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

PRESENT: Cain PART 63

HON. ELLEN M. COIN Justice

Winne Communications

INDEX NO. 150110/2012

MOTION DATE

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

Barbara Bell

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

Dated: 1/31/13

HON. ELLEN M. COIN 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: PART 63

----------X

WINNER COMMUNICATIONS, INC.,

Plaintiff,

-against-

BARBARA BELL,

Defendant

----------X

Index Number: 150110/2012
Submission Date: August 8, 2012
Motion Sequence: 001

For Plaintiff :
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Papers considered in review of this motion to dismiss :

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	1
Plaintiff's Memorandum of Law in Opposition	2
Notice of Cross-Motion	3
Plaintiff's Affirmation in Reply	4
Plaintiff's Memorandum of Law in Opposition and Reply	5
Defendant's Affirmation in Reply	6
Defendant's Memorandum of Law in Reply	7

ELLEN M. COIN, J.:

This litigation concerns the rights and obligations between parties to a month-to-month commercial lease and personal guaranty, with plaintiff Winner Communications, Inc. (Winner), as landlord, and defendant Barbara Bell (Bell), as tenant.

Winner now moves pursuant to CPLR 3211 for an order dismissing Bell's third, fourth and seventh affirmative defenses and sole counterclaim.[1] Winner asserts that the defenses, as well as the counterclaim, are entirely without merit. Bell cross-moves pursuant to CPLR 1001-

[1]At oral argument, plaintiff withdrew so much of its motion as sought dismissal of Bell's second affirmative defense.

1003 to dismiss the complaint asserted against her for failure to join a necessary and indispensable party, on the ground that Gotham Physical Therapy P.C. (Gotham), a professional corporation, rather than Bell, is the tenant and real party in interest. Alternatively, Bell seeks to substitute, or join, Gotham as a named defendant, and consequently to amend her answer pursuant to CPLR 3025 (b), adding Gotham as a defendant with the same defenses and counterclaims.

For the reasons that follow, plaintiff's motion is granted in part, and denied in part, and defendant's cross-motion is denied in its entirety.

BACKGROUND

Winner is the owner of a parcel of land and a five-story building located at 37 Union Square West, New York, New York. Winner leases space in the building to commercial tenants. In January 2001, Bell and a colleague leased the subject premises under another corporate name, Park South Physical Therapy Group, P.C. (Park South). That lease ended on January 31, 2007, but Park South remained in possession as a month-to-month tenant. By mid-2009, however, Bell's colleague had ended their professional relationship. Bell entered into negotiations with Winner, through its property manager, for the leasing of new commercial space. During the negotiations, Bell allegedly indicated that she intended to form a new corporation, and needed the third-floor space for a physical therapy facility that she wished to open. On June 30, 2009, Winner entered into a three-month lease with Bell, as lessee, for the entire third floor of Winner's building. The term of the lease began on July 1, 2009, and ended on September 30, 2009. The monthly base rent due from Bell was $13,083.33.

Bell maintains that because she had not yet incorporated a new corporate entity, Bell and Winner agreed to enter into a short-term lease in her name for the benefit of the soon-to-be incorporated entity. The first page of the lease rider states that the tenant is Park South Physical Therapy Group, P.C., but Bell signed the rider as "Tenant," with no indication that she was signing on behalf of Park South or Gotham.

Pursuant to the terms of the lease rider, the tenant agreed to pay 20% of Winner's total real estate taxes as additional rent (*See* Bernstein Affirm., Ex. C, Lease Rider, Article 44, at 2). In addition, the tenant agreed to pay a late charge of $.02 per $1.00 of unpaid rent or additional rent in the event of failure to pay the rent or additional rent on or before the 10th day of the month. (*Id.*, Article 47, at 5). With the execution of the lease, Bell allegedly paid $34,077.01 as a security deposit to Winner. (*Id.*, Lease Rider, Article 45, at 4). Article 68 (b) (*Right to Assign/Sublet*) of the lease rider states, "Notwithstanding any assignment or sublet, Tenant shall continue to remain liable on this Lease for the performance of all terms, including but not limited to, payment of the rent and additional rent due under this Lease." (Ex. C, Lease, at 12, ¶ 3).

Under Article 11 (*Assignment/Mortgage, Etc.*) of the lease, Bell agreed to not assign the lease without the express written consent of Winner. (*Id.*, at 2). Article 26 (*Waiver of Trial by Jury*") of the lease also provides, in part, that "in the event that landlord commences any summary proceeding or other action for nonpayment of rent, tenant covenants and agrees that it will not interpose any counterclaims of whatsoever nature or description in any such proceeding." (Ex. C, Lease, at 5). Contemporaneous with the execution of the lease, Bell also signed a personal guaranty of the lease (the guaranty). The guaranty states, "[t]his guaranty is a continuing guaranty of payment and not of collectability and is not conditioned upon any attempt

to first collect from the Tenant." (Ex. C, Guaranty, at 16, ¶ 1).

Three days after signing the lease agreement, on July 3, 2009, Bell incorporated Gotham. Bell became the president and primary shareholder of Gotham. Following the expiration of the three-month lease, Bell, doing business as Gotham, continued her occupancy of the third floor premises on a month-to-month basis, subject to the same terms and covenants as those contained in the lease that had expired. A sign was placed on the front door of the premises, indicating that Gotham was in possession of the premises, and business was conducted on the premises under that name, with Winner's knowledge. Rent was paid with checks bearing Gotham's name and the address of the leased premises. Sometime in 2011, Gotham did not send payments to Winner.

On June 3, 2011, Winner commenced a holdover proceeding to recover the subject premises in the Civil Court of the City of New York, Non–Housing Part. (*See* Handel-Harbour Affid., Ex. H, *Winner Communications Inc. v Barbara Bell a/k/a Gotham Physical Therapy*, Index No. 71157-2011). Eventually, the parties settled, and stipulated that Bell and Gotham would vacate the premises by either November 15, 2011 or November 30, 2011. (*See* Handel-Harbour Affid., Ex. G, Stipulation of Settlement at 1). Bell also agreed to pay $6,500 by October 21, 2011, covering the period of November 1, 2011 through November 15, 2011. Furthermore, if Bell elected to stay beyond November 15, 2011, she was to give written notice to Winner by November 10, 2011, and make payment of an additional $6,500 to Winner. (*Id.*). The parties also agreed that all claims and defenses, except for the payment of the November 2011 base use and occupancy, could be pursued in a separate proceeding. (*Id.*, at 3). The stipulation further stated that "[e]xecution on behalf of respondent does not by itself create any tenancy in [Bell's]

name (*id.*)." On December 27, 2011, the Honorable Peter H. Moulton issued a Decision and Order, granting judgment of possession to Winner on default. (*Id.*, Ex. G). Bell and Gotham vacated the premises on December 31, 2011.

The complaint asserts two causes of action. The first cause of action for breach of the lease, seeks $164,361.17 in unpaid rent and additional rents (consisting of late charges, real estate taxes and water charges) for the months of August 2010, and February through December 2011, less an alleged $15,000 security deposit paid on June 30, 2009. The second cause of action seeks an amount not less than $17,000 per month for the fair value of the use and occupancy of the entire third floor space during the months of August 2010, and February through December 2011, for a total of $204,000. Winner contends that Bell made partial payments for these months, totaling $36,916.67. Thus, Winner seeks $152,083.22 for use and occupancy of its premises.

In her answer, Bell denies the material allegations of the complaint, and asserts, inter alia, the following affirmative defenses and counterclaim: a third affirmative defense that alleges payment and disputes the amount claimed by Winner; a fourth affirmative defense of estoppel; and a seventh affirmative defense that Winner breached the lease by failing to provide quiet enjoyment and consistent elevator service. Bell's counterclaim alleges that Winner's failure to maintain the site and elevator caused her to lose many patients, and to suffer numerous cancellations, leading to damages in the amount of $250,000.

DISCUSSION

A. Standard for Dismissal of Affirmative Defenses and Counterclaims

Pursuant to CPLR 3211 (b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." (*See Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). When moving to dismiss an affirmative defense, plaintiff bears the burden of demonstrating that the defense is "without merit as a matter of law." (*Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

On a motion to dismiss an affirmative defense, or a counterclaim, the court must apply the same rules that apply to motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) (*see Leder v Spiegel*, 31 AD3d 266, 271 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]). "[T]he court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]; *see also Cron v Hargo Fabrics,* 91 NY2d 362, 366 [1998]). At the same time, factual allegations that do not state a cause of action, but only consist of bare legal conclusions, are insufficient to raise an affirmative defense. (*See Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]). If there is any doubt as to the availability of a defense, it should not be dismissed. (*Id.*).

B. Dismissal of Affirmative Defenses and Counterclaim

1. Third Affirmative Defense (Payment/Disputes Amount Claimed) The third affirmative defense, alleging payment, disputes the amount of monies Winner claims in this action. Bell argues that she is entitled to receive a larger credit for the amount of security forfeited, which she claims is in Winner's possession. To support her claim, Bell submits copies

of checks sent to Winner, and states in her affidavit that:

> "Up until Gotham's surrender in December of 2011, 'use and occupancy' was paid, contrary to the claims set forth within the underlying Complaint, and the months that remained open the security in the amount of $34,077.01 was applied."

(Bell cross motion, exhibit D, and affidavit of Bell, at 3, ¶ 11).

Winner claims, however, that it has drawn down Bell's alleged $15,000 security deposit towards the outstanding rent arrearage. (Compl., ¶¶ 7,9). Bell also insists that the real estate tax charges were improperly calculated.

CPLR 3018 (b) states, with respect to affirmative defenses, that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or raise issues of fact not appearing on the face of a prior pleading." While Bell has denied the amount of rent claimed by Winner in her answer, CPLR 3018 (b) requires the defense of payment to be affirmatively pleaded. (*See Fetner v Boston Old Colony Ins. Co.*, 62 AD2d 936, 937 [1st Dept 1978]). In this case, Winner must establish its entitlement to the amount of damages it seeks. However, the assessment of damages necessitates "further factual development." (*See Mike Bldg. & Contr., Inc. v Just Homes, LLC*, 27 Misc 3d 833, 846 [Sup Ct, Kings County 2010]). Because the alleged payments already made to Winner bear on the determination of damages, the third affirmative defense is preserved, and that branch of Winner's motion to dismiss the third affirmative defense is denied.

2. Fourth Affirmative Defense (Estoppel)

That branch of Winner's motion seeking dismissal of the fourth affirmative defense of estoppel is granted, since the defense is improperly pleaded. CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of

the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Here, the fourth defense simply states "Estoppel." While the pleading standard does not require detailed factual allegations, it does demand more than a single word defense or an unspecified, conclusory reference to a legal doctrine. An affirmative defense which only pleads a conclusion of law without any supporting facts is insufficient and must be stricken. (*170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008] ["The commercial tenant's challenged affirmative defenses, which pleaded conclusions of law without supporting facts, were properly stricken as insufficient"]; *see also Petracca v Petracca*, 305 AD2d 566, 567 [2d Dept 2003]). Since Bell has failed to plead any facts to support the fourth affirmative defense, it is dismissed.

3. Seventh Affirmative Defense (Partial Actual and Constructive Eviction)

The seventh affirmative defense is also dismissed. For her seventh affirmative defense, Bell claims a failure of consideration based on a breach of the covenant of quiet enjoyment, which requires actual or constructive eviction. (*See Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). To maintain this defense, Bell must show that the acts of Winner, as landlord, precluded her from the use and enjoyment of the premises. (*Id.* at 120-121).

Here, Bell alleges that: (1) the leased space was rendered unusable by the lack of elevator service and other maintenance problems in the building; (2) Winner failed to make elevator repairs in a timely manner; and (3) Bell's business was partially evicted and constructively evicted from the premises by the lack of essential services. In Bell's affidavit, she describes the following unsafe conditions in the building: failure to shovel snow, failure to maintain a safe

stairwell (Bell alleges inadequate lighting and maintenance), flooding of raw sewage into the third floor's locker rooms, frequent water leaks, a rat infestation of the premises, and the lack of elevator service for her clients, who included the elderly, recently injured and those who had recently undergone surgery. Bell states that the use of the elevator was required for her business since it was impossible for a patient with a knee injury, hip replacement or in a wheelchair to reach the third floor without an operable elevator. Consequently, Bell seeks a rent abatement.

Bell submits several unsworn client complaints related to the elevator service in the building as evidence of Winner's alleged negligent maintenance of the elevator. She also provides copies of violations issued by certain city agencies, including the New York City Department of Buildings. Winner argues in reply that Bell's proposed defense is unavailable to a commercial tenant as a matter of law, because the obligation to pay rent is not suspended even if the landlord fails to provide essential services.

> "Whether the breach of the covenant is alleged as a defense to an action for rent due, or is used as a basis for an action for damages, the determining factors, with few exceptions, is whether the tenant has vacated the premises. ... [T]here must be an abandonment of the premises by the tenant [], ... [and] the justified abandonment of the premises, amounting to an eviction in law, must have occurred before the rent has become due."

(*David Herstein Co. v Columbia Pictures Corp.*, 4 NY2d at 120-121 [1958]). "Thus, in an action for rent, it is not sufficient for the tenant to defend on the theory that there was a diminution of the beneficial enjoyment of the property." (*Id.*; *see also Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d 1083, 1087-1088 [2d Dept 2011] [court held that where commercial tenant waived its right to surrender or quit damaged premises, tenant may not claim constructive eviction, but is limited to remedies found in lease]; *Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006] [court dismissed claim for breach of the covenant of quiet

enjoyment where plaintiff admittedly never abandoned the premises]).

An actual eviction occurs when the landlord wrongfully ousts the tenant from physical possession of the leased premises through either a physical expulsion or exclusion. (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]). In order to satisfy the requirements for an actual partial eviction, the tenant must be evicted from a portion of the demised premises. (*See Whaling Willie's Roadhouse Grill, Inc., v Sea Gulls Partners, Inc.*, 17 AD3d 453, 453 [2d Dept 2005]). In the recent case of *Eastside Exhibition Corp. v 210 E. 86th St. Corp.* (18 NY3d 617, 624, *cert denied* __ US__, 133 SCt 654 [2012]), the New York Court of Appeals imposed a *de minimis* rule in cases of actual partial eviction. The Court of Appeals reasoned: "For an intrusion to be considered an actual partial eviction, it must interfere in some, more than trivial, manner with the tenant's use and enjoyment of the premises" (*id.* at 623). A "'tenant's refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages'" for the period in which the rent was unpaid. (*See 487 Elmwood v Hassett*, 107 AD2d 285, 289 [4th Dept 1985], quoting *Frame v Horizons Wine & Cheese, Ltd.*, 95 AD2d 514, 518 [2d Dept 1983]).

To invoke a constructive eviction defense, there must be a substantial interference with the tenant's use and enjoyment of the leased premises, including access to goods and services, which causes the tenant to vacate the premises. (*See Barash*, 26 NY2d at 82). A constructive eviction may also be partial, in which case the tenant need only abandon, or not use, a portion of the premises affected. (*See Johnson v Cabrera*, 246 AD2d 578, 578-579 [2d Dept 1998]; *see also Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d 543, 544 [1st Dept 1992]; *Minjak Co. v Randolph*, 140 AD2d 245, 248-250 [1st Dept 1988]). A partial constructive eviction may result

in an abatement of a portion of the rent or an award of monetary damages. (*See e.g.*, *Minjak Co. v Randolph*, 140 AD2d at 248 ["[W]hen the tenant is constructively evicted from a portion of the premises by the landlord's actions, he should not be obligated to pay the full amount of the rent"]).

The deprivation of elevator service has been the basis of a finding of partial actual and constructive eviction. (*See e.g.*, *Union City Union Suit Co., Ltd. v Miller*, 162 AD2d 101, 101 [1st Dept 1990][removal by the landlord of freight elevator, absolutely essential to tenant's beneficial enjoyment of the premises, constituted actual partial eviction]). Nonetheless, the Appellate Division, First Department, in *Cut-Outs, Inc. v Man Yun Real Estate Corp.* (286 AD2d 258, 261 [1st Dept 2001]) has also held that a landlord's interference with egress and ingress to a building failed to result in partial actual eviction, where tenant did not contend it was deprived of access, but only alleged that access was slower and less convenient. (*See also Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 173 [1st Dept 2010] [while lack of elevator service to a seventh-floor place of business seems critical, there was no evidentiary showing by the tenant that it was actually unable to access the premises as it needed to during the seven-week period that elevator service was not available; no evidence adduced that the tenant was unable to use the premises as intended]).

In this case, neither Gotham nor Bell was removed from the premises. In fact, Bell has admitted that she remained in possession of the space through the entire 27 months, and only left because Winner sought, and won, possession of the premises in the prior holdover proceeding. Nor is there any specific allegation that she was expelled from a particular portion of her space, or that she was forced to vacate any part of the leased space.

Additionally, Bell, as a tenant in possession, was not relieved of her fundamental obligation to pay rent even if Winner failed to provide essential services. (*See Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011]; *Towers Org., Inc. v Glockhurst Corp., N.V.*, 160 AD2d 597, 599 [1st Dept 1990]). It is also well settled that Bell needed to have performed all covenants which were conditions precedent to her right to the beneficial enjoyment of the property, which has not been done here, since Bell has failed to make several rent payments. (*See David Herstein Co. v Columbia Pictures Corp.*, 4 NY2d at 120-121); *Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d at 1088).

Based on these considerations, and Bell's conclusory allegations, Winner's motion to dismiss the seventh affirmative defense of partial actual or constructive eviction is granted.

4. The Counterclaim for Business Interruption, Lost Profits and Income

The sole counterclaim seeks to recover Gotham's lost profits, based on Winner's alleged "careless, reckless and negligent maintenance" of the building. The counterclaim mostly recites the same factual allegations as the seventh affirmative defense. Winner argues that the counterclaim should be dismissed as duplicative of Bell's breach of contract affirmative defense. In addition, Winner insists that Bell, as a stockholder in Gotham, lacks standing to pursue any claim on behalf of Gotham. Finally, Winner argues that the "no counterclaim" provision in the lease precludes Bell from asserting a counterclaim.

In an action to recover damages for breach of contract, "the nonbreaching party may recover general damages which are the natural and probable consequence of the breach." (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]; *see also Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 759 [2d Dept 2009]). "In order to recover "special" or extraordinary

damages that do not flow directly from the breach, a plaintiff is required to plead that the damages were foreseeable and within 'the contemplation of the parties at the time the contract was made'." (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d at 759, quoting *American List Corp. v U.S. News & World Report*, 75 NY2d 38, 43 [1989]). Generally, a claim for lost profits is a claim for special damages. (*See e.g., Rose Lee Mfg., Inc. v Chemical Bank*, 186 AD2d 548, 551 [2d Dept 1992]).

There was no intent expressed by the parties in the lease to allow for lost profits as the basis for damages in the event of a breach. (*See Witherbee v Meyer,* 155 NY 446, 449-450 [1898]; *see also Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). Instead, the opposite is true. When Bell signed the lease, she waived her right to assert any counterclaim.

C. Motion to Dismiss Complaint against Bell, and Substitute/or Join Gotham Physical Therapy P.C. as a Defendant

Bell has moved to amend the pleadings to substitute, or add, Gotham as a new party. In the exercise of its discretion, the court is required to grant amendments freely when justice so requires. Leave to amend will be denied upon a finding of undue delay, bad faith, or undue prejudice. When a motion to amend concerns the addition of a party, the movant bears the burden of satisfying the compulsory joinder requirements of CPLR 1001 or the permissive joinder requirements of CPLR 1002.

Bell asserts that Gotham is a necessary party. She contends that Winner was aware that Bell had signed the short-term lease on behalf of Gotham. In addition, Bell insists that for the next 27 months after the expiration of the temporary lease, Gotham, through its conduct, implicitly became the assigned tenant for all intents and purposes. Winner refutes Bell's

allegations, and maintains that joinder of Gotham is not necessary to accord complete relief between the parties, inasmuch as Gotham was not a party to any of the signed agreements, and that the personal guaranty, in particular, provides support for individual liability on Bell's part.

Based on the documents submitted, it is clear that Gotham is not a necessary party. A party may move for dismissal of the complaint on the ground that the court should not proceed in the absence of a person who should be a party. (*See* CPLR 3211 [a] [10]). CPLR 1001 (a) provides that a person is a necessary party and must be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." The most important reason for compulsory joinder is "to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter." (*Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). The failure to join a necessary party under CPLR 1001 is grounds for dismissal of the action without prejudice pursuant to CPLR 1003. However, dismissal for failure to join a necessary party should only be granted as a "last resort." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 819 [2003], *cert denied* 540 US 1017 [2003]; *see also L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 11 [1st Dept 2007]).

In addition, CPLR 1002 (a) provides for permissive joinder of defendants where they "assert any right to relief jointly, severally, or in the alternative arising out of the same transaction, occurrence, or series of transactions or occurrences . . . if any common questions of law or fact would arise." If a person who should be made a party was not, the court may simply order joinder (*see* CPLR 1001 [b]), or it may allow the case to proceed without the alleged necessary party. (*See* CPLR 1003).

The fact that Gotham was not legally incorporated at the time the lease was executed is critical to the court's determination. In this case, the lease agreement is best termed a pre-incorporation agreement. Generally, a corporation cannot acquire legal rights, or become charged with an obligation, before the articles for incorporation have been filed with the New York Department of State. (*See e.g.*, *Rockaway Improvement LLC v Danco Transmission Corp.*, 9 Misc 3d 210, 215 [Civ Ct, Kings County 2005] ["Section 403 of the Business Corporation Law provides that '[u]pon the filing of the certificate of incorporation by [sic] the department of state, the corporate existence shall begin ... '"]). Until then, the corporation is not in existence, and consequently, it lacks the capacity to enter into a contract. (*See Rubinstein v Mayor*, 41 AD3d 826, 828 [2d Dept 2007]; *Farrell v Housekeeper*, 298 AD2d 488, 489 [2d Dept 2002]). The only party that acquired any rights or obligations was Bell individually as the pre-incorporation "promoter" and incorporator of Gotham. (*See Clinton Investors Co., II v Watkins*, 146 AD2d 861, 862 [3d Dept 1989]).

Bell seeks to be dismissed from the action. However, Bell is presumably subject to the general rule that a corporate promoter, while acting on behalf of a proposed corporation and not for herself, can be held personally liable on contracts made by her for the benefit of a corporation that she intends to incorporate. (*See Geron v Amritraj*, 82 AD3d 404, 405 [1st Dept 2011]).

A corporation does not assume a contract made on its behalf by the mere act of incorporation. A corporation that was non-existent at the time the contract was entered into, cannot be bound by the terms of the contract "'unless the obligation is assumed in some manner by the corporation after it comes into existence by adopting, ratifying or accepting it'."(*Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC*, 31 AD3d 722, 723 [2d Dept

2006][citation omitted]). Moreover, promoters are not discharged from personal liability by the subsequent adoption of the contract by the corporation when formed, unless there is an agreement to release the promoter from liability under the contract. (*Id.* at 723). In other words, the adoption of a contract by a corporation may give rise to corporate liability as well as individual liability on the part of the agent. (*See Universal Indus. Corp. v Lindstrom*, 92 AD2d 150, 152 [4th Dept 1983]).

Bell contends that because Gotham was allegedly assigned the lease agreement, and Winner allegedly accepted the assignment when it accepted Gotham's rent payments, she is no longer individually liable. However, on this record, Bell has never been relieved of her payment obligations under the pre-incorporation lease agreement.

First, the lease agreement does not expressly provide that the rent payments are the obligation of Gotham when it is ultimately formed, and when Gotham formally adopts the lease agreement. A subsequent lease agreement between Winner and Gotham could have worked an assignment of the old lease agreement.

Second, the lease agreement requires the prior written consent of Winner for an assignment to be valid. In order to properly assign the lease agreement, it is essential that Winner consent to the substitution of a new tenant in writing. Accordingly, Bell could not have relied upon the purported assignment simply because Winner accepted, as a matter of convenience, rental payments from Gotham. The fact that Winner accepted the checks does not necessarily establish its consent to assignment of the lease agreement.

Even if there were a valid assignment of the lease, the court finds that the facts still support a conclusion that Bell is liable because there was no novation effected. The requisite

elements of a novation "include a previous valid obligation, agreement of all parties to the new obligation, extinguishment of the old contract, and a new valid contract." (*Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 953 [2d Dept 1985], citing *Town & Country Linoleum & Carpet Co. v Welch*, 56 AD2d 708, 708 [4th Dept 1977]). In effect, a novation works to extinguish an original debt or obligation against the original debtor, and shifts the debt by mutual agreement to a new party. (*See Griggs v Day*, 136 NY 152, 160 [1892]).

Bell fails to plead any allegations to raise the inference of novation. There was no concurrence of the three parties or even of two parties to create a new contract. There is no allegation of any communication between Bell and Winner regarding any assignment. Nor is there any evidence that once Gotham was formed, it formally adopted the lease agreement executed by Bell, leading to a novation. Moreover, the record does not show that Gotham formally adopted the lease agreement by resolution, or through some other appropriate corporate action. In the absence of any evidence of the necessary steps taken to ensure that Winner relinquish its claim against Bell as the original debtor, and that Gotham assume that debt, the court finds that Bell is still individually liable under the lease, and, therefore, Bell cannot be dismissed as the named defendant from this action.

Bell's citation, *Mann v Ferdinand Munch Brewery* (225 NY 189 [1919]), is distinguishable on its face. In *Mann*, the landlord sought to make the assignee of a lease liable, having consented in writing to the assignment. It is not a case where the lessee/assignor sought to make the assignee liable without the consent of the landlord. *Mann* is, therefore, inapplicable.

Dismissal for non-joinder of Gotham is unwarranted because Gotham is not necessary, or indispensable, to the case, as the action can fairly proceed without Gotham (*see Littanzi v State of*

New York, 54 AD2d 1043, 1044 [3d Dept 1976]).

For these reasons, Bell's cross-motion for joinder of Gotham as a named defendant is denied, and the part of her cross-motion seeking to be dismissed from the action is denied as well.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff Winner Communications, Inc.'s motion to dismiss three of defendant Barbara Bell's affirmative defenses, pursuant to CPLR 3211 (a) (7), is granted as to the fourth and seventh affirmative defense, but is denied as to the third affirmative defense; and it is further

ORDERED that plaintiff Winner Communications, Inc.'s motion to dismiss defendant Barbara Bell's counterclaim is granted; and it is further

ORDERED that the branch of defendant Barbara Bell's cross-motion, pursuant to CPLR 1001-1003, to dismiss the complaint against her is denied; and it is further

ORDERED that the branch of defendant Barbara Bell's cross-motion for leave to amend the complaint to add a party defendant is denied.

This constitutes the decision and order of the Court.

Dated: January 31, **2013**

ENTER:

Ellen M. Coin, A.J.S.C.