SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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WYETH, INC., DECISION AND ORDER

Plaintiff, Index No. 656505/2017

- against -

LIBERTY VIEW CORPORATION,

Defendant.

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DAVID B. COHEN, J.:

Motion sequence nos. 002 and 004 are consolidated for disposition herein.

In motion sequence no. 002, defendant Liberty View Corporation, in lieu of serving an answer, moves, pursuant to CPLR 3211 (a) (1), (5) and (7), to dismiss plaintiff Wyeth, Inc.'s complaint for failure to state a claim, or, alternatively, pursuant to CPLR 3013, 3014 and 3024, for a more definite statement. In motion sequence no. 004, defendant moves pre-answer to dismiss the amended complaint on the same grounds.

Underlying Allegations and Background

Plaintiff is a commercial tenant (Tenant) in a building (the Building) located at 533 Canal Street, New York, New York, pursuant to a lease dated March 17, 2008, with an alteration agreement dated June 26, 2014 and an extension amendment dated June 2014 (the Lease). Under the Lease, plaintiff, as "Tenant," occupies a portion of the first floor and the basement (the Premises) as a retail store. Defendant is the landlord (Landlord) and the owner of the Building.

The Lease includes various provisions including Article 14 which provides, in part, that there will be "no diminution or abatement of the rent . . . for interruption or curtailment of [services in connection with] repairs or improvements [and that such action is not] a constructive eviction." Article 57 of the rider to the Lease requires the Tenant to maintain $30,000 as a security deposit.

To the extent the landlord drew down any or all of the security deposit, then, upon five days' notice, the Tenant must restore any deficiency in an amount not less than three times the current rent. The Tenant's failure to replenish and restore the security deposit within the stated period shall constitute a material breach of the Lease. Article 89 of the Lease rider permits the Landlord to require an additional month's security deposit in the amount of one month's current rent, if the Tenant is late in making any rental payments more than three times in any Lease year. Article 20 provides for the recovery of attorneys' fees to the Landlord if the Tenant defaults and the Landlord has commenced a summary proceeding based on that default. Article 107 of the Lease rider states that the Tenant may use "the west elevator [and it] shall be responsible to pay for any and all damaged [sic] caused to said elevator by [its] use thereof." Article 109 provides that, since the basement contains "mechanical equipment and other systems necessary for the operation of the [B]uilding, [the Landlord is permitted] access to the basement." The Lease also has a no waiver clause (Lease, Article 8). In Article 102, the Tenant is permitted to make "at its sole cost and expense . . . [non-structural] alterations, additions, installations, substitutions to the [Premises]." Article 45, section A of the Lease rider repeats, in part, that the Tenant's "changes, improvements and/or alterations [to the demised Premises] . . . shall be performed at Tenant's sole cost and expense, in a good and workmanlike manner." John Birch (Birch), an officer of plaintiff, executed a personal guaranty of plaintiff's Lease obligations.

In or about 2012, plaintiff entered into a sublease agreement to occupy commercial space on the second floor of the Building (amended complaint, ¶ 32). Plaintiff alleges that defendant consented to the sublease agreement (*id.*, ¶ 33).

An amendment to the Lease dated June 2014 (the First Amendment to Lease) extended the Lease term to June 30, 2022, with a five-year option to renew and a right of first refusal. The First

Amendment to Lease also provides that plaintiff shall pay nonparty Leardon Boiler Company $39,666.20 for the purchase of a "new high-pressure service and/or installation" and $11,050 to defendant "for the extension of the elevator shaft to accommodate a nine foot, six inch (9'6") cab in the west elevator of the Building" (First Amendment to Lease, Articles 5-6).

Plaintiff alleges that the alterations and improvements detailed in the alteration agreement "were intended to enable plaintiff to implement a coherent plan of its retail furniture and furnishings business involving both First (partially) and Second Floors of the Building and basement" (amended complaint, ¶ 34). Plaintiff further alleges that it has renovated the service entrance and service elevator at the west side of the Building to facilitate its furniture business on the first and second floors, but defendant has prevented it from using the elevator, thereby making it difficult to transport its inventory between floors at the Building (*id.*, ¶¶ 36-40). Plaintiff claims that it has spent more than $2 million to make the Premises and the second floor suitable for its business (*id.*, ¶ 31). Plaintiff also maintains that its furniture business has suffered losses because of defendant's actions (*id.*, ¶ 41).

On October 18, 2017, defendant sent plaintiff a notice to cure dated October 10, 2017 (the 2017 Notice to Cure), advising plaintiff that defendant had drawn down the security deposit of $57,356.54 and demanding that plaintiff replenish the security deposit by tendering to defendant four months of unpaid rent, amounting to $112,488, in accordance with Articles 57 and 89 of the Lease (*id.*, ¶¶ 47-48). The 2017 Notice to Cure informed plaintiff that a failure to comply with the notice by October 23, 2017 would constitute a material default under the Lease.

Plaintiff commenced this action on October 23, 2017 by filing a summons and complaint together with a proposed order to show cause seeking a *Yellowstone* injunction and a request for an interim stay. On October 24, 2017, defendant sent plaintiff a 10-day termination notice (the

Termination Notice), which noted the unpaid rent and the application of plaintiff's security deposit to the unpaid rent. On October 24, 2017, a hearing was held on the temporary restraining order before Justice O. Peter Sherwood (the October 2017 Hearing). Justice Sherwood denied plaintiff's application for a stay, finding that plaintiff had not shown that it was ready, willing and able to cure the default (October 2017 Hearing tr at 9-10). At the Hearing, defendant noted that plaintiff's cure period had expired and consequently, defendant had terminated the Lease (*id.* at 5-7).

Defendant subsequently commenced a holdover proceeding titled *Liberty View Corporation v Wyeth, Inc., et al.*, Civil Ct, NY County, index No. 80339/2017 (amended complaint, ¶¶ 16-17). In a decision and order dated February 28, 2018 (the 2018 Order), the court (Kenney, J.) granted plaintiff's motion to dismiss the holdover proceeding and denied defendant's cross motion for summary judgment, finding that the predicate notices were deficient such that defendant's termination of the Lease and the commencement of the holdover proceeding may have been improper.[1] Notably, Justice Kenney rejected defendant's contention that Articles 57 and 89 were proper bases for the 2017 Notice to Cure and the Termination Notice because defendant's calculations did not match the amount needed to replenish the security deposit. Defendant's invocation of Article 89 was also improper because that article is "triggered only upon late payments/monetary obligations defined by the Lease as rent and additional rent," and interpreting the security deposit demand as a claim for rent or additional rent "cannot be the basis for a Ten (10) days Termination Notice" under Article 6 (2018 Order at 6-7). The court further noted that defendant may have impermissibly withdrawn funds from the security deposit because at the time of the withdrawal, monthly rent for October 2017 was not yet due (*id.* at 7). Ultimately, the court

[1] Although neither party furnished a copy of the 2018 Order, the decision was annexed to plaintiff's amended complaint filed on August 10, 2018, as exhibit C, and the court may take judicial notice of an undisputed court record or file (*see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 202 [1st Dept 2010]).

determined that defendant "may have wrongfully terminated the Lease and most notably, was precluded from commencing the instant proceeding by its own terms" (*id.* at 11).

On July 25, 2018, defendant sent plaintiff a second notice to cure (the 2018 Notice to Cure) regarding a claimed violation of plaintiff's contractual obligation to maintain a comprehensive general liability policy in the amount of $3 million and a $5 million umbrella policy, as required by Article 49 (A) and (B) of the Lease rider (amended complaint, ¶¶ 23-28). The 2018 Notice to Cure also alleged that plaintiff was in violation of Articles 2, 45, and 102 of the Lease related to the unauthorized alterations plaintiff had performed at the Premises, including the removal of masonry fireproofing from structural columns and the removal of a fire-rated wall and a fire-rated partition without first obtaining defendant's consent. The notice further stated that plaintiff was in violation of Articles 86 and 104 because it failed to complete construction of the retail store in accordance with the June 26, 2014 alteration agreement and failed to maintain the loading dock area. In addition, the notice alleged that plaintiff was in violation of Article 15 related to its use of the elevators at the Building to transport large items to the second floor which was "leased by you under separate agreement from a proprietary lessee, without Landlord's approval or supervision . . . [and without] adequate padding or protection of the elevator cabs" and other areas of the Building.

Shortly thereafter, on August 10, 2018, plaintiff filed an amended summons and complaint that included additional factual allegations related to the holdover proceeding and the 2018 Notice to Cure. The amended complaint pleads causes of action for permanent injunctive and declaratory relief, breach of the duty of good faith, breach of quiet enjoyment, breach of obligations regarding the security deposit, breach of contract regarding work done to an apartment on the sixth floor,

quantum meruit, unjust enrichment, attorneys' fees, prejudgment interest and specific performance.

Plaintiff's application for a *Yellowstone* injunction related to the 2018 Notice to Cure, brought by order to show cause, was denied by this court's order dated December 19, 2018 (the December 2018 Order), which found that plaintiff had failed to show an ability to cure or that the insurance default was susceptible of being cured.

The Parties' Contentions

On the present motions, defendant presents the Lease as documentary evidence in support of dismissal. Defendant asserts that the documentary evidence of the Lease's provisions and plaintiff's admitted failure to replenish the security deposit, as required by the Lease, and plaintiff's lack of a contractual right to avoid paying rent even if access to the freight elevator is limited, bar plaintiff's contractual claims. Defendant contends that the quantum meruit, unjust enrichment and covenant of good faith dealing causes of action are barred by the existence of the Lease, that the attorneys' fee claim and the causes of action regarding the security deposit are barred by the Lease's provisions and that the quiet enjoyment cause of action must be dismissed since such claim requires wrongful conduct, and defendant's actions were allowed under the Lease and, therefore, cannot be considered wrongful.

Plaintiff, in opposition, tenders an affidavit from Birch, who avers that defendant requested that plaintiff renovate certain public areas at the Building, that such work was outside the scope of the Lease, and that defendant promised to pay plaintiff for the work (Birch aff sworn to January 2, 2018, ¶¶ 21 and 52). For instance, Birch avers that defendant requested that plaintiff renovate the kitchen and two bathrooms in a sixth-floor residential unit, construct a new elevator pit and new walls for the elevator shaft, rebuild window openings and lintels throughout the eight-story

building, repair the loading dock, renovate the boiler room in the basement to accommodate a new air duct system, install and fabricate wrought iron gates in the alley, and fill a gap between the door saddle and the lobby floor at the Building's residential entrance[2] (*id.*, ¶¶ 22-27, 30, 42-47, and 61-63). Birch also complains that defendant demanded that plaintiff perform certain additional work to the permanent, interior stairs it had constructed between the first floor and the basement in the demised Premises (*id.*, ¶ 41). All told, the renovations on the sixth floor totaled $258,007.12, the elevator work amounted to $29,587.98, and the loading dock work cost $149,830.92[3] (*id.*, ¶ 28). Birch further avers that plaintiff has been paid only $22,859, and that defendant has not remitted any further payments[4] (*id.*, ¶ 33).

In response, defendant presents a copy of its client trust account at Chase Bank to show that plaintiff's security deposit was held in a separate interest-bearing account (Richard Barrett [Barrett] aff, ¶¶ 4-5, exhibit 1). Defendant also presents a copy of the sixth floor sublease between Barrett, defendant's president, and Birch as documentary evidence that work done on the sixth floor was for the personal use of Birch, who occupied the unit, and was not related to the Lease or for the Premises, which was located on part of the first floor and the basement (Barrett aff, ¶¶ 24-26). Barrett avers that the landlord has paid plaintiff "in full for small discrete jobs at the Building, and voluntarily contributed financially to [plaintiff's] long-delayed project to repair the loading dock, [defendant] never 'forced' [plaintiff] to perform any work, and never assumed any obligation to pay for these projects" (*id.*, ¶ 8).

Regarding the freight elevator, Barrett rejects plaintiff's claim that it has been denied access. He states that plaintiff has had full access to the passenger elevator on the east side of the

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[2] Birch claims that plaintiff also renovated a bathroom on the fifth floor, but his affidavit does not describe what work was performed, or whether plaintiff performed such work at defendant's behest (*id.*, ¶ 32).
[3] Birch avers that the elevator pit work cost $6,737.98 (Birch aff, ¶ 65).
[4] The invoice annexed to Birch's affidavit shows that defendant has paid $22,850.

Building and the freight elevator on the west side of the Building since the beginning of its tenancy until 2015, when defendant undertook a project to modernize the freight elevator (*id.*, ¶ 16). Barrett also states that defendant's elevator contractor furnished a moving platform for the tenants' use (*id.*, ¶ 17). In any event, Barrett avers that Article 107 of the Lease rider provides that "Tenant may use the West Elevator . . . [and] does not guarantee . . . uninterrupted use" (*id.*, ¶ 19). As for the loading dock, Barrett avers that plaintiff was obligated to maintain and repair the loading dock as per Article 104 of the Lease rider (*id.*, ¶ 21). Regarding the boiler and elevator payments referenced in the First Amendment to Lease, Barrett explains that the payments were part of a negotiated settlement of plaintiff's past rent and tax arrears (*id.*, ¶ 11).

Finally, defendant states that the claim that defendants' employees intimidated, insulted and yelled at plaintiff is insufficiently specific (amended complaint, ¶ 194), since it does not note the date, time, place or any other details which would give defendant adequate notice of the allegations against it. Defendant argues that the amended complaint suffers from the same infirmities as the original complaint.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently

incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], *lv denied* 27 NY3d 909 [2016]).

Contract Claim

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms . . . [there must be] sufficiently definite terms and the parties must express their assent to those terms" (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 439 [1st Dept 2012]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

Contract Interpretation

Generally, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the parties' agreement is their written contract (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]). Put another way, "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

"To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]).

Unjust Enrichment

"[U]njust enrichment is not a catchall cause of action to be used when others fail [but] [i]t is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 937 [2012]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another which, in good conscience, ought to be returned" (*Carriafielo-Diehl & Assoc., Inc. v D & M Elec. Contr., Inc.*, 12 AD3d 478, 479 [2d Dept 2004]). However, "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello,* 18 NY3d at 790; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]). Also "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out the same subject matter" (*Clark-Fitzpatrick, Inc.* at 388; *see also L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]).

Duty of Good Faith

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance . . . [which] embraces a pledge that 'neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'"

(*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *see also ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008], *lv dismissed* 12 NY3d 748 [2009]). However, there is a "well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent that it is consistent with the provisions of the contract . . . [since] the negotiated terms of the contract [are binding]" (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *see also Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]).

Quiet Enjoyment and Constructive Eviction

"[I]n the absence of a constructive eviction, there is no breach of the covenant of quiet enjoyment" (*Board of Mgrs. of the Saratoga Condominium v Shuminer*, 148 AD3d 609, 610 [1st Dept 2017]; *see also Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 542 [1st Dept 2015]). "Constructive or actual eviction requires that 'there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises'" (*Schwartz*, 132 AD3d at 542, quoting *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]; *see also Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 510 [1st Dept 2015]). Conduct is not wrongful if "it was authorized by the lease" (*Carlyle, LLC*, 133 AD3d at 510). "To establish constructive eviction, a tenant need not prove physical expulsion" (*Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [1st Dept 2010]; *cf. Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 221 [1st Dept 2006] ["in order to assert a defense of constructive eviction, the tenant must abandon the premises"]).

***Yellowstone* Injunction**

> "The purpose of a *Yellowstone* injunction, which tolls the period in which a tenant may cure a claimed violation of the lease, is for a tenant to avoid forfeiture after a determination against it has been made on the merits, because the tenant will still have an opportunity to cure . . . [a] necessary linchpin of a *Yellowstone* injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction"

(*Bliss World LLC v 10 West 57th Street Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019] [citations omitted]; *see also 166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]). Moreover, "[o]nce the lease was terminated in accordance with its terms, the court lacked the power to revive it" (*166 Enters. Corp.*, 81 AD3d at 159).

Conversion

General Obligations Law § 7-103, which governs security deposits for rental properties, provides that a tenant's security deposit "shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same" (General Obligations Law § 7-103 [1]). Additionally, a landlord in receipt of a security deposit must deposit the money into a separate, interest-bearing account and notify the tenant in writing of the name and address of the banking organization in which the funds were deposited (General Obligations Law § 7-103 [2], [2-a]). "The statute makes no exception for a mixed commercial/residential building" (*Gihon, LLC v 501 Second St., LLC*, 103 AD3d 840, 841 [2d Dept 2013]). When a landlord fails to give a tenant written notice of the banking institution, then a rebuttable presumption arises that the landlord has commingled a tenant's security deposit with its own funds (*see Dan Klores Assoc. v Abramoff*, 288 AD2d 121, 121 [1st Dept 2001]).

Discussion

Initially, the court notes that, when a party moves for pre-answer dismissal of a complaint under CPLR 3211 (a) or (b), CPLR 3211 (f) operates to extend the moving party's time to serve a responsive pleading "until ten days after service of notice of entry of the order." Service of a pre-answer motion to dismiss not only extends the defendant's time to answer but also the plaintiff's time to amend its complaint as of right (*see Re-Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2d Dept 2013]; *STS Mgt. Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 [2d Dept 1998]; *Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374, 375 [1st Dept 1991]). Moreover, service of an amended complaint supersedes the original (*see CRAFT EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 139 AD3d 638, 638-639 [1st Dept 2016]). As such, in view of plaintiff's service of an amended complaint while the first motion to dismiss was pending, defendant's motion for dismissal of the original complaint is denied as moot.

Turning to the amended complaint, it is well settled that the court must accept plaintiff's allegations as true for the purpose of deciding the motion. However, the court need not accept allegations that are refuted by documentary evidence or mere conclusory assertions (*see Goldman*, 5 NY3d at 571).

As noted above, the court denied plaintiff's motion for a *Yellowstone* injunction related to the 2017 Notice to Cure[5] (October 2017 Hearing tr at 5-7, 9-10), and the denial remains law of the case, which cannot be contravened by a court of coordinate jurisdiction (*see Landis v 383 Realty Corp.*, — AD3d —, 2019 NY Slip Op 05213, *1 [1st Dept 2019]; *Matter of Pettus v Board of Directors*, 169 AD3d 524, 525 [1st Dept 2019], *appeal dismissed* 2019 NY Slip Op 72378, 2019

[5] In opposition to defendant's motion to dismiss the original complaint, plaintiff also sought to withdraw its first cause of action for injunctive relief and its second cause of action for a declaratory judgment (Fromme affirmation dated January 3, 2018, ¶¶ 117, 119).

WL 2440846, 2019 NY LEXIS 1663 [2019]), irrespective of Justice Kenney's determination in the 2018 Order that the predicate notices were improper. Plaintiff has not appealed Justice Sherwood's determination nor has it moved to renew the prior application "based upon new facts not offered on the prior motion" (*see* CPLR 2221 [e] [2]). Thus, an amended complaint in which plaintiff asserts a cause of action for a *Yellowstone* injunction and other injunctive relief is an improper vehicle to challenge the propriety of the 2017 Notice to Cure. As for the 2018 Notice to Cure, this court has already denied plaintiff's application for a *Yellowstone* injunction and this determination remains law of the case (*see Landis*, 2019 NY Slip Op 05213 at *1). Therefore, defendant's motion insofar as it seeks dismissal of the first cause of action for injunctive relief is granted, and the first cause of action is dismissed.

In the second cause of action, plaintiff seeks a declaration that it is not in default, that the 2017 Notice to Cure is defective and that defendant is not entitled to terminate the Lease. CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). Relief is limited to a declaration of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

As applied herein, it appears that there is no justiciable controversy related to the 2017 Notice to Cure, discussed *supra.* Moreover, although Justice Kenney found that the predicate notices that formed the basis for the holdover proceeding were inadequate, her determination did not preclude defendant from serving the 2018 Notice to Cure, which alleged violations of other

Lease provisions. The second cause of action does not seek a declaratory judgment pertaining to the 2018 Notice to Cure, and this court has already denied plaintiff's application for a *Yellowstone* injunction related to that notice. Consequently, defendant's motion for dismissal of the second cause of action for a declaratory judgment must be granted in the absence of a justiciable controversy, and the second cause of action is dismissed.

Plaintiff's claims in the third cause of action and the thirteenth cause of action are based on the Lease and defendant's purported conduct in misusing the security deposit, limiting access to the freight elevator, requiring plaintiff to repair the loading dock, and failing to pay for various improvements to the demised Premises. Plaintiff, though, was contractually obligated to maintain and repair the loading dock, and the Lease expressly governed the use of the security deposit and the use of the freight elevator. Accordingly, the portion of defendant's motion that seeks dismissal of plaintiff's third cause of action for breach of the Lease and the thirteenth cause of action for specific performance of the freight elevator must be granted.

Defendant has also shown that the Lease provided that there would be "no diminution or abatement of the rent" and that alterations to the Premises were at plaintiff's "sole cost and expense" (Lease, Article 102). Although plaintiff complains that defendant or its agents wrongfully interfered with its possession of the demised Premises, and demanded that plaintiff perform certain work within the demised Premises, the court must enforce the parties' agreement and not rewrite its terms (*see Eujoy Realty*, 22 NY3d at 424; *W.W.W. Assoc.*, 77 NY2d at 157). Here, under Article 102, section H, any non-structural alterations to the interior of the Premises required defendant's approval. In addition, under the Lease's provisions, plaintiff could not fail to make rental payments or fail to replenish the security deposit based upon its claims that defendant had not provided proper access to the freight elevator. Conduct that is "authorized by

the [L]ease" is not wrongful and, accordingly, it cannot support a claim for constructive eviction (*Carlyle, LLC*, 133 AD3d at 510). Similarly, a claimed breach of the duty of good faith cannot stand where defendant's actions are "consistent with the provisions of the contract" (*Phoenix Capital*, 51 AD3d at 550).

Finally, to the extent that plaintiff has alleged that defendants' employees yelled at and insulted plaintiff, this claim is insufficient under CPLR 3013, since it does not note the date, time, place or any other details which would give defendant adequate notice of the allegations against it and a plaintiff's complaint must be "*sufficiently particular* to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, to be proved" *(Mid-Hudson Val. Fed. Credit Union v Quartararao & Lois, PLLC*, 155 AD3d 1218, 1220 [3d Dept 2017], *affd* 31 NY3d 1090 [2018], quoting CPLR 3013; *see also Detringo v South Is. Fam. Medical, LLC*, 158 AD3d 609, 609 [2d Dept 2018]). Therefore, the fourth cause of action for breach of the common-law right of quiet enjoyment must be dismissed.

The Lease provisions also permit defendant to use the security deposit when plaintiff fails to make timely rent payments, and require plaintiff to replenish the security deposit. Thus, the sixth cause of action for "estoppel" and the seventh cause of action for "unclean hands" must be dismissed. In any event, "[u]nclean hands . . . is not a cause of action" (*Tri-Star Pictures, Inc. v Leisure Time Prods., B.V.*, 749 F Supp 1243, 1254 [SD NY 1990], *affd* 17 F3d 38 [2d Cir 1994], *cert denied* 513 US 987 [1994]).

As for the fifth cause of action for conversion, the complaint identifies the specific funds that have been withheld, alleges that plaintiff has not been furnished with the requisite written notice as required by statute, and alleges that plaintiff holds a possessory interest in the funds.

Thus, the complaint "adequately alleges a cause of action for conversion in violation of General Obligations Law § 7-103" (*Rubman v Oscuhowski*, 163 AD3d 1471, 1473 [4th Dept 2018]).

Defendant has submitted a copy of the account statement showing that it had a separate interest-bearing account for plaintiff's security deposit. The bank statement from March 2008 establishes that defendant deposited $30,000 into savings account 000002902485594 (the Savings Account), and the amount of the deposit matches the amount of the security deposit set forth in Article 57 of the Lease rider.

Generally, a bank statement may be used to rebut the inference of commingling (*see Urban Soccer Inc. v Royal Wine Corp.*, 53 Misc 3d 448, 461 [Sup Ct, NY County 2016], *affd* 148 AD3d 576 [1st Dept 2017]). Here, the September 2017 statement for the Savings Account reflects a balance of $28,787.27 until September 7, 2017, when a transfer of $28,678.27 was made to "CHK Xxxxx2421." Defendant has not explained why the amount in the Savings Account was less than $30,000 prior to the September 7, 2017 transfer. Additionally, the 2017 Notice to Cure indicated that defendant had drawn down the full amount of the security deposit, or $57,356.54, but the September 2017 statement did not reflect a balance of $57,356.54 in the Savings Account before the transfer on September 7, 2017 was made. Moreover, the transfer of $28,678.27 left a balance of $109.05 in that account, inclusive of interest, even though defendant claimed it withdrew the full amount of the security deposit. Thus, the documents supplied by defendant do not conclusively demonstrate that plaintiff does not have a cause of action for conversion of the security deposit. Furthermore, while Barrett's affidavit does not constitute documentary evidence for purposes of a motion brought under CPLR 3211 (a) (1) (*see Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), the affidavit is silent as to when defendant notified plaintiff in writing of the

identity of the banking institution where it had deposited the monies or the amounts it held in trust. Accordingly, dismissal of the fifth cause of action is denied (*see LeRoy v Sayers*, 217 AD2d 63, 68 [1st Dept 1995] [concluding that the defendant had not established that "the account did not also contain nontrust funds . . . [n]or does the statement inform us as to how defendant made use of the account during the period in issue"]).

The eighth cause of action for breach of contract, the ninth cause of action for quantum meruit, and the tenth cause of action for unjust enrichment all pertain to the "various alteration and repair work (the 'Work')" that was not required by the Lease (amended complaint, ¶¶ 222-224). It is well settled that a plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (*Hochman v LaRea*, 14 AD3d 653, 654-655 [2d Dept 2005]). The term "Work" insofar as it encompasses the work performed on the loading dock cannot form the premise of a contract claim when plaintiff was expressly obligated under Article 104 in the Lease rider to maintain and repair it. Similarly, plaintiff was contractually obligated to pay Leardon Boiler Company. To the extent that plaintiff is seeking relief for work performed on the sixth floor, this work is not within the scope of the Lease, since it does not relate to the demised Premises, but rather to the apartment subleased to Birch. Moreover, the extracontractual work was performed for Birch's (or Barrett's) benefit, not defendant. Therefore, the eighth, ninth and tenth causes of action predicated upon the loading dock work, the sixth-floor renovation, and the boiler must be dismissed.

Plaintiff, however, also alleges that it paid $29,587.98 to construct an elevator pit for the freight elevator. The First Amendment to Lease states that plaintiff was to pay only $11,050 for an extension of the elevator shaft and does not mention any work to the elevator pit, which Birch

claims was performed at defendant's request. Defendant has not explained this discrepancy. In addition, defendant has not produced any documentary evidence to refute the allegations that plaintiff has rebuilt window openings and lintels at the Building, installed and fabricated wrought iron gates in the alley, and filled an unsafe gap at the lobby entrance at defendant's request, and that plaintiff was not paid. While Barrett avers that defendant has paid plaintiff for "discrete jobs" at the Building, Barrett's affidavit is an improper submission on a motion to dismiss (*see Lowenstern*, 143 AD3d at 562). In any event, defendant has not furnished the court with any documents describing these discrete jobs, if those jobs matched the description of the extracontractual work plaintiff is alleged to have performed, or if any of the extracontractual work described in Birch's affidavits has already been paid to conclusively establish that plaintiff has no cause of action. Thus, the part of defendant's motion seeking to dismiss the eighth, ninth and tenth causes of action for this extracontractual work must be denied.

The Lease provision regarding attorneys' fees does not give plaintiff the right to such a claim. Because in the absence of a contractual or statutory right (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]), attorneys' fees are not a cognizable claim, the portion of defendant's motion that seeks dismissal of the eleventh cause of action must be granted. The twelfth cause of action for pre-judgment interest must also be dismissed, since such a claim is not a separate cause of action, but rather interest is recoverable on "a sum awarded" (CPLR 5001 [a]).

In view of the foregoing, the court need not discuss the alternative relief requested on the motion as the averments in Birch's two affidavits sufficiently amplified and supplemented the allegations in the complaint (*see Rovello v Orofino Realty, LLC*, 40 NY2d 633, 635-636 [1976]).

Order

It is, therefore,

ORDERED that defendant's motion to dismiss plaintiff's complaint (motion sequence no. 002) is denied as moot, in light of plaintiff's service of an amended complaint; and it is further

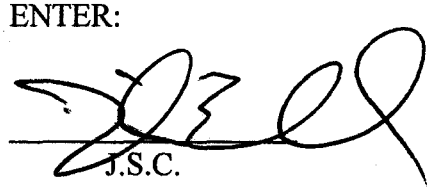
ORDERED that defendant's motion to dismiss the amended complaint (motion sequence no. 004) is granted to the extent of dismissing the first, second, third, fourth, sixth, seventh, eleventh, twelfth and thirteenth causes of action in their entirety and so much of the eighth, ninth and tenth causes of action related to the loading dock, the sixth floor, and the boiler, and the first, second, third, fourth, sixth, seventh, eleventh, twelfth and thirteenth causes of action in the complaint and so much of the eighth, ninth and tenth causes of action related to the loading dock, the sixth floor, and the boiler are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 58, Room 574, 111 Centre Street, New York, New York, on August 14, 2019, at 9:30 a.m.

Dated: July 16, 2019

ENTER:



HON. DAVID B. COHEN
J.S.C.