Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI IA Part 3
Acting Supreme Court Justice

----------X
245-02 OWNER LLC,

Plaintiff,

-against-

CVS ALBANY, L.L.C. and CVS CAREMARK CORPORATION

Defendants.
----------X

Index Number 719630/2018

DECISION / ORDER

Motion Seq. #1

The following papers EF numbered as follows read on this motion by plaintiff 245-02 Owner LLC for, *inter alia*, a judgment declaring that a July 29, 2018 termination notice sent by the defendants is null and void

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	2-28
Answering Affidavits - Exhibits	30-50, 55
Reply Affidavits	52-53, 56-63
Memoranda of Law	51

Upon the foregoing papers, it is ordered that the motion is denied.

I. The Allegations of Plaintiff 245-02 Owner LLC

The plaintiff alleges the following:

The plaintiff owns a building located at 245-02 Merrick Boulevard, Rosedale, New York (the property or building). The plaintiff's predecessor in interest and defendant CVS Albany, LLC (CVS or tenant) entered into a lease agreement dated August 28, 2007 wherein the former agreed to build on the site according to specifications provided by the latter and then to rent the property to CVS. The lease provided for a term that ran from July 23, 2013 to January 31, 2039. Defendant

CVS Caremark Corporation gave its written guarantee that CVS would fulfill its obligations under the lease. Although the plaintiff had not obtained a Certificate of Occupancy (CO) for the premises, CVS took possession on July 23, 2013 and began to operate its pharmacy retail store.

On or about February 6, 2017, CVS notified the plaintiff that the store would be closed, and the tenant then began to remove virtually everything from the building, including monitoring equipment for the utilities such as the heating system. CVS continued to pay the rent despite closing the store.

In or about September, 2017, CVS requested the plaintiff owner to consent to the sublease of the premises to New York Dialysis Services, Inc. The plaintiff consented to the sublease and promised to cooperate in the procurement of a certificate of occupancy needed for the operation of a medical facility. On December 4, 2017, CVS executed a Tenant Estoppel Certificate stating, *inter alia*, that neither the plaintiff nor the tenant were in default on the lease. CVS also acknowledged that certain matters had to be attended to before the city would issue a certificate of occupancy.

On January 24, 2018, during a severe cold spell, CVS failed to maintain necessary heat in the building and approximately eighty (80) pipes and several sprinkler heads burst, causing water to flood the building. Since CVS kept no personnel in the building and had disabled the monitoring systems, no one discovered that the building had been flooded until water seeped from the basement into the street. The bursting pipes and sprinkler heads caused extensive damage to the building.

On March 1, 2018, the plaintiff's agent informed CVS that because it had taken no action to repair the damage, the owner had become concerned about a problem with mold. An electrician sent to the building to look around refused to enter it because of fear of falling ceilings and the possibility of electrocution.

In June of 2018, the plaintiff received an email from a CVS maintenance person stating that the premises had been fully repaired, and the plaintiff again sent an electrician to the premises. After repairing corroded wires and defective outlets, the electrician reported to the plaintiff that the freight elevator had significant damage and that mold had spread throughout the building.

On July 19, 2018, CVS sent the plaintiff a Notice of Lease Termination purporting to terminate the lease effective July 20, 2018. The plaintiff rejected the termination notice. On July 24, 2018, CVS's proposed subtenant copied the plaintiff on an email informing CVS that it would not enter into the sublease because it was no longer financially feasible to do so.

II. Procedural History

The plaintiff began the instant action by the filing of a summons and a complaint on December 21, 2018. The first four causes of action are for a judgment, pursuant to CPLR §3001, declaring that CVS breached the lease by failing to maintain the premises in a habitable condition, that CVS breached the lease by failing to repair the premises, that CVS has waived its right to

terminate the lease based on purported defaults by the owner, that the termination notice is null and void, and that the lease remains in full force and effect. The plaintiff obtained the instant Order to Show Cause on December 6, 2018 and submitted it on January 16, 2019. The parties entered into a so-ordered stipulation dated January 16, 2019 permitting the plaintiff's agent to enter the building for the purpose of shutting off the water supply and blowing out the pipes. The defendants filed an answer on February 6, 2019.

III. Discussion

The first branch of the motion is for an order "[p]ursuant to CPLR 3001 awarding judgment declaring that the July 19, 2018 termination notice sent by defendants null, void, and of no force and effect." If the plaintiff intended by this branch of the motion to obtain relief by way of a preliminary injunction, then the defendants rightfully oppose it on the ground that it seeks ultimate relief requested in the complaint. The purpose of a motion for a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties. (*Masjid Usman, Inc. v. Beech 140, LLC,* 68 AD3d 942 [2nd Dept 2009]; *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051 [2nd Dept 2009]). Moreover, "absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment." (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727, 728 [2nd Dept 2005]; *Board of Managers of Wharfside Condominium v. Nehrich,* 73 AD3d 822 [2nd Dept 2010]). There are no extraordinary circumstances warranting the granting of a preliminary injunction concerning the termination notice sent by the defendants. The defendants have permitted the plaintiff access to the building, and the parties' rights under the lease may be determined in the normal course of litigation without further harm to either side. If the first branch of the motion is intended to be for summary judgment, then the defendants rightfully oppose it on the ground that a party may not move for summary judgment before the joinder of issue (*see,* CPLR §3212[a]; *Stone Column Trading House Ltd. v. Beogradska Banka A.D.*, 139 AD3d 577[1st Dept. 2016]). In the case at bar, the plaintiff served the instant motion before the defendants served their answer, "A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to." (*City of Rochester v. Chiarella*, 65 NY2d 92, 101[1985]).

The second branch of the motion is for a preliminary injunction "compelling defendants to take immediate steps to restore the subject premises to its pre-flood condition...." A party moving for a preliminary injunction must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in his favor. (*see Aetna Insurance Co. v Capasso*, 75 NY2d 860 [1990]). The plaintiff failed to carry this burden. "Irreparable injury" means injury for which money damages are not satisfactory, and economic loss which is compensable in money does not constitute irreparable harm. (*see DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635 [2nd Dept. 2009]; *EdCia Corp. v McCormack*, 44 AD3d 991 [2nd Dept 2007]). Moreover, " [a] mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action." (*Matos v. City of New York*, 21 AD3d 936, 937 [2nd Dept 2005]; *Zoller v. HSBC Mortg. Corp. (USA),*

135 AD3d 933 [2nd Dept 2016]). In the case at bar, the plaintiff did not show that there are unusual circumstances that require the mandatory injunctive relief sought by it pending the resolution of the action. (*see Zoller v. HSBC Mortg. Corp. (USA), supra.*)

This is the decision and order of the Court.

Date: March 5, 2019

3/5/2019
Hon. Joseph Risi, A.J.S.C.

FILED
MAR 14 2019
COUNTY CLERK
QUEENS COUNTY