintiff is barred by the applicable statute of limitations, is, according

to plaintiff, "an undeniably misconstrued interpretation of the law."

Plaintiff further contends that it is unclear why defendants' Verified Answer alleges *res judicata* as an affirmative defense as they fail to set forth any facts whatsoever to support this allegation. Plaintiff claims it has not instituted a previous action for the relief sought. Plaintiff also argues that defendants make a bald, conclusory, self-serving allegation that plaintiff failed to properly repair and/or negligently repaired the subject premises, resulting in property damage and a vague claim for $10,000.00 in damages. Plaintiff asserts that defendants failed to state what repairs were required, how said repairs were negligently done and they did not state any basis for the amount of damages sought.

Plaintiff also argues that defendants are unable to support their claim of constructive eviction as they failed to allege an abandonment of the premises based upon plaintiff's actions.

In opposition to plaintiff's motion, defendants argue that there are clearly issues of fact which would prevent the Court from rendering summary judgment. Defendants submit that "[t]his is the third action that the Plaintiff has brought for unpaid rent (Annexed hereto and marked Exhibit 'A' is a copy of the summons and complaint filed in District Court/County of Nassau dated June 4th, 2009 requesting identical relief to the instant lawsuit.) The District court (*sic*) case was placed on (*sic*) trial calendar and on June 17th, 2010, my attorney appeared in District Court before Justice Hirsch in Civil Court, Part 2. The Plaintiff failed to appear and the matter was marked off calendar for one year with the right to restore it by stipulation or motion. Neither a motion was made nor a stipulation has been entered into to restore this matter to (*sic*) calendar. Simultaneously with the District Court action, the Plaintiff's (*sic*) commenced an action in the commercial small claims court seeking the same relief. Annexed hereto and marked Exhibit 'B' is a copy of the commercial small claims summons. Despite the fact that Judge Hirsch directed the Plaintiff to consolidate the matters the Plaintiff refused to do so forcing me to defend both actions. The commercial small claims action was also dismissed upon the Plaintiff's failure to appear. This action is the plaintiff's third bite at the apple and clearly an

abuse of process." *See* Defendants' Affidavit in Opposition Exhibits A and B.

Defendants argue that they vacated the "demised" subject premises on April 3, 2009 and surrendered the key to the landlord due to the landlord's failure to repair the leaking roof. *See* Defendants' Affidavit in Opposition Exhibit C. Defendants contend that the alleged leaking roof rendered the space unusable and interfered with the normal business operations. Defendants submit that they sent a number of e-mails to the landlord advising him that the roof was leaking every time it rained and that the roofer that he sent had failed to repair the roof properly so that the leaks continued. *See* Defendants' Affidavit in Opposition Exhibit D. Defendants allege that, as a result of the leaks, portions of their inventory were destroyed. *See* Defendants' Affidavit in Opposition Exhibit E.

Defendants assert that it is their position that they were constructively evicted from the subject premises and were forced to abandon said premises.

In reply to defendants' opposition, plaintiff argues that defendants have failed to provide any evidentiary proof to establish the existence of material issues of fact. Plaintiff adds that *res judicata* does not apply as no judgment on the merits was ever reached in the previous court actions outline by defendants. Plaintiff further argues that, just because defendants left the property, does not mean that any liability under the lease ceases to exist. Plaintiff contends that defendants vacated without any mutual release or agreement being executed and, therefore, plaintiff if entitled to the rent due under the lease even though defendants vacated said property.

Plaintiff further adds that, under the lease agreement, defendants were supposed to maintain insurance and, therefore, they should look to their insurance company for any of the alleged damages they suffered. Plaintiff contends that, under Article 8, Section 6 of the lease agreement, plaintiff is not liable for inconvenience, annoyance or injury to lessee's business arising from making or failing to make repairs to the premises. Plaintiff also states that "defendants are not allowed to diminution the rental value based on inconvenience, annoyance, or injury."

With respect to defendants' claim of quite enjoyment, plaintiff argues, "[d]efendant (*sic*)

is claiming they vacated the property based on the failure to repair the leaking roof. If you look at the Defendants' emails, Defendants (*sic*) complaint dates back to February 14, 2007. Defendant (*sic*) claims they vacated in April 3, 2009. If the alleged violation of quiet enjoyment really caused the defendants to vacate, why did the defendants wait almost two years to vacate? Defendants did not vacate the property based on their alleged constructive eviction. There are no facts that support defendant's (*sic*) contention that they left the property due to the alleged leaks. Defendants' last email complaining about the property was dated October 10, 2008. Defendants vacated the property after failing to tender rent and are now using the alleged leaks in an attempt to avoid liability."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist.

See Sillman v. Twentieth Century- Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Mosheyev v. Pilevsky*, 283 A.D.2d 469, 725 N.Y.S.2d 206 (2d Dept. 2001). Indeed "[e]ven the color of a triable issue forecloses the remedy." *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Rudnitsky v. Robbins*, 191 A.D.2d 488, 594 N.Y.S.2d 354 (2d Dept. 1993). *See also Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957)

First, with respect to plaintiff's motion to dismiss defendants' affirmative defenses, the Court finds that the second affirmative defense, that plaintiff's claim is barred by the Doctrine of Laches, and the third affirmative defense, that plaintiff's claim is barred by the Statute of Limitations, are inapplicable to the instant matter since the cause of action is based upon a contractual agreement for which the law provides a six year statute of limitations. Defendants alleged default occurred beginning on or about January 2009. Therefore, the instant action was brought well within the statute of limitations. The doctrine of laches does not apply where the law provides a statute of limitations period. Accordingly, defendants' second affirmative defense and third affirmative defense are hereby **DISMISSED**.

With respect to defendants' fourth affirmative defense, that plaintiff's claim is barred by the doctrine of *res judicata*, while there were prior actions commenced related to the same relief sought in the instant action, there is no evidence that there were any judgments on the merits

reached in said prior actions. Therefore, the doctrine of *res judicata* is inapplicable in the instant matter, Accordingly, defendants' fourth affirmative defense is hereby **DISMISSED**.

Defendants' first affirmative defense alleges that plaintiff breached the covenant of quiet enjoyment and warranty of habitability. The Court notes that it is established case law that there is no warranty of habitability applicable to commercial leases. Therefore, **the portion** of defendants first affirmative defense asserting a **breach of the warranty of habitability** is hereby **DISMISSED**.

A covenant of quite enjoyment does, however, apply to commercial property. Defendants allege that plaintiff breached the covenant of quiet enjoyment, forcing a constructive eviction, by failing to repair the leaking roof. Defendants argue that the leaks in the subject property rendered the space unusable and interfered with their normal business operations. As previously mentioned, defendants submit that they sent multiple e-mails to the landlord confirming the fact that the roof was leaking every time it rained that the roofer the landlord sent to repair the roof failed to repair it properly as the leaking continued to occur. Defendants submitted a copy of a LIPA bill, dated April 6, 2009, as evidence of their abandonment of the subject premises. *See* Defendants' Affidavit in Opposition Exhibit C. Defendants further submit a letter, dated April 14, 2009, sent to plaintiff, along with proof of receipt of same, that stated, "I was very disappointed to hear from your lawyer on 4/10/09 that you have decided to change course and are now demanding that I pay March and April months rent under the lease. As you know, I have been complaining for many many months about your failure to repair the significant and faulty leak(s) and the resulting mold that has formed inside the building, making the property inhabitable and disastrous for operation of my business. You clearly have materially breached the express terms of the lease agreement leaving me no choice but to vacate the premises upon proper prior notice. In fact, when we spoke on 3/25/09 and I told you my intentions to leave the property due to your failure to respond to my repeated requests to repair the leaks and mold, your reply was 'I don't blame you,' leading me to naturally believe that we were in agreement that is was time to terminate the lease on an amicable basis. You even said

words to the effect, 'draw up a letter,' which I promptly had my attorney do with the appropriate termination and release documentation confirming all our discussions." *See* Defendants' Affidavit in Opposition Exhibit D.

The Court finds that there are material issues of fact raised by defendants' affirmative defense that plaintiff breached the covenant of quite enjoyment precipitating an alleged constructive eviction. Accordingly, plaintiff's motion for summary judgment is hereby **DENIED.**

In sum, the Court holds that defendants' second, third and fourth affirmative defenses, along with that portion of defendants' first affirmative defense that alleges a breach of the warranty of habitability, are hereby **DISMISSED.** Plaintiff's motion, pursuant to CPLR § 3212, for an order granting it summary judgment is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on April 2, 2012, at 9:30 a.m., in the Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 16, 2012