| **G Family Holdings, LLC v Washington-W. 11th St. Owners Corp.** |
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| 2019 NY Slip Op 33692(U) |
| December 19, 2019 |
| Supreme Court, New York County |
| Docket Number: 158636/2014 |
| Judge: Kelly O'Neill Levy |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. KELLY O'NEILL LEVY **PART** IAS MOTION 19

*Justice*

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**INDEX NO.** 158636/2014

G FAMILY HOLDINGS, LLC, SCHATZI CORP. D/B/A WALLSE

**MOTION DATE** 09/04/2019

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

WASHINGTON-WEST 11TH ST. OWNERS CORP.,

**DECISION + ORDER ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff G Family Holdings, LLC ("GFH") is a lessee, and plaintiff Shatzi Corp. d/b/a Wallse ("Shatzi") is a sub-lessee, of defendant-lessor Washington-West 11th St. Owners' Corp. This action, commenced on September 10, 2014, relates to allegations that defendant maintained scaffolding at the subject location for too long, leading to lost profits and a breach of the lease between defendant and GFH. Plaintiffs also seek reimbursement for certain repairs. Note of Issue was filed on November 30, 2018. Defendant timely moves for summary judgment pursuant to CPLR § 3212. Plaintiffs oppose.

"The drastic remedy of summary judgment may only be granted where, viewing the facts in the light most favorable to the non-movant, 'the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact,"' and the non-moving party has subsequently 'fail[ed] "to establish the existence of material issues of fact which require a trial of the action"'…Summary judgment disposition is inappropriate where varying inferences

may be drawn, because in those cases it is for the factfinder to weigh the evidence and resolve any issues necessary to a final conclusion." *Dormitory Authority v. Samson Constr. Co.*, 30 N.Y.3d 704, 717 (2018) (citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012)).

Plaintiffs' first and fourth causes of action stem from an alleged breach of contract. "[T]he elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages." *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

Shatzi, as a sub-lessee, does not have a valid contract with defendant and thus cannot maintain a breach of contract claim against defendant as a matter of law. *Ivan Mogull Music Corp. v. Madison-59th Street Corp., et al.*, 162 A.D.2d 336 (1st Dep't 1990) ("Absent privity of contract between plaintiff, a sublessee, and defendants…defendants are entitled to summary judgment dismissing the first cause of action for breach of contract."). Shatzi argues that a "Liquidation Agreement" signed by Shatzi and GFH enables Shatzi to maintain a breach of contract claim despite the lack of a contract. "Liquidation Agreements" have been accepted in certain construction and general contractor cases. *See, e.g., North Moore St. Developers, LLC v. Meltzer/Mandl Architects, P.C.*, 799 N.Y.S.2d 485 (1st Dep't 2005). However, the court could find no application of this practice in the long history of sub-lessee/lessee/lessor actions, nor have plaintiffs identified any such application. Accordingly, Shatzi's first and fourth actions relating to breach of contract are dismissed as there is no contract between Shatzi and defendant.

Unlike Shatzi, GFH's claims are based on a valid contract with defendant—the subject lease. However, GFH does not allege the critical element of damages. *See, e.g., Morris*, 46 A.D.3d at 479. The alleged damages in this case, including lost profits and costs of repairs, were all incurred by Shatzi—not GFH. GFH had no physical presence on the property and continued

receiving rent per the terms of the agreement with Shatzi. The lack of alleged damages to GFH critically differentiates this case from cases where the alleged breach by the lessor was coupled with alleged damages to the lessee. *See, e.g., Hooters of Manhattan, Ltd. v. 211 West 56 Assocs.*, 2007 WL 2175589 (Sup. Ct. N.Y. Cty. 2007). Just as Shatzi cannot assume the privity that only GFH possesses with defendant, so too GFH cannot assume the damages that only Shatzi has allegedly suffered.[1] As neither plaintiff can sustain the first and fourth causes of action for breach of contract as a matter of law, the motion is granted to the extent of dismissing the first and fourth causes of actions.

Plaintiffs' second cause of action appears to assert a tort action that defendant owes and breached a "duty to Plaintiffs to execute and perform the construction work at the Building and to cooperate and make timely approvals of alterations to the Demised Premises with reasonable care and reasonable diligence." To prevail on such an action, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 (1985). It is well-settled law that "[t]he obligation of a landlord in any case to repair, or rebuild demised premises, rests solely on express covenant or undertaking. Without an express covenant to that effect by the lessor, he is neither bound to repair the demised premises himself nor to pay for repairs made by the tenant." *Witty v. Matthews*, 52 N.Y. 512 (1873). The subject lease binds defendant to "maintain and repair the public portions of the building," but this is a duty owed to GFH as lessee—not Shatzi as sub-lessee. "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v. City*

[1] This does not, as plaintiffs allege, result in immunity for the landlord. Sub-lessee is entitled to sue the lessee and the lessee is entitled to sue the lessor. This arrangement has facilitated sub-lessee/lessee/lessor litigation since its inception.

*of New York*, 95 N.Y.2d 95, 100 (2000). As Shatzi has no covenant with defendant, defendant owes no duty to Shatzi to repair. While lessors can be liable to sub-lessees for negligence under certain circumstances, the only negligence alleged here is negligently delaying execution of a duty that defendant simply does not owe to Shatzi.

GFH, by contrast, is owed a duty but cannot establish a proximate injury from the alleged breach as there are no alleged damages to GFH. Furthermore, GFH cannot assert a tort claim when it is "not separate and apart from its claim for breach of contract [and] predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract." *OP Solutions, Inc. v. Crowell & Morning, LLP*, 72 A.D.3d 622 (1st Dep't 2010); *see also Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382 (1987) ("It is well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated."). As neither plaintiff can sustain the second cause of action as a matter of law, the motion is granted to the extent of dismissing the second cause of action.

Plaintiffs' third cause of action is also vaguely worded but appears to assert a private nuisance action. "[T]he elements of…a private nuisance…are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Indus. V. Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 570 (1977). It is a question of fact as to whether the alleged interference was substantial, unreasonable, and interfered with Shatzi's use and enjoyment of the land. As for intention, "[a]n invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct." *Id.* at 571

(citations omitted). Plaintiffs have established that there is a question of fact as to whether defendant knew that the delay that led to the scaffolding remaining was resulting in an invasion of Shatzi's use and enjoyment of the land. Accordingly, the motion is denied to the extent that it seeks dismissal of Plaintiffs' third cause of action for private nuisance. However, to the extent that Plaintiffs' third cause of action is for breach of the covenant of quiet enjoyment, it is dismissed as a matter of law.[2]

Plaintiffs' fifth cause of action is for unjust enrichment relating to certain repairs that were performed by Shatzi. "In order to sustain an unjust enrichment claim, '[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *E.J. Brooks Co. v. Cambridge Sec. Seals*, 31 N.Y.3d 441 (2018) (citing *Mandarin Trading Ltd. v. Wildenstein*, 884 N.Y.S.2d 47, 53 (1st Dep't 2009)). Questions of fact exist as to the circumstances surrounding the repairs and the need for them and so a determination of the equity of the repairs at this time would be premature. Accordingly, the court declines to dismiss Shatzi's claim for unjust enrichment. However, the motion is granted to the extent that GFH's claims of unjust enrichment can be dismissed as no "expense" is alleged and so the cause fails as a matter of law.

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[2] "To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. There must be an actual ouster, either total or partial, of it the eviction is constructive, there must have been an abandonment of the premises by the tenant. Plaintiffs did not abandon the premises, and are claiming only to have been 'evicted' from the terrace area, due to exterior renovations…" *Richard Jackson v. Westminster House Owners, Inc.*, 24 A.D.3d 249, 249 (1st Dep't 2005); *see also Wright v. Catcendix Corp.*, 248 A.D.2d 186 (1st Dep't 1998) ("IAS Court properly determined that plaintiffs, as subtenants, have no cause of action against defendant cooperative corporation for…breach of lease agreement, breach of covenant of quiet enjoyment, or breach of warranty of habitability since, between them and the cooperative, there was neither a cooperative agreement nor landlord-tenant relationship."). Here there is no abandonment, no ouster, and no contract between Shatzi and defendant.

Defendant also moves for summary judgment on the counterclaims presented. The counterclaims which relate to the aforementioned structural repairs, as well as installation of an air conditioner, involve considerable disputed questions of fact. Similarly, the counterclaims relating to alleged interference with a hatch and with the quiet enjoyment of the property also involve considerable disputed questions of fact. Summary judgment is accordingly denied for all of defendant's counterclaims as there exist questions of fact.

Accordingly, it is hereby:

**ORDERED,** that the motion is granted to the extent that plaintiffs' first, second and fourth causes of action are dismissed; and it is further

**ORDERED,** that the motion is granted to the extent that plaintiffs' third cause of action is limited to a claim for private nuisance; and it is further

**ORDERED,** that the motion is granted to the extent that GFH's fifth cause of action is dismissed; and it is further

**ORDERED,** that the motion is otherwise denied.

This constitutes the decision and order of the court.

12/19/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |