SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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THE CARLYLE, LLC,

Plaintiff,

-against-

BEEKMAN GARAGE LLC, QUIK PARK BEEKMAN LLC, QUIK PARK BEEKMAN II LLC, QUIK PARK 1633 GARAGE LLC,

Defendants.

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DECISION AND ORDER
Index №.: 652780/13
Motion Seq. Nos. 001 & 002

JOAN M. KENNEY, J.S.C.:

Motion Sequences 001 and 002 are hereby consolidated for disposition.

In this breach of contract action, plaintiff, The Carlyle LLC (the Carlyle) moves for an Order, pursuant to CPLR 3212, for partial summary judgment against defendants Beekman Garage LLC (Beekman Garage), Quik Park Beekman LLC (QP Beekman), Quik Park Beekman II LLC (QP Beekman II) (collectively, the Beekman defendants) on its claims for unpaid rent, late fees, and attorney's fees. Plaintiff also seeks dismissal of defendants' affirmative defenses (Motion seq. No. 001). Defendant, Quick Park 1633 Garage LLC cross-move for summary judgment dismissing plaintiff's third cause of action alleging that defendants Beekman Garage, QP Beekman, QP Beekman II, and Quick Park 1633 Garage LLC (QP 1633) have failed to pay rent.

By way of Motion Sequence 002, plaintiff seeks a temporary restraining order and an order of attachment, pursuant to CPLR 6201 (3) and CPLR 6210, against defendants QP 1633.

FACTUAL BACKGROUND

Parking-Lot Lease

At least one of the defendants has operated a parking garage located at 51-53 East 76th Street in Manhattan as a tenant of the Carlyle from December, 2012 until August, 2013. None of

of the entities paid any rent to the Carlyle from the period of November 1, 2012 until August 31, 2013.

On December 7, 2001, the Carlyle and Beekman Garage entered into a sublease for a term from December 10, 2001 until November 13, 2006. Beekman Garage, with the consent of the Carlyle, assigned its interest in the sublease to QP Beekman. On May 1, 2008, the Carlyle and QP Beekman entered into a modification of the sublease, which extended the term until April 30, 2016. Under the modified sublease, QP Beekman was to pay $109,166.67 per month for the period between May 1, 2008 and April 30, 2013 and "Fair Market Rent"[1] for the period between April 30, 2013 until April 30, 2016. QP Beekman assigned its interest in the sublease to QP Beekman II pursuant to an Assignment and Assumption of Lease executed on May 15, 2009.

As to the involvement of QP 1633, in an action brought by the Carlyle against QP Beekman II in civil court, Rafael Llopiz (Llopiz), the principal of all four defendants, submitted an affidavit, sworn on April 26, 2013, which stated that "Quik Park 1633 has been in possession of the subject garage premises with the Landlord's knowledge and has been paying rent to the Landlord for approximately three years" (Llopiz April 26, 2013 affidavit, ¶ 7). Despite this affidavit, Harvey Burstein (Burstein), CFO of "Quik Park," stated in an October 31, 2012 email to Greg Dinella (Dinella), the Carlyle's director of finance, that the tenant at the parking garage is "Quik Park Beekman II LLC [QP Beekman II]." Llopiz himself, following up on Burstein's communication, emailed Dinella on October 31, 2012 to say "that the only tenant liable for this is Quik Park Beekman II LLC."

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[1] The sublease extension defines "Fair Market Rent" as "the annual fair market rental value of the Demised Premises as reasonably determined by Landlord, but in no event less than the Fixed Annual Rent then being paid by Tenant [$1,310,000, or $109,166.67 per month].

The parking garage contains a basement area that the Carlyle began leasing back on May 1, 2003. As of November 2012, the monthly rent paid by the Carlyle to QP Beekman II for the basement was $9,614.68. However, when the Carlyle stopped receiving rental payments, it stopped making payments to QP Beekman II on the lease-back of the basement.

Repairs to Parking Garage

In August 2012, the Carlyle authorized repairs to the facade of the parking garage pursuant to a recommendation by an architectural and engineering firm hired to evaluate the structure. The Carlyle submits an affidavit from a principal of the firm, Douglas Stieve (Stieve), who stated that the firm, Wiss, Janney, Elstner Associates, Inc. (WJE), observed several problems with the building's facade, among which were:

> "[C]racked brick, stone, and terra cotta masonry throughout the 2nd to the 5th Floor. Additionally, the Garage's cornices were severely deteriorated and loose. WJE considered these problems to be potentially hazardous and emergent, requiring repairs. The problems were likely the result of the age of the building. The problems were reported to the New York City Department of Building's (DOB), as required by law. The DOB subsequently issued a violation and an order for the potentially hazardous condition to be corrected"

(Stieve affidavit, ¶ 6).

The repairs involved erecting a scaffolding in front of the building, and the use of six parking spots within the parking garage. Stieve stated that such measures were necessary:

> As part of the repair structural shoring had to be installed to prevent collapse during the work. This was required because the facade is load-bearing and supports the weight of the masonry of the facade and a portion of the south side of the garage. The weight of the facade had to be transferred to the shoring to allow the cornice and surrounding masonry to be safely removed and replaced without collapse of the facade and potentially the southern portion of the garage. The design of the structural aspects of the shoring required the use of portions of six parking spaces inside the Garage. Without this shoring, the facade, and potentially the southern portion of the building, risked collapse.

(Stieve affidavit, ¶¶ 7-8).

On December 12, 2012, Burstein, defendants' CFO, wrote, on letterhead that referred noncommittally to "Quick Park," to Dinella, the Carlyle's director of finance, about the repairs. According to Burstein, the use of the parking spots cost the parking garage $6,000 and the scaffolding "has created a significant visibility issue whereby our customers cannot see the garage entrance." As a result, Burstein informed Dinella that "effective November 1st we will deduct 10K/mo from the rent payment to cover the above."

The Carlyle alleges that during negotiations regarding a possible rental abatement, Llopiz stated that unless the Carlyle granted a payment reduction and an extension of the lease, then he would not pay rent at all (Dinella December 9, 2013 affidavit, ¶ 29). The Carlyle refused Llopiz's demands to lower the rent, and no rent was paid on the parking garage for the period between November 2012 and August 2013 (plaintiff's Rule 19-A statement of facts, ¶ 24). The Carlyle terminated the sublease on August 31, 2013.

Civil Court Proceedings and the Present Action

On March 4, 2013 the Carlyle filed a non-payment petition in civil court against QP Beekman II in civil court, L&T index No. 57850/13. That case was dismissed for failure to include a necessary party, QP 1633, and the Carlyle filed this action on August 7, 2013 seeking damages for the rental non-payment against the four related entities.

The Carlyle also brought a second action in civil court seeking possession of the parking lot.

DISCUSSION

I. Plaintiff's Motion for Partial Summary Judgment (MOTION SEQUENCE 001)

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

A. Rent and Late Fees

The Carlyle argues that QP Beekman II breached the sublease and its extension by failing to pay rent and late fees. The Carlyle argues that it fully performed under the sublease and its extension, while QP Beekman II abandoned its obligation, under paragraph 1 of the sublease extension, to pay rent,[2] and failed, under article 53 (B) of the sublease, to pay late fees.[3]

As to the other Beekman defendants, the Carlyle argues that they are jointly and severally liable under article 44 (C) of the sublease. Article 44 is entitled "Assignment and Subletting," and its subsection C provides:

> Tenant shall remain fully liable for the performance of all of Tenant's obligations hereunder notwithstanding any subletting or assignments provided for herein and,

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[2] Under paragraph 1 of the sublease extension, QP Beekman II was obligated to pay $109,166.77 a month, which, for the period of nonpayment, the Carlyle calculates to be a total nonpayment amount of $1,091,666.70.

[3] Article 53 (B) of the sublease provides:

> In every case in which Tenant is required by the terms of this Lease to pay Owner a sum of money and payment is not made within ten (10) days after the same becomes due, interest shall be payable on such sum or so much thereof as shall be unpaid from the date it becomes due until it is paid. Such interest shall be at an annual rate which shall be two (2) percentage points higher than the prime rate in effect at The Chase Manhattan Bank, N.A. or Citibank N.A., whichever is greater, but in no event more than the highest rate of interest which at such time shall be permitted under the laws of the State of New York.

> without limiting the generality of the foregoing, shall remain fully responsible and liable to Owner for all acts and omissions of any subtenant, assignee or anyone claiming by, through or under any subtenant or assignee which shall be in violation of any of the obligations of this Lease, and any such violation shall be deemed to be a violation by Tenant. Notwithstanding any assignment and assumption by the assignee of the obligations of Tenant hereunder, Tenant, and each immediate or remote successor in interest of Tenant, shall remain liable jointly and severally (as a primary obligor) with its assignee and all subsequent assignees for the performance of Tenant's obligations hereunder, and shall remain fully and directly responsible and liable to Owner for all acts and omissions on the part of any assignee subsequent to it in violation of any of the obligations of this Lease.

In opposition, defendants argue that Beekman defendants were entitled to stop paying rent because they were partially evicted from the garage. Defendants cite to *Eastside Exhibition Corp. v 210 E. 86th St. Corp.* (18 NY3d 617, 622 [2012]) for the proposition "that the withholding of the entire amount of rent is the proper remedy when there has been a partial eviction by a landlord." However, *Eastside Exhibition Corp.* held that "not every intrusion amounts to an eviction which warrants a full rent abatement," (18 NY3d at 622), and that no such eviction had taken place where landlord, without permission or notice, "entered the demised premises and installed cross-bracing between two existing steel support columns on both of plaintiff's leased floors causing a change in the flow of patron foot traffic on the first floor and a slight diminution of the second-floor waiting area" (*id.* at 620). Defendants also cite to *132 Spring Assoc. v Helverson* (NYLJ, May 18, 1990 at 21, col 1 (App Term, 1st Dept 1990), which upheld a trial court's finding that "the acts of the landlord in failing to properly service, maintain and repair the [freight] elevator in a diligent and timely manner constitutes an actual partial eviction."

Here, defendants argue that there is at least a question of fact as to whether the Beekman

defendants were partially evicted when the Carlyle arranged for the construction of scaffolding to make repairs and interfered with the use certain parking spots. In order to support their claims of partial eviction, defendants do not submit any financial evidence to show interference with the business, but they do submit another affidavit from Llopiz, who stated, in terms echoed by defendants' moving papers, that the partial eviction was comprised of five elements:

> "Carlyle's prolonged construction (i) made it impossible for Beekman to use those twelve parking spots[4] for any purpose whatsoever, (ii) blocked Beekman's signs so that driver's searching for transient parking could not see that there was a garage located in the building (or the rates being offered), (iii) partially blocked the entrance to the Garage with a large beam (and, on occasion, damaged Beekman's customer's cars, which Beekman had to pay to repair), (iv) blocked certain doorways that provide ingress and egress to and from the Garage, and (v) interfered with [defendants'] ability to use the sole elevator in the Garage."

(Llopiz December 13, 2013, ¶ 12).

Aside from partial actual eviction, defendants also argue that they were the victims of a partial constructive eviction. Defendants cite to *Barash v Pennsylvania Term. Real Estate Cor* (26 NY2d 77, 83 [1970]) for the proposition that "constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." Citing to *Minjak Co. v Randolph* (140 AD2d 245, 248 [1st Dept 1998] [noting that a constructive eviction claim is still viable even if tenant "has abandoned only a portion of the demised premises due to the landlord's acts in making that portion of the premises unusable by the tenant"]), defendants contend that abandonment of the entire property is not a requisite of

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[4] At another point in his affidavit, Llopiz states that "six [parking spots] were directly obstructed by the scaffolding itself and another six were obstructed by various materials and equipment related to the scaffolding and/or construction performed by Carlyle" (Llopiz December 13, 2013 affidavit, ¶ 10).

constructive eviction.

Defendants argue that the Carlyle interfered with its right, under article 22 of the sublease, to "peaceably and quietly enjoy the premises." Thus, defendants argue that they were constructively evicted and cite to *Arbern Realty Co. v Clay Craft Planters Co.* (188 Misc 2d 314, 315 [App Term, 2d Dept 2001]), where the court found a partial constructive eviction where the tenant was denied access to 12 of the 20 parking spaces specifically referenced in the lease, and its access to the premises' loading dock was "severely limited."

In its moving papers, the Carlyle argues that defendants' second affirmative defense for breach of the sublease should be denied because the sublease prohibits claims for constructive eviction or rent abatements flowing out of the repairs. Specifically, the Carlyle refers to articles 4 and 13 of the sublease. Article 4 of the sublease, entitled "Repairs," provides, in pertinent part, that the Carlyle "shall maintain and repair the public portions of the buildings, both exterior and interior . . . there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business . . ." Defendants refer to another portion of the article, which states: "The provisions of this article 4 with respect to the making of repairs shall not apply in the case of fire or other casualty which are dealt with in article 9 hereof." Defendants contend that there is a question of fact as to whether the need for repairs were caused by a "casualty." Additionally, defendants argue that article 4 does not allow the Carlyle to "oust Beekman from a substantial portion of the Garage for a prolonged period of time."

Article 13 of the sublease provides, in pertinent part:

"Owner or Owners' agents shall have the right (but shall not be obligated) to enter

> the demised premises in any emergency at any time, and, at other reasonable times on reasonable notice to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work complying with laws, regulations and other directions of governmental authorities . . . . Owner may, during the progress of any work in the demised premises, take all necessary materials and equipment into said premises without same constituting an eviction nor shall the Tenant be entitled to any abatement of rent while such work is in progress nor to any damages by reason of loss or interruption."

Defendants contend that "in the demised" premises, as it used in article 13, excludes the facade of the building, the subject of the repairs. In support, defendants cite to *Duane Reade v Reva Holding Corp.* (30 AD3d 229, 236 [1st Dept 2006] [holding that an exculpatory clause did not apply, as "the work in question was not performed 'in the demised premises,'" as required by the clause, "but on the roof over the demised premises"]). Additionally, defendants argue that articles 4 and 13 are void as against public policy.

Defendants also argue that the Carlyle is not entitled to summary judgment on the question of damages because the Beekman defendants are entitled to an offset, as the Carlyle has failed to pay Beekman rent payments owed on the lease-back agreement for the basement. In support, defendants cite to *MHA Inc. v Consulting for Architects* (244 AD2d 169, 169 [1st Dept 1997]), which held that "[p]artial summary judgment on defendant's first counterclaim was properly denied where the parties' claims against each other arise out of the same transaction . . . and plaintiff's claim appears to have merit and exceeds defendant's counterclaim, and indeed, constitutes a defense thereto."

In order to show that their counterclaims for the basement lease-back exceed plaintiffs claims, defendants submit a purported addendum to the contract which, defendants allege,

memorialized the lease-back agreement. However, the purported addendum is not attached to the sublease or signed, and the Carlyle claims that it was never agreed upon. Defendants also argue that the Carlyle owes the Beekman defendants $97,413.82 in monies collected on the Beekman defendants' behalf, but not remitted to the Beekman defendants.

Here, the Carlyle is entitled to summary judgment as to liability on its claims against the Beekman defendants for unpaid rent and late fees. Article 4 of the sublease clearly grants the Carlyle the right to "repair the public portions of the buildings, both exterior and interior." Moreover, the Beekman defendants agreed, in article 4, to bear the risk for such repairs, as it agreed that "there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of the Owner by reason of inconvenience, annoyance, or injury to business."

Defendants fail to raise an issue of fact as to whether the repairs were caused by a "casualty." Defendants offer no evidence that challenges the assertion by Stieve, the architect, that "[t]he problems observed were likely the result of the age of the building" (Stieve affidavit, ¶ 6). Thus, there is no question that the repairs fall under the fire and casualty exception under the sublease.

Moreover, defendants' public policy argument is unavailing. Two sophisticated parties entered into a lease here, and the lease provided that while the Carlyle would do any repairs needed on the building, the Beekman defendants would effectively absorb the cost of any injury to its business caused by such repairs. Nothing in this arrangements offends any public policy. Moreover, the Carlyle's motion is not premature, in that there is not likely to be any unexchanged evidence that would change this result, as it is clearly required by the sublease.

Defendants also fail to raise a question of fact as to whether the Beekman defendants

were entitled to withhold the entire amount of rent because the Carlyle partially evicted them, either actively or constructively. For a partial actual eviction, the taking must be unauthorized (*Eastside Exhibition Corp.*, 23 AD3d at 103 [referring to "the general rule that unauthorized taking suspends the obligation to pay rent]), while a partial constructive eviction requires a wrongful act (*Barash*, 26 NY2d at 83 ["constructive eviction exists where, although there has been no physical expulsion or exclusion of tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises"]). Here, "inconvenience, annoyance, and injury" to the Beekman defendants' business, caused by the repairs, is explicitly authorized under the article 4 of the sublease. Thus, as it was neither unauthorized nor wrongful, the facade repair of the garage, and the concomitant inconvenience, annoyance, and injury to the Beekman defendants' business, does not constitute a partial eviction.

Defendants' argument that summary judgment is inappropriate because they are entitled to an offset for unpaid rent on the basement of the garage, and for funds collected by the Carlyle on behalf of the Beekman defendants, is also unavailing. Defendants rely on *MHA, Inc.*, which held that partial summary judgment on defendants' counterclaim was inappropriate where "plaintiff's claim appears to have merit and exceeds defendant's counterclaim, and indeed, constitutes a defense thereto" (244 AD2d at 169). Here, any offset does not constitute a defense to the Beekman defendants' defaults under the sublease, and, despite defendants' extravagant claims as to amount owed on the lease-back of the basement, cannot be more than the amount owed to the Carlyle in unpaid rent and back fees on the entire garage. As such, defendants' claim for an offset is not an impediment to summary judgment against the Beekman defendants on the

Carlyle's claims for unpaid rent, late fees, and attorney's fees.

B. Attorney's Fees

In addition to back rent and late fees, the Carlyle argues that the Beekman defendants are liable under article 19 of the sublease, which provides that if tenant defaults on the sublease "and Owner, in connection . . . with any default by Tenant . . . makes any expenditures . . . including but not limited to attorney's fees, in instituting . . . any actions . . . such obligations incurred with interest . . . shall be deemed to be additional rent hereunder and shall be paid by Tenant."

Defendants argue that the Beekman defendants are not liable for attorney's fees because they did not default under the sublease because the repair work constituted a partial eviction and, as such, they were entitled to withhold rent.

Here, as discussed above, the Beekman defendants did default under the sublease by failing to pay rent and late fees. Thus, they are liable for the Carlyle's attorney fees.

C. Affirmative Defenses

The court has reviewed the portion of the Carlyle's motion for summary judgment which seeks an order striking defendants affirmative defenses on grounds that there is no factual basis for the affirmative defenses and/or as barred in accordance with the subject lease(s). In as much as defendants failed to raise an issue of fact with respect to any of these affirmative defenses, this Court must grant the Carlyle's application to strike defendants' affirmative defenses.

II. Defendants' cross motion for partial summary judgment

Defendants cross-move to dismiss all claims against QP 1633. The third cause of action alleges that QP 1633 is liable to the Carlyle for rent, and/or use and occupancy for the period in which the Carlyle did not receive rent. Defendants argue that, as a subtenant, QP 1633 did not

owe any rent to the Carlyle. Citing to *Decker v Chaung* (185 AD2d 613, 613 [4th Dept 1992] ["[b]ecause there was no privity between petitioner and respondent, petitioner cannot recover rent and other charges from respondent"]), defendants argue that, as there is no privity between QP 1633 and the Carlyle, the Carlyle may not recover rent against it.

As to use and occupancy, defendants cite to RPAPL 741 (5). Article 7 of the RPAPL is entitled "Summary Proceeding to Recover Possession Of Real Property," and section 741 is entitled "Contents of petition," while the fifth subsection provides:

> "State the relief sought. The relief may include a judgment for rent due, and for a period of occupancy during which no rent is due, for the fair value of use and occupancy of the premises if the notice of petition contains a notice that a demand for such a judgment has been made."

In opposition, the Carlyle notes that its use and occupancy claim does not arise from contract, but is a form of quantum meruit. The Carlyle cites to *Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, [2d Dept 1999]) which held that "[t]he obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant." Instead, *Eighteen Assoc.* held that "an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties" (*id.* [internal quotation marks and citation omitted]). The Carlyle also refers to Llopiz's affidavit, submitted in the nonpayment proceeding at civil court, that QP 1633 "has been in possession of the subject garage premises with the Landlord's knowledge and has been paying rent to the Landlord for approximately three years" (Llopiz April 26, 2013 affidavit, ¶ 7).

Here, defendants fail to make a prima facie showing of entitlement to judgment on its

cross motion to dismiss the Carlyle's use and occupancy claim against QP 1633. Nothing in RPAPL 741 (5) suggests that plaintiff cannot bring a use and occupancy claim against QP 1633, while also bringing a failure to pay rent claim against the Beekman defendants. As such, defendants are not entitled to dismissal of the Carlyle's claim for use and occupancy against QP 1633. Meanwhile, it is clear that the Carlyle has abandoned any claim for rent against QP 1633. As such, defendants' cross motion is granted as to dismissal of the Carlyle's claims for rent against QP 1633, but denied as to the Carlyle's claim for use and occupancy against QP 1633.

III. Plaintiff's Motion for an Order of Attachment (MOTION SEQUENCE 002)

The Carlyle seeks an order of attachment CPLR 6201 (3), which provides that attachment is appropriate where "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." The Carlyle cites to *DLJ Mortg. Capital, Inc. v Kontogiannis* (594 F Supp 2d 308, 318-319 [USDC EDNY 2009] [internal quotation marks and citation omitted]), which laid out the showing required for such an order:

> "Under New York law, a plaintiff may obtain an order of attachment if it demonstrates that (1) it has stated a claim for a money judgment; (2) it has a probability of success on the merits; (3) the defendant, with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered, or secreted property, or removed it from the state or is about to do any of these acts, and (4) the amount demanded from the defendant is greater than the amount of all counterclaims known to plaintiff. Because attachment is a harsh remedy, these statutory factors must be strictly construed in favor of those against whom" attachment is sought."

Here, the third element is the focus, as the first is clearly met, while the analysis above shows that the second and fourth elements are also met. *DLJ Mortg. Capital* specifies the

requirements of this third element:

> To establish the third element for attachment, the plaintiff must prove both that the defendant (1) has assigned, disposed of, encumbered, or secreted property, or removed it from the state, or is about to do any of these acts; and (2) has acted or will act with the intent to defraud creditors or to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor. Removal, assignment, or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits. Because [f]raud is not lightly inferred, plaintiff's moving papers must contain evidentiary facts as opposed to conclusions proving the fraud. Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. Rather, [i]t must appear that such fraudulent intent really exists in the defendant's mind.

(*id.* at 319 [internal quotation marks and citation omitted]).

The Carlyle argues that this element is met for three reasons: removal of assets from the tenant of record, QP Beekman II; obfuscation of the identity of the tenant of record; and past fraud and abuse by Llopiz.

First, in support of the allegation that defendants drained QP Beekman II of assets in order to render itself judgment-proof, the Carlyle submits an affidavit from Kevin Smith (Smith), one of its attorneys, who refers to a conversation he had with opposing counsel during the first civil court proceeding:

> "during a hearing on May 21, 2013 in connection with the non-payment petition, David Rozenholc, counsel for QP Beekman II represented to me in Court that [the Carlyle] was wasting its time because a monetary judgment against QP Beekman II was not collectable. That admission confirms what is obvious: Defendants intend to prevent [the Carlyle] from ever collecting upon a judgment"

(Smith December 9, 2013 affidavit, ¶ 35).

David Rozenholc (Rozenholc) responded with his affidavit denying that he made such a statement:

> "To be clear, I neither told Mr. Smith that a monetary judgment 'was not collectable' nor stated that Defendants were involved in deliberate efforts to shield assets from creditors or [the] Carlyle. I do recall mentioning to Mr. Smith that the garage in question was operating at loss for some period of time as a result of Plaintiff's conduct. I am astonished that a lawyer-to-lawyer remark such as this is now being used – many months later – as 'evidence' of some sort of illicit disposition of assets by my clients. It is, obviously, no such thing."

(Rozenhold January 30, 2013 affidavit, ¶¶ 5-7).

Second, the Carlyle contends that the Carlyle's acts in confusing, or actually changing the identity of the tenant at the parking garage, is circumstantial evidence of their intention to defraud the Carlyle. Specifically, the Carlyle refers to Llopiz's sworn statement that QP 1633 "has been in possession of the subject garage premises with the Landlord's knowledge and has been paying rent to the Landlord for approximately three years" (Llopiz April 26, 2013 affidavit, ¶ 7). The Carlyle submits defendants' September 13, 2013 responses to plaintiff's sixth interrogatory, which asked defendants to "[i]dentify and describe any entities or persons that have operated the parking garage at the Premises, including, but not limited to the name of the entities or persons and the dates of any such operation." Defendants responded that "the parking garage at the Premises has been operated by Beekman Garage LLC, Quik Park Beekman LLC and Quik Park Beekman II LLC for the duration of the Sublease and Sublease extension." The Carlyle also notes that in a case before Judge Bransten entitled *Quik Park Southern LLC et. al. v Lexington Insurance Company*, index No. 651688/13, Beekman Garage identified its principal place of business as the subject parking garage.

Third, the Carlyle argues that past fraud and abuse by Llopiz should help the court make a finding of fraudulent intent here. In support, the Carlyle submits an affidavit submitted by the defendants in yet another Quik Park litigation in supreme court, New York county, this one

entitled *Quik Park West 57 LLC et. al. v Bridgewater Operating Corporation*, index No. 651524/13. The affidavit is from Daniel Kass (Kass), a senior forensic auditor at Thacher Associates, LLC (Thacher), a corporate intelligence, investigative, and integrity risk-management firm that the defendant hired to conduct a review of the management of four parking garages involved in the litigation. The review found, among other things, that Quik Park entities violated a management agreement between the parties by "commingling revenues of the Garages into a single 'sweep account.' " (Kass May 21, 2013 affidavit, ¶ 22). More specifically, the Thacher's "most troubling discovery" was that

> "plaintiffs had withdrawn approximately $6.8 million more than permitted under the Management Agreement and that the monies, after being improperly commingled into a sweep account, were used to pay, among other things, personal expenses of Rafael Llopiz or the members of his family, including $15,606.36 to pay a lease on a Porche, $9,935.22 for a lease on a Ferrari and $67,593.28 in meals and entertainment . . . once plaintiffs became aware of Thacher's review of their operations of the Garages, plaintiffs started re-depositing into the sweep account the founds that had been improperly transferred"

(*id.*, ¶¶ 26-31).

Here, the Carlyle has failed to make a showing entitling it to attachment under CPLR 6201 (3). Strictly construing these factors, the Carlyle fails to make a showing of entitlement to an attachment. First, it is not clear that defendants have disposed of assets. Smith's assertion that Rozenholc proclaimed QP Beekman II judgment-proof is not only contested by Rozenholc, it also fails to clearly show that defendants disposed of assets. Since the Carlyle cannot show that assets were disposed of, it cannot show that the disposal was fraudulent. Moreover, the Carlyle fails to show that defendants are about to dispose of assets. As such, the Carlyle's motion for an order of attachment is denied. Accordingly, it is hereby

ORDERED that the portion of The Carlyle, LLC's motion (motion seq. No. 001) seeking summary judgment on its claim for unpaid rent, as well as for late fees, and attorney's fees is granted; and it is further

ORDERED that plaintiff's application to strike defendants' affirmative defenses, is granted; and it is further

ORDERED that the portion of defendants' cross motion for summary judgment seeking dismissal of plaintiff's claim for unpaid rent against defendant 1633 Garage LLC is granted. However, the cross motion application seeking dismissal of plaintiff's claim for use and occupancy against defendant 1633 Garage LLC, is denied; and it is further

ORDERED that plaintiff's motion (motion seq. No. 002) for a temporary restraining order and an order of attachment against defendants, is denied; and it is further

ORDERED that an assessment of damages against defendants is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness NO LATER THAN AUGUST 1, 2014 and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

Dated: June 30, 2014

ENTER:

Hon. JOAN M. KENNEY