Gerald Gardner Wright, P.C. & Assoc. v Champion Prop. Mgt., LLC

2012 NY Slip Op 33229(U)

September 24, 2012

Supreme Court, Nassau County

Docket Number: 4354-08

Judge: Timothy S. Driscoll

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x

GERALD GARDNER WRIGHT, P.C. & ASSOCIATES,

Plaintiff,

-against-

CHAMPION PROPERTY MANAGEMENT, LLC and 2701 ASSOCIATES LLC,

Defendants.

---x

TRIAL/IAS PART: 16

NASSAU COUNTY

Index No: 4354-08
Motion Seq. Nos. 10 and 11
Submission Date: 12/8/11

The following papers having been read on these motions:

Notice of Motion, Affirmations in Support,
Defendants' Rule 19-a Statement and Exhibits....................................x
Defendants' Memorandum of Law in Support....................................x
Affidavit in Opposition..x
Notice of Cross Motion, Affidavit in Support and Exhibits..................x
Reply Memorandum of Law in Further Support/Opposition................x

This matter is before the Court for decision on 1) the motion by Defendants Champion Property Management, LLC ("Champion") and 2701 Associates LLC ("2701 Associates") ("Defendants") filed on June 28, 2012, and 2) the cross motion by Plaintiff Gerald Gardner Wright, P.C. & Associates ("Plaintiff") filed on July 11, 2012, both of which were submitted on August 3, 2012, following oral argument before the Court. For the reasons set forth below, the Court 1) with respect to Defendants' motion: a) grants Defendants' motion to dismiss the first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action in the Revised Second Amended Complaint; and b) denies Defendants' motion to dismiss the third and eleventh causes of action in the Revised Second Amended Complaint; and c) denies Plaintiff's cross motion.

[* 2]

BACKGROUND

A. Relief Sought

Defendants move for an Order, 1) dismissing the Revised Second Amended Complaint dated March 6, 2012 ("Revised Complaint") (Ex. 1 to Wolkenstein Aff. in Supp.) pursuant to CPLR § 3025(b) on the grounds that it was served without leave of Court; 2) dismissing the First, Second and Fourth through Tenth Causes of Action, pursuant to CPLR § 3211(a)(5), on the grounds that they are barred by the applicable statute of limitations; 3) dismissing the Sixth, Seventh, Tenth and Eleventh Causes of Action, pursuant to CPLR § 3211(a)(7), on the grounds that they fail to state a cause of action; 4) dismissing the Fifth, Sixth, and Eighth through Tenth Causes of Action, pursuant to CPLR § 3211)(a)(1), on the grounds that they are contradicted by documentary evidence; 5) granting Defendants summary judgment dismissing the Third Cause of Action on the grounds that the claims set forth therein are without support and lack merit; and 6) granting Defendant 2701 Associates judgment on its counterclaim ("Counterclaim") for 35 months of unpaid rent in the amount of $307,650, plus additional rent and attorney's fees incurred in enforcing the Lease.

Plaintiff opposes Defendants' motion and cross moves for an Order 1) pursuant to CPLR § 3025(b), declaring that the Revised Complaint was properly served, pursuant to CPLR § 3025(b) and the Court's prior Order dated February 6, 2012 ("2012 Decision"); or, in the alternative, 2) granting Plaintiff leave to serve and file the Revised Complaint *nunc pro tunc* and deeming same served upon the Defendants effective March 7, 2012; 3) granting Plaintiff partial summary judgment on the issue of the square footage of the suite formerly occupied by Plaintiff at the building located at 50 Clinton Street, Hempstead, New York 11550, finally resolving that issue for all purposes in the within action; 4) dismissing the Counterclaim pursuant to CPLR §§ 3211(a) and/or 3212; 5) imposing sanctions on Defendants for interposing a Counterclaim they were not authorized to assert, and then moving for summary judgment on the Counterclaim; h6) striking the Defendants' Answer based on its allegedly deliberate and willful failure to meaningfully respond to Plaintiff's discovery demands; and 7) granting Plaintiff leave to re-plead further in the event that the Revised Complaint, or any portion thereof, is dismissed or found legally insufficient by the Court.

Defendants oppose Plaintiff's cross motion.

B. The Parties' History

The parties' lengthy history is set forth in numerous prior decisions of the Court. As noted in those prior decisions, this action arises out of Defendants' alleged violation of a court order, misrepresentation concerning the amount of space leased pursuant to a lease agreement, and violation of the terms of a lease. Plaintiff alleges that there have been violations of his lease agreement for the Premises regarding, *inter alia*, parking spaces, repairs and maintenance of the Premises which is located at 50 Clinton Street, Hempstead, New York. Plaintiff also alleges that Defendants have failed to comply with the Stipulation that was so-ordered by the Court (Austin, J.) in a prior related action ("Prior Action").

In the 2012 Decision, the Court addressed Plaintiff's motion for leave to serve and file the Second Amended Complaint (Ex. 2 to Wolkenstein Aff. in Supp.), and Defendants' motion for reargument of the Court's prior decision dated August 19, 2011 ("2011 Decision") which addressed Defendants' motion to dismiss the complaint. In the 2012 Decision, the Court 1) upon reargument, modified the 2011 Decision to the extent that the Court directed that Plaintiff may not proceed on a fraud claim; and 2) granted Plaintiff's motion to amend but, in light of the Court's conclusion that Plaintiff's fraud claim was not viable, permitted Plaintiff to file an amended complaint consistent with the 2012 Decision.

The Second Amended Complaint, which is dated September 30, 2011, contained five (5) causes of action: 1) fraud, based on the allegation that Defendants misrepresented the square footage of the Demised Premises, 2) breach of contract based on the allegation that Defendants failed to perform specific work set forth in the Second Lease Amendment, 3) breach of contract based on the allegation that Defendants breached the Stipulation by failing to return parking spaces to Wright, refusing to discuss the square footage of the space with Wright, failing to install overhead air conditioning/heating ducts, and failing to replace carpet in the Demised Premises, and 4) actual partial eviction based on Defendants' failure to provide Plaintiff with fifteen (15) designated parking spaces, as required by the Second Lease Amendment, and 5) an allegation that Champion is the agent of 2701 Associates and, therefore, 2701 Associates is responsible for the actions and omissions of Champion.

Following the 2012 Decision, Plaintiff filed the Revised Complaint which is dated March 6, 2012. The Revised Complaint contains eleven (11) causes of action: 1) breach of the Second Lease Amendment as it relates to the number of rentable square feet in the Premises, 2) breach of the Second Lease Amendment as it relates to Defendants' obligation to perform

[* 4]

work and carry out responsibilities at the Premises, 3) breach of the Stipulation by failing, *inter alia*, to return parking spaces to Wright and replace carpeting, 4) actual partial eviction by failing to comply with the Second Lease Amendment and Stipulation's direction regarding providing parking spaces to Wright, 5) actual partial eviction by Defendants who allegedly "actually partially evicted plaintiff from a portion of the Suite leased to it under the Second Lease Amendment" (Rev. Compl. at ¶ 106), 6) an allegation that the actual partial eviction of Plaintiff was intentional and deliberate, warranting punitive damages, 7) unjust enrichment to Defendants as a result of Plaintiff paying additional rent, which included payment for property taxes, based on square footage that it never received, 8) trespass as a result of 50 Clinton Street Associates, and/or its agents and employees, performing construction work at the Premises which resulted in the "shrinking" of the space leased to Plaintiff (*id.* at ¶ 127), and the leasing of property, to a third party, to which Plaintiff was entitled, for which KND Management and 15th Street Holding, LLC, as assignees and successors in interest to 50 Clinton Street Associates, are liable, 9) trespass based on the allegation that the trespass initiated by 50 Clinton Street Associates, as set forth in the eighth cause of action, was continuing in nature until Plaintiff vacated its suite on or about March 30, 2011, and Defendants are liable for the continuing trespass,10) an allegation that the trespass by Defendants was deliberate and willful, warranting punitive damages, and 11) a request for attorney's fees, pursuant to the terms of the Stipulation.

In support of Defendants' motion, Barry Ekstein ("Ekstein") affirms that he is the manager of Defendant Champion Property Management, LLC ("Champion) which, in turn, is the manager of the affairs and property of Defendant 2701 Associates LLC ("2701 Associates"). Ekstein affirms that Plaintiff, at all relevant times, was the tenant of Unit 601 ("Demised Premises") in the Premises. Plaintiff first leased the Demised Premises in 1989 and then signed a new, separate lease for the same Demised Premises in 1993, as reflected by the lease ("Lease") provided (Ex. 6 to Ekstein Aff. in Supp.). Plaintiff thereafter extended the Lease and added contiguous space to the Demised Premises, pursuant to a First Lease Amendment dated March 1, 1996 ("First Lease Amendment") (*id.*). Thereafter, in May of 2001, Plaintiff executed a Second Lease Amendment for the Demised Premises for a period of seven years ("Second Lease Amendment") (*id.*), which expired on April 30, 2008.

Ekstein affirms that, at the time of the execution of the Second Lease Amendment in 2001, the landlord and owner of the Premises was 50 Clinton Street Associates, LP ("50 Clinton Associates"). Subsequently, 50 Clinton Associates transferred the Premises to 15th Street Holdings LLC ("15th Street Holdings" or "Prior Owner") on or about March 15, 2001. In 2003,

Plaintiff commenced the Prior Action against the Prior Owner. The Prior Action was titled *Gerald Gardner Wright, P.C. & Associates v. KND Management Co. Inc., A/A/F 15th Street Holdings LLC and 50 Clinton Street Associates Management Co., L.P.*, Nassau County Index Number 008320/2003. The Prior Action contained numerous claims, including the plaintiff's claim that the size of the Demised Premises was not what was stated in the lease.

Ekstein submits that "[s]quarely before the Court in the [Prior Action] was the issue of whether the Plaintiff had possession of less square footage than the Lease/Second Lease Amendment allegedly provided to Plaintiff, and therefore, whether the Plaintiff was overpaying rent to the Prior Owner" (Ekstein Aff. in Supp. at ¶ 7). The Prior Action was ultimately resolved by the Stipulation between Plaintiff and the Prior Owner (*id.* at Ex. 10) which, although mistakenly dated February 6, 2003, was executed on February 6, 2004.

Ekstein avers that 2701 Associates purchased the Premises on or about February 28, 2006 and continues to own the Premises to this day, as reflected by the deed provided (Ex. 7 to Ekstein Aff. in Supp.). 2701 Associates did not purchase the membership interests of 15th Street Holdings but, rather, purchased the primary asset of 15th Street Holdings, which was the Premises. Thereafter, 2701 Associates retained the services of Champion to manage the Premises.

Ekstein affirms that, subsequent to 2701 Associates' purchase of the Premises, Plaintiff continued to pay the base rent, through March of 2008, without complaint. In early 2008, however, Plaintiff refused to pay approximately $12,000 in additional rent, and Champion retained counsel ("Prior Counsel") to proceed against Plaintiff for the outstanding rent. Prior Counsel drafted and served, but allegedly failed to file properly, a non-payment proceeding against Plaintiff in Nassau County District Court. Subsequently, in March of 2008, Plaintiff filed the instant action ("Instant Action").

Ekstein affirms that, pursuant to the Second Lease Amendment, the Lease expired on April 30, 2008. Despite the expiration of the Lease, and the filing of the Instant Action, Plaintiff held over in the Demised Premises for thirty five (35) months, nearly three years, and did not vacate the Demised Premises until March 30, 2011 ("Holdover Period"). Plaintiff concedes this fact, as reflected by his allegation in the Revised Complaint that "the trespass initiated by 50 Clinton Street Associates was continuing in nature and continued to occur each and every day until plaintiff vacated the Suite, on or about March 30, 2011" (Rev. Compl. at ¶ 131). During the Holdover Period, Plaintiff failed to pay any rent, use and occupancy, or additional rent, except for a single payment in February of 2009 which was applied to the unpaid April 2008 rent.

Ekstein notes that, pursuant to the Lease, 2701 Associates is entitled to double rent for any holdover period unless the lease was extended in writing. Paragraph 11 of the Rider to the Lease, titled "Holding Over," provides, in pertinent part, as follows:

> If the Tenant retains possession of the demised premises or any part thereof after the termination of the term by lapse of time or otherwise, without prior written approval of Landlord, the Tenant shall pay the Landlord rent at double the rate specified in Article 1 for the time the Tenant thus remains in possession, and in addition thereto, shall pay the Landlord all damages, consequential as well as direct, sustained by reason of tenant's retention of possession.

Ekstein affirms that the Lease was never extended in writing past April 30, 2008.

Ekstein affirms that Article 1 of the Lease was amended by the Second Lease Amendment which specified that the base monthly rent was $4,395 per month. Thus, Ekstein submits, Plaintiff is obligated to 2701 Associates for base rent in the amount of $307,650. Ekstein explains that he arrived at that sum by doubling the base rent of $4,395, as authorized by paragraph 11 of the Rider, which equals $8,790 per month, and multiplying that amount by 35, representing the number of months during the Holdover Period. Ekstein affirms, further, that Defendant is entitled to additional rent, for taxes and utilities, in the approximately amount of $40,629.86. Defendant filed and served a counterclaim ("Counterclaim") for this amount, dated September 12, 2011 (Ex. 4 to Ekstein Aff. in Supp.). Plaintiff served an unsigned Reply to Counterclaim (*id.* at Ex. 5).

Ekstein also addresses the allegations in the third cause of action in the Revised Complaint, in which Plaintiff alleges that Defendants breached the Stipulation by failing to return parking spaces to Wright, refusing to discuss the square footage of the space with Wright, failing to install overhead air conditioning/heating ducts and failing to replace carpeting in the Demised Premises. Ekstein submits that these allegations are "simply false" (Ekstein Aff. in Supp. at ¶ 23). Ekstein affirms that he has managed the Premises since 2701 Associates' purchase of the Premises in 2006 and that 1) Plaintiff, at all times, was provided with his fifteen (15) parking spaces; 2) the overhead air conditioning and ducts were installed in the Demised Premises and were in good working order since March of 2006; 3) new carpet was installed within a year or two prior to Defendants taking possession of the Premises in 2006; and 4) Plaintiff never complained to Ekstein about these issues. Ekstein affirms that while Plaintiff "did have a gripe about the size of his space" (*id.* at ¶ 25), which cause of action was resolved pursuant to the Stipulation, Plaintiff never complained that he was deprived of the items set forth in the Stipulation. Moreover, in response to Defendants' discovery demands in the Instant

[* 7]

Action, Plaintiff produced twelve (12) pages of documents (*id.* at Ex. 14), none of which relates to the third cause of action. In addition, Plaintiff's responses to Defendants' Interrogatories (*id.* at Ex. 15) contain no details regarding any conversation, correspondence or communication that Plaintiff had with Ekstein, or any member of his office, regarding a failure to return parking spaces to Plaintiff, to install overhead air conditioning or heating ducts, or to replace carpeting in the Demised Premises. Ekstein also denies that he refused to discuss the square footage issue with Wright, and affirms that he did discuss that issue with him, although Ekstein refused to reduce the rent as he concluded that Wright's claims had no merit. Ekstein notes that the Stipulation did not require Defendants to reduce the rent, or entitle Plaintiff to a rent reduction and suggests that the language in the Stipulation requiring the parties to discuss the square footage was "intended to be nothing more than a harmless appeasement to Plaintiff" (*id.* at ¶ 29). Ekstein affirms that when 2701 Associates purchased the Premises, it did not receive the maintenance records for the Premises and, therefore, does not have documentary proof of the installation of the carpeting and air conditioning and, further, that there would be no records regarding the parking spaces. Ekstein avers, however, that he has made his statements based on his inspection of the Premises, including the Demised Premises, in 2006 when the Premises was being purchased, and based on numerous subsequent inspections of the Premises.

The Stipulation (Ex. 10 to Aff. in Supp.) provides, *inter alia*, that 1) the plaintiff's Order to Show Cause dated June 5, 2003 was withdrawn with prejudice; and 2) the plaintiff's Order to Show Cause dated September 5, 2003 was withdrawn with prejudice. It also provides that the Prior Action was "settled" upon the terms and conditions set forth in the Stipulation.

With respect to Plaintiffs' cause of action for attorney's fees, the Stipulation provides, at paragraph 9, that the parties agree to indemnify and hold each other harmless for reasonable costs and expenses that either may incur due to the failure to abide by the terms of the Stipulation, including but not limited to reasonable attorney's fees.

Paragraph 5 of the Second Lease Amendment, dated May of 2001, provides that the landlord will, within 75 days from the date of execution of the Second Lease Amendment but in no event later than September 2001, perform certain work at no cost to the tenant. Pursuant to paragraphs 5(a) through (f) of the Second Lease Amendment, the landlord agreed to 1) change existing light fixtures in the Demised Premises; 2) install wall plates and outlet covers where required; 3) provide overhead air conditioning ducts in the conference room and two offices within the Demised Premises; 4) re-paint, re-carpet and re-wallpaper the Demised Premises; 5) maintain all equipment installed in the Demised Premises, including lighting fixtures and

bulbs; and 6) shampoo the carpeting in the Demised Premises at least 3 times per year.

In opposition, Wright submits that the Revised Complaint was filed in accordance with the Court's directives. Wright requests further that, to the extent that the Revised Complaint exceeded the scope of the leave granted in the 2012 Decision, the Court grant Plaintiff leave to serve and file the Revised Complaint.

Wright disputes Ekstein's assertion that Plaintiff was provided with his 15 parking spaces. Wright affirms that it was denied those parking spaces until it vacated the Premises. Wright also disputes Ekstein's assertion that the work set forth in the Stipulation was completed, and affirms that the work was not performed.

Wright also makes reference to conversations that took place during mediation sessions with the Special Referee. As the Court is of the view that these conversations were in the context of settlement discussions, these conversations are not admissible and the Court will not consider them.

C. The Parties' Positions

Defendants submit that the Court should dismiss the Revised Complaint because Plaintiffs failed to obtain leave of court to assert eight (8) new causes of action, which the Court did not authorize in the 2011 and 2012 Decisions. Defendants also argue that, with respect to the Revised Complaint, 1) the first cause of action, alleging breach of contract, is not viable because it is precluded both by the statute of limitations and the doctrine of *res judicata* in light of the Settlement; 2) the second cause of action, alleging breach of contract, is precluded by the statute of limitations in light of the fact that the applicable breach took place no later than September 5, 2001, the date by which the landlord was to complete certain work, pursuant to paragraph 5 of the Second Lease Amendment; 3) the third cause of action, alleging violations of the Stipulation, is completely without merit in light of Ekstein's affirmations and Plaintiff's failure to provide documentation in support of his claim; 4) the fourth, fifth and sixth causes of action, based on actual partial eviction, are barred by the one-year statute of limitations as Plaintiffs' causes of action accrued a) with respect to the parking spaces, in 2003, when Plaintiffs commenced the Prior Action, or 2006, at the latest, when Plaintiff refused to sign an estoppel certificate on the grounds that there had been a violation of the Stipulation's requirements regarding parking spaces (*see* ¶¶ 35 and 36 of Rev. Compl.), and b) with respect to the construction, in 2001 when Defendants allegedly completed construction that deprived Plaintiff of space to which it was entitled; 6) the seventh cause of action, based on unjust enrichment, is not viable in light of the existence of the Second Lease Amendment which governs the dispute at

issue; 7) the eighth, ninth and tenth causes of action, asserting trespass, lack merit in light of the fact that a) the ninth cause of action is redundant of the eighth; b) Plaintiffs' claim for trespass must be limited, at most, to any trespass occurring from March 8, 2009, which is three (3) years prior to the date of filing of the Revised Complaint, but is nonetheless barred in light of the fact that Plaintiff was a holdover tenant as of April 30, 2008, the date on which Plaintiffs' lease expired; 8) the sixth and tenth causes of action, seeking punitive damages, must be dismissed because New York does not recognized independent causes of action for punitive damages, and because punitive damages may not be awarded in an action based on a private breach of contract; and 9) the Court should dismiss the eleventh cause of action, seeking attorney's fees, both because it was pled for the first time in the Revised Complaint and because attorney's fees are only recoverable as an element of contract damages if a breach of the sublease is proven.

Defendants also submit that 2701 Associates has established its right to judgment on its Counterclaim by establishing that 1) 2701 Associates and Plaintiff had a landlord-tenant relationship; 2) Plaintiff is bound by the Second Lease Amendment; 3) 2701 Associates has been the landlord since March of 2006 as a result of the purchase of the Premises; 4) the rental amount of $4,395 per month was set forth in the Second Lease Amendment; 5) the Lease provides for double rental for any holdover period; 6) the Plaintiff's Lease expired in April of 2008; and 7) Plaintiff neither rent, use or occupancy, nor additional rent, for the 35 month Holdover Period.

Plaintiff opposes Defendants' motion submitting, *inter alia*, that 1) if Plaintiff is time-barred from asserting its contractual causes of action based on the Second Lease Amendment, then the Counterclaim is time-barred as well; 2) the third cause of action is viable 3) the contractual causes of action are not time-barred, as Defendants' breach was ongoing and continued until March 30, 2011, the date on which Plaintiff vacated the Premises; 4) given that Defendants first became involved with the Premises in 2006, the contractual causes of action as against 2701 Associates would not accrue until that date and are not time-barred; 5) the fourth through sixth causes of action, alleging actual partial eviction, are not time-barred as Defendants' acts were continuing in nature; 6) dismissal of the seventh cause of action, alleging unjust enrichment, would be premature, both because the Court has not determined that a valid contract existed between the parties, and because there may be time periods regarding which there is a dispute as to the applicability of a written agreement; and 7) the eighth, ninth and tenth causes of action are not new given that the essence of these claims is that Defendants failed to provide Plaintiff with the appropriate square footage.

With respect to the Counterclaim, Plaintiff submits that, in light of the fact that Defendants accepted rent from Plaintiff in 2009, Plaintiff became a month-to-month tenant by operation of law, rather than a holdover, during the Holdover Period. Plaintiff also notes that, with respect to Defendants' request for double rent pursuant to the Second Lease Amendment, Defendants neglected to include the language in paragraph 11 of the Rider which provides that "Notwithstanding the above, lease renewal negotiations shall commence no less than one (1) year prior to expiration of lease, and in the event negotiations are still in progress after the expiration date, Tenant shall not pay double the rent." Thus, Plaintiff contends, there are issues regarding the applicability of paragraph 11 of the Rider to this action.

In reply, Defendants submit, *inter alia*, that 1) Plaintiff has failed to provide legal authority for its assertion that if the breach is ongoing, the statute of limitations does not apply, and Defendants reassert their position that the six year statute of limitations accrued with the execution of the Second Lease Amendment; 2) Plaintiff's argument that, because Defendants purchased the Premises in 2006, the statute of limitations as against them accrued in 2006 is "absurd in so many respects, it [is] hard to fathom how it could have even been made" (Ds' Reply Memo. of Law at p. 8), and undermines Plaintiff's prior claims that Defendants are successors in interest to the Prior Owners; 3) contrary to Plaintiff's claim, the Court has not previously rejected Defendants' *res judicata* argument based on the Stipulation in the Prior Action; 4) the eighth, ninth and tenth causes of action, asserting trespass and alleging for the first time that the landlord "surreptitiously stole the space by constructing over it" (*id.* at p. 13), are new causes of action that do not relate back to the original complaint; 5) Plaintiff has provided no authority for its assertion that a single payment of rent converts a holdover tenancy to a non-holdover month to month tenancy; 6) Defendants are entitled to dismissal of the third cause of action in light of Plaintiff's failure to produce a single document supporting its claim; 7) Plaintiff has failed to provide legal authority for his arguments as to why Defendant 2701 Associates is not entitled to summary judgment on its Counterclaim; and 8) Plaintiff should not be permitted to further amend its complaint.

RULING OF THE COURT

A. Dismissal Standards

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Applicable Statutes of Limitation

Pursuant to CPLR § 213(2), the statute of limitations for breach of contract is 6 years. In New York, a breach of contract cause of action accrues at the time of the breach. *Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993), citing *Edlux Constr. Corp. v. State of New York*, 252 App. Div. 373, 374 (3d Dept. 1937), aff'd 277 N.Y. 635 (1938), and *Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979).

Claims in trespass are governed by the three-year limitations period set forth in CPLR § 214(4). *Herrington v. Verrilli*, 151 F. Supp. 2d 449, 460 (S.D.N.Y. 2001), citing, *inter alia*, *Weichert v. O'Neill*, 245 A.D.2d 1121, 1122 (4th Dept. 1997). Wrongful eviction claims are governed by the one year statute of limitations applicable to intentional torts. *Id.*, citing, *inter alia*, *Gold v. Schuster*, 264 A.D.2d 547 (1st Dept. 1999).

C. Res Judicata

The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11

N.Y.3d 8, 13 (2008), quoting *Matter of Grainger* [*Shea Enters.*], 309 N.Y. 605, 616 (1956). Under New York's transactional approach to *res judicata*, 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 seeking a different remedy. *Id.* at 533-534, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981).

D. Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d.

E. Punitive Damages

No separate cause of action for punitive damages lies for pleading purposes. *Paisley v. Coin Device Corp.*, 5 A.D.3d 748, 750 (2d Dept. 2004). A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action. *Yong Wen Mo v. Gee Ming Chan,* 17 A.D.3d 356, 359 (2d Dept. 2005), quoting *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 616 (1994).

F. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

G. Application of these Principles to the Instant Action

The Court grants Defendants' motion to dismiss the first and second causes of action, based on the breach of the Second Lease Amendment, based on the Court's conclusion that these causes of action are barred by the doctrine of *res judicata* in light of the Stipulation in the Prior Action which addressed these very issues, and by the statute of limitations in light of the fact that the applicable breach took place no later than September 5, 2001, the date by which the landlord was to complete certain work, pursuant to paragraph 5 of the Second Lease Amendment. The

Court grants Defendants' motion to dismiss the fourth and fifth causes of action, alleging actual partial eviction, based on the Court's conclusion that those causes of action are time-barred in light of the fact that the statute of limitations began to run, at the latest, in February of 2006 when Plaintiff refused to sign the estoppel certificate, and the initial complaint was filed more than one year after that date. The Court dismisses the sixth cause of action in light of the fact that there can be no independent cause of action for punitive damages, and because the fourth and fifth causes of action are not viable. The Court dismisses the seventh cause of action in light of the fact that there are written agreements governing the parties' dispute.

The Court grants Defendants' motion to dismiss the eighth, ninth and tenth causes of action based on the conclusion that there is no reasonable interpretation of the Court's 2011 and 2012 Decisions that would permit the assertion of these causes of action. The Second Amended Complaint that was before the Court when it issued those decisions contained no factual allegations, or causes of action, related to the construction that allegedly "shrank" Plaintiff's space and deprived Plaintiff of a portion of the Premises to which it was entitled. In light of Plaintiff's failure to seek leave to assert these factually new causes of action, the Court dismisses those causes of action. The Court denies Plaintiff's application for leave to amend to include those causes of action based on the Court's conclusion that, given the protracted nature of this litigation, that amendment would unduly prejudice Defendants.

The Court denies Defendants' motion to dismiss the third cause of action, based on a breach of the Stipulation, and the eleventh cause of action, which is a request for attorney's fees, pursuant to the terms of the Stipulation. Although Plaintiff has not provided documentation in support of its claim that Defendants failed to provide the promised parking spaces, replace carpeting and install air conditioning/heating ducts, Wright has affirmed that these items were not provided and the Court concludes, under these circumstances, that there exist factual issues making summary judgment inappropriate. The Court also determines that the statute of limitations began to run, with respect to this cause of action, in 2006 when Plaintiff refused to sign the estoppel certificate and, accordingly, this cause of action is timely.

The Court also denies Defendants' motion for summary judgment on its counterclaim, in light of existing issues of fact, including the applicability of the double rent provision in the Rider to the facts of this case. There is evidence supporting the conclusion that lease renewal negotiations were ongoing.

[* 14]

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on October 23, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 24, 2012

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE