SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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INDEX NO. 652724/2015

FIFTH AVE. CENTER, LLC,

Plaintiff,

- v -

DRYLAND PROPERTIES, LLC,

Defendant.

MOTION DATE 10/25/2019, 10/25/2019, 10/25/2019, 10/25/2019, 10/25/2019

MOTION SEQ. NO. 006 007 008 009

DECISION + ORDER ON MOTION

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DRYLAND PROPERTIES, LLC

Plaintiff,

-against-

RHINO CO FITNESS LLC, REEBOK INTERNATIONAL LTD, MANHATTAN MEDICAL DEVELOPMENT LLC

Defendant.

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Third-Party
Index No. 595365/2016

The following e-filed documents, listed by NYSCEF document number (Motion 006) 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 324, 328, 329, 330, 331, 332, 333, 356, 357, 358, 359, 360, 361, 362, 363

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 324, 328, 329, 330, 331, 332, 333, 356, 357, 358, 359, 360, 361, 362, 363

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 203, 204, 205, 206, 207, 208, 209, 210, 211, 325, 334, 335, 336, 337, 338, 349, 352

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236,

237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 326, 339, 340, 341, 342, 343, 350, 353, 354, 355

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 327, 344, 345, 346, 347, 348, 351, 364

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, and the memorandum decision below, it is

ORDERED that the motion of plaintiff Fifth Ave. Center LLC for partial summary judgment on the issue of defendant Dryland Properties LLC's liability on the first, second, fifth, ninth, tenth, eleventh, thirteenth, fourteenth, and fifteenth causes of action (motion sequence no. 006) is denied; and it is further

ORDERED that the motion of third-party defendant Reebok International Ltd. for summary judgment dismissing the third-party complaint (motion sequence no. 007) is denied; and it is further

ORDERED that the part of the motion of defendant Dryland Properties LLC for summary judgment dismissing the complaint (motion sequence no. 008) is granted to the extent of dismissing the first, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action and the first, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the part of the motion of defendant Dryland Properties LLC for summary judgment on its first counterclaim against plaintiff Fifth Ave. Center LLC and on its fourth cause of action against third-party defendant Manhattan Medical Development LLC in the third-party complaint (motion sequence no. 008) is granted with regard to liability only; and it is further

ORDERED that the motion of third-party defendant Rhino Fitness Co LLC for summary judgment dismissing the third-party complaint (motion sequence no. 009) is denied.

1/2/2020
DATE

HON. CAROL R. EDMEAD J.S.C.

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

This action arises out of a landlord/tenant dispute involving a commercial lease. In motion sequence no. 006, plaintiff Fifth Ave. Center, LLC (FAC) moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendant/third-party plaintiff Dryland Properties, Inc.'s (Dryland) liability on the first, second, fifth, ninth, tenth, eleventh, thirteenth, fourteenth, and fifteenth causes of action in the complaint. In motion sequence no. 008, Dryland moves for summary judgment dismissing the complaint and for summary judgment on its first counterclaim against FAC and its fourth cause of action against third-party defendant Manhattan Medical Development, LLC (MMD). In motion sequence no. 007, third-party defendant Reebok International Ltd. (Reebok) moves for summary judgment dismissing Dryland's claims for indemnification. In motion sequence no. 009, third-party defendant Rhino Co Fitness LLC (Rhino) moves separately and joins Reebok's application for summary judgment dismissing the third-party complaint. Motion sequence nos. 006, 007, 008 and 009 are consolidated for disposition herein.

BACKGROUND

Familiarity with the court's prior decisions in this action is presumed. The background relevant to these motions is as follows.

A. The Lease

Dryland is the owner of several units within the condominium building located at 420 Fifth Avenue, New York, New York (the Building) (New York St Cts Elec Filing [NYSCEF] Doc No. 310, Lisa M. Solomon [Solomon] affirmation, exhibit T [complaint], ¶ 2). MMD, as tenant, and Dryland, as owner and landlord, entered into a 15-year commercial lease dated October 24, 2011 (the Lease) for unit nos. 11 and 12 and a portion of unit no. 10, all located on Lower Level 2, or the subcellar, of the Building (the Premises), for use as a medical office (NYSCEF Doc No. 265,

Solomon affirmation, exhibit A [the Lease] at 2-3). Nonparty Florida Radiation Oncology Group (FROG) had formed MMD to develop and run a private radiation oncology facility at the Premises (the Project) (NYSCEF Doc No. 222, Brian W. Shaw [Shaw] affirmation, exhibit G [Geoffrey Shotwell (Shotwell) tr] at 11 and 19). FAC's parent company, nonparty Integrated Oncology Network Holdings LLC (ION), acting through a subsidiary, had invested in an entity that had partnered with MMD on the Project (NYSCEF Doc No. 223, Shaw affirmation, exhibit H [Jeffrey Goffman (Goffman) tr] at 20-22).

According to the Lease, the Project required approval from New York State and City agencies, and MMD agreed to pursue the requisite approvals within the first five months after the lease term commenced (NYSCEF Doc No. 265 at 3). Section 4.5 defined this five-month period as the "Due Diligence Period" (the Due Diligence Period), and section 4.3 defined the lease commencement date (the Lease Commencement Date) as the date the document was executed (*id.* at 3). Section 4.5 allowed MMD to terminate the Lease within five months of the Lease Commencement Date or during the Due Diligence Period if it had not received the requisite approvals for the Project (*id.* at 4). FROG retained Geoffrey Shotwell (Shotwell) as its construction consultant (NYSCEF Doc No. 222 at 39-40).

Under section 4.6, MMD would not commence paying monthly rent until seven months after it received the last permit or approval on the Project (the Free Rent Period), but no later than one year after the Lease Commencement Date (NYSCEF Doc No. 265 at 4). In addition to paying fixed monthly rent, MMD agreed to pay additional rent defined as "Tenant's Proportionate Share … by which real estate taxes allocable to Landlord's Property for each tax year" (*id.* at 5 [section 6.1]) and "Tenant's Proportionate Share of the increases in the Operating Expense over the Base Operating Expense" (*id.* at 8 [section 7.3]).

MMD agreed to furnish Dryland with a $150,000 security deposit (the Security Deposit) and Dryland agreed "to keep [it] ... separate from its general funds in an interest bearing deposit account" (NYSCEF Doc No. 265 at 4 [section 4.9]). In the event FAC failed to remit rent or additional rent, Dryland could apply the Security Deposit to "the extent necessary to make good any such noticed arrearages of rent or other sums of money due," provided Dryland first served MMD with written notice and MMD failed to effect a cure within the time prescribed (*id.*). The Lease also contains a provision titled "Quiet Enjoyment," which reads:

> "18.6 Landlord agrees that upon Tenant's paying the rent and performing and observing the agreements and conditions on its part to be performed and observed hereunder, Tenant shall and may peaceably and quietly have, hold and enjoy the Demised Premises and all rights of Tenant hereunder during the term of this Lease"

(NYSCEF Doc No. 265 at 19).

An addendum to the Lease executed April 17, 2012 states that the Due Diligence Period expired on March 24, 2012, that MMD and Dryland agreed to a second five-month Due Diligence Period, and that both agreed to reduce the Free Rent Period to six months (NYSCEF Doc No. 265 at 32). A First Lease Modification Agreement dated November 26, 2012 further extended the Due Diligence Period to January 12, 2013, but otherwise did not alter MMD's right to terminate the Lease at the end of the Due Diligence Period (*id.* at 34).

In October 2013, MMD, with Dryland's consent, assigned the Lease to FAC, and FAC agreed to assume MMD's duties and obligations (the Assignment) (NYSCEF Doc No. 265 at 40). The Assignment contained a disclaimer provision stating that "[t]he Lease is ... accepted by ... [FAC] AS IS, WHERE IS, without any representations or warranties of whatsoever nature, express or implied" (*id.*). A Second Lease Modification Agreement executed in 2013 between FAC and

Dryland modified and replaced section 4.9 of the Lease by increasing the Security Deposit from $150,000 to $320,000 (*id.* at 37).

In June 2014, FAC and nonparties NYU Langone Medical School of Medicine and NYU Hospitals Center (together, NYU) executed a letter of intent in which FAC proposed to develop and sublease the Premises to NYU (NYSCEF Doc No. 242, Shaw affirmation, exhibit AA at 1).

B. The Rhino Lease

Rhino, as tenant, and Dryland, as owner and landlord, entered into a 10-year lease dated January 23, 2012 (the Rhino Lease), for a unit located in the Building's cellar directly above the Premises for use as a fitness studio (NYSCEF Doc No. 231, Shaw affirmation, exhibit P at 2-3 and 24 and 26). Rhino operated the "Reebok CrossFit Fifth Ave." gym within its demised premises (the Gym) (NYSCEF Doc No. 310, ¶¶ 23-24; NYSCEF Doc No. 219, Shaw affirmation, exhibit D [Rhino answer], ¶ 3). Significantly, Schedule B, paragraph 20, of the Rhino Lease states:

> "Tenant will be obligated to sound proof the 'gym floor area' of the Demised Premises at the Tenant's sole cost.
> a. Upon completion of the sound proof the tenant space below the Demised Premises will not exceed the sound levels normally associated with retail space.
> b. If the tenant fails to properly sound proof the demised space the Landlord has the right to provide and install a sound proofing system that meets the above stated sound levels at the sole expense of the Tenant"

(NYSCEF Doc No. 231 at 29-30). Additionally, the self-help provision in article 14.1 states, in pertinent part:

> "If Tenant shall default in the performance or observance of any agreement or condition in this lease contained on its part to be performed or observed, other than an obligation to pay money, and shall not cure such default within the applicable cure period ... Landlord may, at its option ... at any time thereafter cure such default for the account of Tenant ... Landlord may cure any such default as aforesaid prior to the expiration of said thirty (30) days period, but after notice to Tenant, if the curing of such default prior

> to the expiration of said thirty (30) day period is reasonably necessary to protect the real estate or Landlord's interest therein or to prevent injury or damage to persons or property"

(NYSCEF Doc No. 231 at 13). Reebok executed a guaranty in connection with the Rhino Lease (NYSCEF Doc No. 232, Shaw affirmation, exhibit P at 1).

C. The Present Dispute

Although the first permits were issued in May 2013 (NYSCEF Doc No. 222 at 81), FAC claims it was unable to move forward with the Project because of the activities taking place within the Gym. FAC alleges that the "CrossFit" exercise regimen involves "the purposeful and repeated dropping of free weights and weight equipment as part of both individual exercise and group classes ... [encourages] customers to fling heavy free weights into the air and then ... allow the weights to hit the floor" (NYSCEF Doc No. 310, ¶ 24). FAC further alleges that these activities created "a constant array of disturbances, including excessive vibrations, massive booms, noxious noise, and an adverse effect on hangers supporting pipes and conduits" (*id.*, ¶ 25).

Goffman, FAC's chief executive officer, avers in an affidavit that the noise and vibration issues began in early 2012, while the Project was in the early planning stage (NYSCEF Doc No. 264, Goffman aff, ¶ 15). Although Shotwell testified that he could not recall when he first heard or felt the noise or vibrations during his site visits, he described hearing "[a] thud. It would be akin to taking a 200-pound weight from overhead and dropping it on the floor" (NYSCEF Doc No. 222 at 330). The "thudding" was "[i]ntermittent" (*id.* at 35). Shotwell raised these issues with Peter Zimmar (Zimmar) of Heritage Realty Services, LLC (Heritage), Dryland's managing agent, and stressed that Dryland had to take measures to abate the disturbances emanating from the Gym (*id.*, ¶ 16).

Goffman states that "Dryland gave repeated assurances that it would investigate and abate or cause to be abated the noxious noise and vibrations caused by the Rhino CrossFit gym" (*id.*, ¶ 17). By email dated July 11, 2012, Zimmar advised Shotwell that "Reebok/Crossfit are exploring appropriate sound attenuation methods consistent with first class office environments" (NYSCEF Doc No. 270, Goffman aff, exhibit F at 2).

Grant Ingersoll (Ingersoll), ION's president, testified that he personally heard and felt the noise and vibrations[1] (NYSCEF Doc No. 224, Shaw affirmation, exhibit I [Ingersoll tr] at 29). Ingersoll explained, "[i]t was like that every time they dropped a significant amount of weight. You would look up in the exposed rafters and pipes shake and dust fall down, and it was extraordinarily loud. It was like a bomb going off upstairs" (*id.* at 29). He stated that the noise and vibrations "became untenable for us" (*id.* at 31).

Others complained about the noise, vibrations and odors emanating from the Gym as well, including the Building's property manager, Jones Lang Lasalle (JLS), the Building's cleaning contractor and a contractor for another Building tenant (NYSCEF Doc No. 274, Goffman aff, exhibit J at 1-2). By email dated August 22, 2012, Zimmar informed Nate Forster (Forster) of Rhino of these complaints, and warned it was Rhino's "responsibility not to interfere with the quiet enjoyment of other tenants" (*id.* at 1). In response, Forster stated that he believed the noise from the Gym was "[a]t retail noise level" as per its lease (*id.*). Shotwell raised the "potential noise and vibration issue" again in a July 24, 2012 email to Zimmar (NYSCEF Doc No. 271, Goffman aff, exhibit G at 1).

[1] Goffman testified that FAC assumed the Lease from MMD to satisfy a New York state requirement regulating the practice of corporate medicine (NYSCEF Doc No. 223 at 22). The Assignment was also the result of a negotiated settlement resolving a dispute between ION, FROG and their affiliated entities.

Goffman testified that the vibrations would likely interrupt the delivery of radiation treatment to a cancer patient (NYSCEF Doc No. 223 at 37). Ingersoll explained the Project required the installation of a machine to determine the precise location of a patient's tumor, and a second machine to pinpoint and irradiate the isocenter of that tumor (NYSCEF Doc No. 224 at 32-33). Any vibration would cause the specialist to recalibrate the isocenter (*id.* at 36). Ingersoll further explained that "when you are treating a tumor in someone's prostate and the chance of a weight dropping and you miss by a little bit, can be catastrophic" (*id.* at 31). Goffman also testified, "[i]t was a significant vibration and one that would prohibit us from proceeding with the build-out that was contemplated because we deliver radiation to cancer patients that are dying, and that delivery of treatment is within 1 millimeter of precision. Any vibration like that is going to throw off the ability to treat those patients precisely" (NYSCEF Doc No. 223 at 37).

In December 2012, Rhino installed a Kinetics noise control system on top of the floor in the Gym (NYSCEF Doc No. 218, Shaw affirmation, exhibit C [third-party complaint], ¶ 42). Dryland credited Rhino $50,000 and paid it $150,000 for the system (*id.*, ¶ 43).

In January 2013, FAC, Dryland and Heritage discussed possible measures to remediate the noise and vibrations. Ingersoll wrote the following in an email to Zimmar dated January 15, 2013:

> "The biggest issue for us right now is the noise, but I believe working with all parties that we will come to an arrangement. Issue 1: Noise from CrossFit [is] not currently acceptable. All parties agree that the noise will be abated to allow MMD a level of quiet enjoyment. (Note: Nate from CrossFit called me…he said that the cost would be about $250k to outfit his gym with a raised floor.) Heritage, CrossFit and MMD all agree that we will try less expensive options, including no weights thrown during treatment hours, before going to the raised floor. However, ultimately, MMD will need to have quiet enjoyment of its space during business hours, even if the floor must be built"

(NYSCEF Doc No. 273, Goffman aff, exhibit I at 1). On May 24, 2013, Dryland served Rhino with a 30-day notice to cure "the noise and vibration resulting from the repeated dropping of weights" (NYSCEF Doc No. 218, ¶ 45). In response, Rhino allegedly agreed to install a new floor system, but the system was not installed (*id.*, ¶¶ 47 and 53).

Meanwhile, complaints from JLS of shaking or falling lights, falling fireproofing material, and loosened or falling rods, hangers or sprinkler pipes from the vibrations continued through 2013 and 2014 (NYSCEF Doc No. 275, Goffman aff, exhibit K at 1; NYSCEF Doc No. 279, Goffman aff, exhibit O at 4-5; NYSCEF Doc No. 280, Goffman aff, exhibit P at 1; NYSCEF Doc No. 281, Goffman aff, exhibit Q at 1; NYSCEF Doc No. 282, Goffman aff, exhibit R at 1; NYSCEF Doc No. 283, Goffman aff, exhibit T at 1). None of the written complaints were from FAC.

In or around March 2014, FAC and Rhino discussed whether Rhino would take over FAC's Lease. In response to Zimmar's request for information on the new floor system, Forster wrote, "I am in the process of trying to get the down stairs space from the medical tenant … The floors are ready to install but I cannot do both. It's either one or the other … If I can't get down stairs I'll proceed with the floors" (NYSCEF Doc No. 280, Goffman aff, exhibit P at 1).

Toward the end of 2014, NYU withdrew from the Project (NYSCEF Doc No. 264, ¶ 40). In January 2015, FAC relieved Shotwell of his services and terminated all Project contracts (*id.*, ¶ 44). Thereafter, FAC sought to assign its Lease to Rhino or sublet the Premises (*id.*, ¶¶ 40-41). In March 2015, a broker advised FAC that the Premises was more suitable for use as a storage space because of the "loud banging coming from the floor above caused by Crossfit's activities" (NYSCEF Doc No. 288, Goffman aff, exhibit X at 2).

Beginning February 1, 2015, FAC ceased paying rent (NYSCEF Doc No. 213, George Constantin [Constantin] aff, ¶ 14). By letter dated February 23, 2015, FAC's counsel requested

that Dryland advise him of the "specific steps that Dryland ... have taken and will take to cure and abate" the noise and vibration nuisance (NYSCEF Doc No. 291, Solomon affirmation, exhibit A at 1). In response, Dryland's counsel stated that Dryland could not act without adequate proof of the nature and frequency of the alleged nuisance, details of which were lacking in FAC's February 23, 2015 letter (NYSCEF Doc No. 292, Solomon affirmation, exhibit B at 1). FAC's counsel disputed this contention, writing that Dryland had conducted tests for the alleged nuisance (NYSCEF Doc No. 293, Solomon affirmation, exhibit C at 1).

FAC subsequently served Dryland with a notice of landlord's default dated May 4, 2015, in which it expressed that it has been "unable to use the subject subcellar space for the intended Medical Center/Oncology/Radiology occupancy due to the noxious noise and vibrations" (NYSCEF Doc No. 296, Solomon affirmation, exhibit F at 2). FAC explained that Dryland failed to abate the nuisance, and that it had been unable to market the Premises to prospective occupants (*id.* at 2). The notice read, in part, that Dryland had "materially defaulted in its covenant and agreement with Tenant that Tenant may peaceably and quietly enjoy the Premises" (*id.* at 3). FAC served Dryland with a notice dated July 16, 2015 terminating the Lease (NYSCEF Doc No. 301, Solomon affirmation, exhibit K at 1), and demanded the return of its Security Deposit (NYSCEF Doc No. 302, Solomon affirmation, exhibit L at 1). In response, Dryland rejected FAC's termination notice because "no term of the lease allows your client to terminate [it]" and stated that FAC had been evicted from the Premises on June 16, 2015 (NYSCEF Doc No. 303, Solomon affirmation, exhibit M at 1).

According to a five-day notice dated March 9, 2015, Dryland had alleged that MMD and FAC owed $62,538.19 in rent and additional rent[2] (NYSCEF Doc No. 258, Shaw affirmation,

[2] Section 13.1 of the Lease provides for a 10-day period after receipt of a notice of default from Dryland during which FAC may cure a default in the payment of rent (NYSCEF Doc No. at 13).

exhibit QQ at 1). An affidavit of conspicuous service sworn to April 30, 2015 reflects that attempts at service of the petition upon MMD and FAC were made at the Premises on April 28 and April 29, 2015 before Dryland's process server affixed the notice to the entrance door of the Premises (; NYSCEF Doc No. 298, Solomon affirmation, exhibit H at 1). The process server also sent the documents by regular and certified mail to MMD and FAC at the Premises and to two Florida addresses (*id.*). Dryland then commenced a summary proceeding against MMD and FAC for non-payment of rent titled *Dryland Properties, LLC v Manhattan Med. Dev., LLC*, Civ Ct, NY County, index No. 62982/2015 (the L&T Action) (NYSCEF Doc No. 297, Solomon affirmation, exhibit G at 1; NYSCEF Doc No. 298 at 1). Dryland obtained a judgment of possession on May 19, 2015 on default, and a warrant of eviction was issued on May 21, 2015 (NYSCEF Doc No. 248 at 1-2). FAC alleges that it had no knowledge of the eviction (NYSCEF Doc No. 304, Solomon affirmation, exhibit N at 1).

In 2015, Dryland sued Rhino and Reebok for the noise and vibration disturbances (NYSCEF Doc No. 264, ¶ 30). The summons and complaint in the action, of which the court takes judicial notice (*see Curry v Hundreds of Hats, Inc.*, 146 AD3d 593, 593-594 [1st Dept 2017]), referred to a report prepared by Shen Milsom & Wilke (SMW), an acoustical engineering firm, describing the results of a series of tests conducted in July 2012 and January 2013 in the subcellar (NYSCEF Doc No. 1, complaint, in *Dryland Properties LLC v Rhino Co Fitness LLC*, Sup Ct, NY County, index No. 152819/2015, ¶¶ 23-24). In its complaint, Dryland alleged that SMW had confirmed the background ambient noise in the subcellar far exceeded what was permissible under the Administrative Code of the City of New York (*id.*, ¶¶ 25-31), and found that significant structural vibrations had caused pipes and anchors to dislodge from the subcellar slab (*id.*, ¶¶ 32-

33). Dryland, Rhino and Reebok have discontinued the action (NYSCEF Doc No. 42, stipulation of discontinuance, in *Dryland Properties LLC*).

D. The Present Action

FAC commenced this action against Dryland on August 5, 2015 by filing a summons and complaint. The second amended verified complaint pleads claims for: (1) private nuisance; (2) breach of section 7.2 of the Lease; (3) breach of sections 1.2 and 22.1 of the Lease; (4) breach of section 18.6 of the Lease; (5) a judgment declaring that FAC was constructively evicted from the Premises; (6) breach of sections 20.1 and 20.2 of the Lease; (7) rent overcharge; (8) breach of sections 6.3 and 7.5 of the Lease; (9) fraud; (10) breach of the implied covenant of good faith; (11) return of the Security Deposit; (12) breach of section 1.2 of the Lease; (13) a judgment declaring that the judgment of possession entered in the L&T Action is a nullity; (14) conversion; (15) breach of fiduciary duty; and (16) a violation of General Obligations Law § 7-103. The seventh cause of action for an alleged overcharge of FAC's proportionate share of the Building's real estate taxes and operating expense escalations has been dismissed (*see Fifth Ave. Ctr., LLC v Dryland Props., LLC*, 2016 NY Slip Op 30290[U], *16 [Sup Ct, NY County 2016], *revd on other grounds* 149 AD3d 445 [1st Dept 2017]). The sixteenth cause of action asserting a violation of General Obligations Law § 7-103 has also been dismissed (*see Fifth Ave. Ctr., LLC v Dryland Props., LLC*, 2019 NY Slip Op 31113[U], *13 [Sup Ct, NY County 2019]).

In its answer, Dryland interposed 18 affirmative defenses and two counterclaims for breach of the Lease and for recovery of its attorneys' fees. In the first counterclaim, Dryland alleges that FAC breached the Lease provision requiring it to pay rent, additional rent or liquidated damages through the expiration of the Lease term, and seeks damages of not less than $376,568.06 (NYSCEF Doc No. 217, Shaw affirmation, exhibit B at ¶¶ 72 and 78).

Dryland also commenced a third-party action against Rhino, Reebok and MMD, largely repeating the same allegations from the earlier action against Rhino and Reebok. Dryland acknowledged that Rhino had installed a Kinetics noise control system, but the system did not "noticeably abate the noise and vibration" (NYSCEF Doc No. 238, Shaw affirmation, exhibit C [third-party complaint], ¶¶ 41-43). It is alleged that in response to a May 24, 2013 notice to cure, "Rhino asserted that it would install a new state of the art flooring system," but the installation would take at least nine months (*id.*, ¶¶ 49-50). It is further alleged that as of September 24, 2014, Rhino violated sections 2.2, 8.1 (a), and 18.2 of the Rhino Lease by failing to install the new floor system (*id.*, ¶¶ 52-57). The third-party complaint seeks: (1) a judgment declaring that Rhino and Reebok are responsible for any damages awarded to FAC on the first, second, third, fourth and fifth causes of action in FAC's complaint; (2) indemnification against Rhino and Reebok under sections 12.1 (a) and 22.1 (d) of the Rhino Lease; (3) recovery of Dryland's costs and legal fees from Rhino and Reebok; (4) breach of the Lease against MMD for rent and additional rent in an amount no less than $5,685,074.80; and (5) an award of attorneys' fees against MMD. Rhino, Reebok and MMD have all served answers to the third-party complaint.

FAC, Dryland, Rhino and Reebok now move separately for summary judgment.[3]

THE PARTIES' CONTENTIONS

A. FAC's Motion

FAC argues that it is entitled to partial summary judgment on its nuisance, quiet enjoyment and constructive eviction claims because the evidence demonstrates that it has been deprived of the beneficial use of the Premises. In support, FAC tenders Goffman's affidavit in which he avers

[3] The memoranda of law submitted by FAC and Dryland far exceed the page limits set forth in Uniform Rule 14 (b) (1) of the Rules of the Justices, New York County, Supreme Court, Civil Branch, and the lengthy submissions have been filed without leave of court. The parties are advised they should not repeat this error on all future submissions.

that "Dryland gave repeated assurances that it would investigate and abate or cause to be abated the noxious noise and vibrations caused by the Rhino CrossFit gym," but Dryland failed to do so (NYSCEF Doc No. 264, ¶ 17), despite possessing the right to perform repairs under the Rhino Lease. FAC argues that Dryland was aware of the "potential noise infiltration" as early as October 2011, as evidenced in Shotwell's email (NYSCEF Doc No. 270, affirmation of plaintiff's counsel, exhibit F at 3), and the provision in the Rhino Lease requiring Rhino to sound proof its space.

FAC posits that the "sham" L&T Action precludes Dryland from retaining the Security Deposit. It complains that Dryland improperly obtained a default judgment because service of the five-day predicate rent notice and the notice of petition were defective. Although Dryland was aware that FAC did not conduct any business at the Premises, it proceeded to post both notices to the entrance of the Premises. Moreover, by letter dated April 30, 2015, FAC advised Dryland of its new address in California, as required under section 18.7 of the Lease (NYSCEF Doc No. 295, Solomon affirmation, exhibit E). Dryland's rent invoices also show that Dryland had mailed them to FAC at the same California address (NYSCEF Doc No. 289, Goffman aff, exhibit Y at 8, 10-14 and 16-19). Dryland, though, never attempted to serve FAC there. FAC seeks a declaration that the judgment of possession and warrant of eviction issued in the L&T Action are nullities.

FAC also contends that Dryland breached several Lease provisions, including those requiring Dryland to maintain a "first class office building," to provide FAC with access to the Premises, and to furnish FAC with documentation detailing its proportionate share of the real estate taxes. FAC submits that Dryland breached the implied covenant of good faith and fair dealing by describing the Premises as commercial condominium units, not office units as per the Building's declarations, by concealing or misrepresenting their knowledge of the noise and vibration disturbances, and by pursuing the L&T Action for the sole purpose of re-letting the Premises to

Rhino. As for the fraud claim, FAC repeats its allegation that Dryland had misrepresented the Premises as consisting of commercial office units. FAC maintains that these classifications affect its beneficial and financial rights because "[b]illing for a tenant as an occupant of an Office Units [sic] was materially lower than billing for a tenant as an occupant of a commercial unit" (NYSCEF Doc No. 313, FAC's memorandum of law at 59).

B. Dryland's Motion

Dryland argues that the first, second, third, fourth, fifth and sixth causes of action are barred by equitable or promissory estoppel, or waiver, or are duplicative. Submitted in support is an affidavit from Constantin, a Heritage member and a Dryland manager (NYSCEF Doc No. 213, ¶ 1). Regarding the disturbances, Constantin avers that "we knew this was an issue that needed to be resolved ... [but] it was not an emergency condition" because the Project was not complete (*id*, ¶ 9). He submits that remediation was not necessary until FAC opened its treatment facility because FAC had made no complaints about the issue between January 2013 to February 2015 (*id.*, ¶ 12). In addition, Dryland argues that FAC cannot sustain the nuisance, quiet enjoyment or constructive eviction claims because Dryland did not create the nuisance or control the Gym. FAC remained in legal possession of the Premises until Dryland obtained the warrant of eviction. Additionally, Dryland contends that an out-of-possession landlord's right to re-enter a leased premises is limited, in part, to repairing a significant structural or design defect that is contrary to a specific statutory provision. Complaints about noise, though, do not constitute a significant structural or design defect. Even if FAC was deprived of the beneficial use of the Premises, it still continued to pursue the Project. In any event, Dryland contends that FAC's damages are wholly speculative because NYU's letter of intent was not binding absent the execution of additional agreements, and FAC never completed the Project.

Dryland submits that FAC cannot establish that Dryland breached any Lease provision or that a breach caused FAC to suffer damages. Therefore, the contract claims should be dismissed. Dryland also urges the court to dismiss the fraud and breach of the implied covenant of good faith and fair dealing claims because FAC cannot establish each element necessary to maintain them. The Lease provides that FAC remained liable for rent in the event of a default, and thus, Dryland asserts that it was entitled to retain the Security Deposit. Lastly, Dryland concludes that FAC's damages are wholly speculative since FAC never completed the Project.

As for the request for a declaratory judgment, Dryland argues that RPAPL 735 did not legally require it to effectuate service upon FAC outside of New York or upon FAC's New York attorney. Further, the requisite notices were served at the address listed in the Lease for notice purposes. Dryland submits that the rent notices, while mailed to a California address, were addressed to MMD, which is a separate legal entity.

Dryland also moves for summary judgment on its first counterclaim against FAC and the fourth cause of action against MMD for the unpaid rent due through the end of the Lease term as directed under section 13.2 of the Lease.

C. Reebok's Motion

Reebok contends that the contract claims should be dismissed because FAC cannot prove that Dryland proximately caused its damages. FAC took the Premises "as is," and was therefore aware of alleged nuisance at the time of the Assignment. Additionally, Reebok submits that FAC's damages are speculative. As to the nuisance claim, Reebok maintains that a landlord's right to re-enter is limited to an entry based upon an affirmative contractual obligation to repair or to inspect and repair a significant structural or design defect that is contrary to a specific statutory safety provision. Excessive noise or vibrations does not constitute significant structural or design defects.

D. Rhino's Motion

Rhino argues that the nuisance claim is barred by the doctrines of estoppel, waiver, and the election of remedies. In view of the "as is" language in the Assignment, FAC was fully aware of the alleged nuisance when it executed the Assignment, thereby waiving its right to seek damages. Rhino maintains that FAC is estopped for pursuing its claims given its course of conduct. Specifically, Rhino asserts that FAC failed to complain about the disturbances for several months and pursued the possibility of Rhino taking over the Premises.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A motion for summary judgment must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If the movant meets its prima facie burden, then "the burden shifts to the nonmoving party 'to establish the existence of material issues of fact which require a trial of the action'" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 174 [2019], quoting *Vega*, 18 NY3d at 503). "Viewing the evidence in the light most favorable to the non-moving party, if the nonmoving party ... fails to establish a material triable issue of fact, summary judgment for the movant is appropriate'" (*Nomura Asset Capital Corp. v Cadwalader,*

Wickersham & Taft LLP, 26 NY3d 40, 49 [2015], *rearg denied* 27 NY3d 957 [2016] [internal quotation marks and citations omitted]). Additionally, "[w]here two different conclusions may reasonably be reached from the evidence, a motion for summary judgment should be denied" (*S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 472 [1st Dept 2019]).

A. Admissibility of Goffman's Affidavit

At the outset, counter to Dryland's assertion, Goffman's sworn affidavit is admissible and will be considered. The failure to include a certificate of conformity as required under CPLR 2309 (c) is not a fatal defect (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009]), and FAC corrected the deficiency in reply (*see DaSilva v KS Realty, L.P.*, 138 AD3d 619, 620 [1st Dept 2016]).

B. Equitable and Promissory Estoppel

The doctrine of equitable estoppel requires a showing that "(1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts" (*Health-Loom Corp. v Soho Plaza Corp.*, 272 AD2d 179, 181 [1st Dept 2000] [internal quotation marks and citation omitted]). Crucially, there must be some evidence that the party invoking the doctrine was "misled into a detrimental change of position" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). "The elements of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance" (*Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]).

Here, neither Dryland nor Rhino have demonstrated that promissory estoppel applies. Both parties rely heavily on Ingersoll's January 15, 2013 email which purports to reflect his tacit

agreement allowing the implementation of a less expensive alternative to remediate the noise and vibration issue before calling upon Rhino to install a raised floor (NYSCEF Doc No. 237 at 1). However, counter to their assertions, Ingersoll's email was less than equivocal. Ingersoll's acceptance of an alternative method to mitigate the disturbance was not expressly conditioned upon completion of the Project. Indeed, Dryland and Rhino ignore the balance of Ingersoll's email stating that "ultimately, MMD will need to have quiet enjoyment of its space during business hours, even if the floor must be built" (*id.*). Based on the foregoing language, it is apparent that MMD (and thus FAC) did not promise or agree to allow the noise and vibrations to continue unabated until it opened a cancer treatment center. Therefore, the clear, unambiguous promise element is lacking for promissory estoppel to apply.

Likewise, neither Dryland nor Rhino have demonstrated a detrimental change in position to support a claim of equitable estoppel. Dryland alleged in its third-party complaint that Rhino had agreed to install a new floor system in June 2013 (NYSCEF Doc No. 218, ¶ 47), well before any physical work on the Premises had begun. Such a statement, which constitutes a judicial admission (*see Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 674 [1st Dept 2010]), defeats a claim of equitable estoppel.

C. Waiver

Waiver is the "intentional relinquishment of a known right" (*Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Empl. Relations Bd.*, 7 NY3d 458, 465 [2006] [internal quotation marks and citation omitted]). "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgmt., L.P.*, 7 NY3d 96, 104 [2006]). Proof of affirmative conduct or a failure to act may constitute a waiver (*id.*). Nevertheless, a waiver must be "clear, unmistakable and

without ambiguity" (*Matter of Professional Staff Congress-City Univ. of N.Y.*, 7 NY3d at 465). Here, Rhino has not demonstrated that FAC knowingly or intentionally waived its right to pursue its claims. Ordinarily, "as is" language in a lease pertains to the condition of the leased premises, and the inclusion of such language in a lease does not warrant the conclusion that FAC had agreed to allow an alleged nuisance to persist.

D. Private Nuisance

The first cause of action alleges that Dryland intentionally, unreasonably, and wrongfully interfered with its use and enjoyment of the Premises by failing to abate the noise and vibrations.

A private nuisance is "a continuous invasion of rights – 'a pattern of continuity or recurrence of objectionable conduct'" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [citation omitted]). The objectionable conduct "must interfere with a person's interest in the use and enjoyment of land" (*id.*). The interference must have been intentional (*see Berenger v 261 W. LLC*, 93 AD3d 175, 183 [1st Dept 2012]). An intentional interference arises 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" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 571 [1977], *rearg denied* 42 NY2d 1102 [1977] [internal quotation marks and citation omitted]). Thus, the elements for a common-law private nuisance claim 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" (*id.* at 570 [citations omitted]). However, "a cause of action for nuisance does not lie against a landlord who 'did not create the nuisance' and who has 'surrendered control of the premises' to a tenant" (*Clarke v 6485 & 6495 Broadway Apt. Inc.*, 122 AD3d 494, 495 [1st Dept 2014], quoting *Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d 543, 544 [1st Dept 1992]).

As applied herein, FAC has failed to demonstrate its entitlement to summary judgment on the nuisance claim. "[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed" (*Broxmeyer v United Capital Corp.*, 79 AD3d 780, 782-783 [2d Dept 2010] [internal quotation marks and citation omitted]). In this instance, the parties do not dispute that recurring episodes of excessive noise can constitute a nuisance (*see Berenger*, 93 AD3d at 182-183). FAC, though, has not met its burden of establishing the remaining elements for a private nuisance claim.

FAC submits that Dryland knew leasing the Gym would result in the creation of a nuisance, and cites the provision in the Rhino Lease requiring Rhino or Dryland to sound proof the space. However, FAC's reference to this provision, standing alone, is insufficient to warrant the inference that Dryland knew a nuisance would certainly result. FAC offers no specific evidence to establish Dryland's intent at the time it executed the Rhino Lease. Further, the evidence shows that Dryland attempted to remedy the disturbances by crediting or paying Rhino to install a noise control system in December 2012 and by serving Rhino with a notice to cure the alleged nuisance in 2013. These actions belie FAC's contention that Dryland intentionally allowed the purported nuisance to persist.

FAC has also failed to show that Dryland retained the requisite control over the Gym. Its reliance on this court's earlier reasoning that the complaint sufficiently alleged "that 'it was within Defendant's control to abate the noise and vibrations'" (*Fifth Ave. Ctr., LLC*, 2016 NY Slip Op 30290[U], * 7) is unavailing. The scope of review on a motion to dismiss and a motion for summary judgment differs because one involves the sufficiency of the pleadings whereas the other examines the sufficiency of the evidence (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d

349, 350 [1st Dept 2006], *affd as mod* 9 NY3d 105 [2007], citing *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]).

It is well settled that "the duty to abate a private nuisance existing on real property arises from the power to possess the property and control the activities that occur on it" (*Taggart v Constabile*, 131 AD3d 243, 247 [2d Dept 2015]). FAC cites *Zamzok v 650 Park Ave. Corp.* (80 Misc 2d 573, 575 [Sup Ct, NY County 1974]) for the proposition that a landlord who reserves the right under a lease to enter the demised premises to perform repairs may be held liable for a nuisance created by another tenant. To be sure, "retention of a right of reentry is merely one way an owner may maintain a degree of control" (*Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 90 [1st Dept 2002]). However, FAC's reliance on *Zamzok* is misplaced. Unlike the facts in *Zamzok*, where the defendant landlord reserved its right to re-enter the leased premises of another tenant for the purposes of making repairs (80 Misc 2d at 575-576), Dryland's ability to re-enter the Gym was limited to the making of emergency repairs and alterations (NYSCEF Doc No. 231 at 22 [section 20.2]). Here, FAC has not established that the type of repair necessary to abate the alleged nuisance constituted an emergency repair for purposes of invoking section 20.2 in the Rhino Lease. Additionally, since Dryland is an out-of-possession landlord, for purposes of tort liability, its right of reentry is limited to "a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011] [internal quotation marks and citation omitted]). Not only does the Rhino Lease place the obligation of performing all interior repairs upon Rhino (NYSCEF Doc No. 231 at 8 [section 8.1]), but FAC has not presented any evidence that the noise and vibrations

emanating from the Gym constituted a significant structural or design defect that is contrary to a specific statutory safety provision.

FAC's reliance on section 14.1, or the default provision, of the Rhino Lease is also misplaced. FAC effectively seeks to hold Dryland liable for failing to perform an obligation in its lease with Rhino that allows Dryland to cure any non-monetary default. FAC, though, is not a party to the Rhino Lease. Furthermore, FAC has submitted no caselaw in support of its proposition that an alleged breach of the Rhino Lease enables it to recover against Dryland on a nuisance or tort theory of liability. Notably, FAC has not pursued a private nuisance claim against Rhino.

In view of the foregoing, Dryland has demonstrated its entitlement to summary judgment on the nuisance cause of action. The evidence establishes that the disturbances were caused by activities taking place within the Gym, where Rhino was the tenant in sole possession and control (*see Bernard* 181 AD2d at 544; *George v Board of Directors of One W. 64th St., Inc.*, 2011 NY Slip Op 32325[U], *14-15 [Sup Ct, NY County 2011]; *Sherlock v 20 E. 9th St. Owners Corp.*, 2011 NY Slip Op 30750[U], *4 [Sup Ct, NY County 2011). Accordingly, summary judgment on the first cause of action is denied to FAC and granted to Dryland, and the first cause of action is dismissed.

E. Quiet Enjoyment and Constructive Eviction

The fourth cause of action pleads a breach of the quiet enjoyment provision found in section 18.6 of the Lease, and the fifth cause of action pleads a claim for constructive eviction.

A cause of action for constructive eviction is "dismissible as duplicative of those for breach of the covenant of quiet enjoyment" when both claims are premised upon an active or constructive eviction (*Phoenix Garden Rest. v Chu*, 245 AD2d 164, 166 [1st Dept 1997]). Additionally, a constructive eviction claim is generally considered a defense to a nonpayment proceeding (*see*

Elkman v Southgate Owners Corp., 233 AD2d 104, 105 [1st Dept 1996]). Because FAC's constructive eviction claim is predicated upon the same facts as the quiet enjoyment claim, the fifth cause of action must be dismissed.

The constructive eviction claim is dismissed for the additional reason that FAC cannot demonstrate it had abandoned the Premises prior to May 21, 2015, when the warrant of eviction was issued in the L&T Action. A party claiming constructive eviction must abandon the leased premises with reasonable promptness (*see M.Y. Realty Corp. v Atlantic First Fin. Corp.*, 19 AD3d 156, 156 [1st Dept 2005]). In this instance, there were no complaints made about the alleged nuisance from FAC or MMD for nearly two years after Ingersoll's January 15, 2013 email. Ingersoll and Shotwell could not recall when or with what frequency they had complained about the disturbances to Dryland, and the documentary evidence proffered by FAC shows that most of the complaints from 2013 and 2014 originated from the Building's property manager. During this two-year period, FAC continued to pursue the Project, as evidenced by the letter of intent with NYU executed in June 2014. Accordingly, summary judgment on the fifth cause of action is denied to FAC and granted to Dryland, and the fifth cause of action is dismissed.

"'To prevail on a cause of action for breach of the covenant of quiet enjoyment, a tenant must show an ouster, or if the eviction is constructive ... an abandonment of the premises'" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006], quoting *Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958], *rearg denied* 4 NY2d 1046 [1958]). The tenant must also show that it performed all conditions precedent in its lease unless those conditions have been waived (*see Dave Herstein Co.*, 4 NY2d at 121). Where the tenant ceases to pay rent, a claim for breach of the quiet enjoyment provision in a lease cannot be maintained (*see Cafe Lughnasa Inc. v A&R Kalimian LLC*, 176 AD3d 523, 523 [1st Dept 2019]), because the "failure

to pay rent 'constitutes an election of remedies'" (*Schwartz v Hotel Carlyle Owners Corp.*, 132 AD3d 541, 543 [1st Dept 2015], quoting *Frame v Horizons Wine & Cheese*, 95 AD2d 514, 518 [2d Dept 1983]).

Here, FAC's right to quiet enjoyment was expressly conditioned upon its performance of all Lease obligations, including the payment of rent and additional rent. Dryland has demonstrated, and FAC does not dispute, that FAC ceased paying rent beginning in February 2015. Thus, Dryland has demonstrated its entitlement to summary judgment on the breach of the quiet enjoyment provision for the period after February 1, 2015 (*see Dave Herstein Co.*, 4 NY2d at 120-121; *Leider v 89 William St. Co.*, 22 AD2d 952, 953 [2d Dept 1964]). FAC fails to raise a triable issue of fact in opposition regarding this period because it has not shown that it satisfied section 18.6 by paying all sums due under the Lease or shown that payment was waived (*see Dave Herstein Co.*, 4 NY2d at 121).

As to the period preceding February 1, 2015, Dryland has demonstrated that FAC was never actually evicted from the Premises. "An actual eviction takes place when acts of the landlord cause a physical expulsion or exclusion from the premises" (*Manhattan Mansions v Moe's Pizza*, 149 Misc 2d 43, 45 [Civ Ct, NY County 1990]), and here, FAC was never physically expelled from any portion of the Premises. In response, FAC fails to tender any evidence showing that it had been physically excluded from the Premises.

Dryland has also shown that FAC was not constructively evicted from any part of the Premises. A constructive eviction occurs where "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). The claim does not require the "physical expulsion or exclusion of tenant" from the demised premises, but does require the tenant

to have abandoned its possession (*id.*). A constructive eviction may occur even though the tenant abandons only a portion of the demised premises (*see Minjak Co. v Randolph*, 140 AD2d 245, 248 [1st Dept 1988]).

While the testimony makes clear that the noise and vibrations would significantly hinder the operation of a cancer treatment facility, Shotwell, Ingersoll and Goffman never explained when the facility would open or whether quiet enjoyment was necessary during the construction portion of the Project. Rather, Ingersoll and Goffman expressed concern that the noise and vibrations would affect the delivery of treatment to a patient, not that the disturbances would prohibit FAC from constructing the facility. Significantly, Shotwell testified that the noise and vibrations did not impede FAC's or MMD's ability to obtain permits for the Project (NYSCEF Doc No. 222 at 52). A history of the work permits issued by the New York City Department of Buildings for the Premises reveals that FAC first applied for Project permits in September 2012 and received permits valid through February 2014 (NYSCEF Doc No. 235, Shaw affirmation, exhibit T at 4-5). FAC retained a general contractor "very close to the termination date" (NYSCEF Doc No. 222 at 76). It applied for and received a loan to fund the work in November 2013 from nonparty TD Bank, N.A. (NYSCEF Doc No. 239, Shaw affirmation, exhibit X at 1). Furthermore, Shotwell attributed the delay in moving the Project forward to FAC's decision to change the type of cancer treatment facility envisioned at the Premises from a private facility to a public one (NYSCEF Doc No. 222 at 41-42).

These actions were all undertaken despite the disturbances emanating from the Gym. As such, the noise and vibrations originating from the Gym did not impede FAC from progressing with the Project and building out the Premises, and therefore, did not substantially interfere with FAC's beneficial use and enjoyment of the Premises during its occupancy (*see Pacific Coast Silks,*

LLC v 247 Realty, LLC, 76 AD3d 167, 172 [1st Dept 2010] [concluding that plaintiff tenant failed to demonstrated that "elevator service was necessary for it to operate its business during that time period; indeed, no one testified as to exactly ... when the tenant had expected to open for business"]; *Holy Props. Ltd. v Cole Prods.*, 208 AD2d 394, 394 [1st Dept 1994], *affd* 87 NY2d 130 [1995] [concluding that there was no proof in the record that the conditions complained of were substantial or amounted to a material deprivation of the defendant's beneficial use and enjoyment]). Because FAC cannot establish that it was denied the beneficial use of the Premises, summary judgment on the fourth cause of action is denied to FAC and granted to Dryland, and the fourth cause of action is dismissed.

F. Breach of Contract

To prevail on a cause of action for breach of contract, a plaintiff must prove the existence of a contract, plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The plaintiff must demonstrate that its damages were caused by the breach, and that its damages can be proven with reasonable certainty (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). Merely alleging a breach of contract claim without articulating facts showing the plaintiff's damages from the breach is insufficient (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]).

FAC pleads five causes of action for breaches of various Lease provisions.

1. Section 7.2

The second cause of action is predicated upon an alleged breach of section 7.2 (c) of the Lease, the relevant part of which reads, "Landlord shall maintain Landlord's Property and Demised Premises as a first class office building" (NYSCEF Doc No. 265 at 8).

At the outset, the phrase "first class office building" is not defined anywhere in the Lease. Goffman avers the Building declarations state that a unit shall not be used in a manner inconsistent with the customary use for a first class office building in midtown Manhattan (NYSCEF Doc No. 264, ¶ 7), but he does not elaborate on what constitutes customary use. FAC urges the court to apply the "common meaning" for the term "first class," and submits that Webster's Third New International Dictionary (1993) defines "first class" as "of the best quality; of the highest excellence" (NYSCEF Doc No. 313 at 40). That definition, though, appears to impose a higher standard than how the term "first class" is ordinarily used in the context of real property matters. As to the latter, "first class" pertains to the general good repair or condition of a building (*Building Serv. Local 32B-J Pension Fund v 101 L.P.*, 148 AD3d 594, 595 [1st Dept 2017] [discussing whether building systems and sidewalks "remained current, in touch with the times"]; *Matter of Putnam Theat. Corp. v Gingold*, 16 AD2d 413, 418 [4th Dept 1962] [stating that the building was a "first-class building in good condition ... [and] an up-to-date office building ... in a good state of repair]; *Stipe v Harbor House Owners Corp.*, 2011 NY Slip Op 32557[U], * 21 [Sup Ct, NY County 2011] [discussing a first class apartment building as one in good repair]; *Hawkins, Delafield & Wood, LLP v RBNB 67 Wall St. Owner LLC*, 7 Misc 3d 753, 754 [Sup Ct, NY County 2005] [concluding that "determining what is a 'first class' office building deals primarily with the maintenance and service provided, not the quality of the tenancy"]).

The language contained in section 7.2 (c) of the Lease references the "way in which ... [Dryland] uses, operates, repairs, or maintains" its property and the services and charges in connection therewith (NYSCEF Doc No. 265 at 8). Here, FAC's complaints primarily concerned the noise and vibrations emanating from the Gym, not the Building's systems (*see Building Serv. Local 32B-J Pension Fund*, 148 AD3d at 595-596]). Nevertheless, it is not the court's position to

divine what the parties' intended as to what constituted a "first class office building" without any documentary or testimonial evidence on what the parties believe the phrase meant. Hence, FAC's recitation of a dictionary definition for the term "first class" is insufficient to establish a breach of this provision of the Lease.

Dryland, too, has failed to meet its prima facie burden on this cause of action. A defendant moving for summary judgment "cannot meet its prima facie burden by pointing to perceived gaps in plaintiff's proof" (*Vazquez v 3M Co.*, — AD3d —, 2019 NY Slip Op 08133, *1 [1st Dept 2019]), and here, Dryland merely points to gaps in FAC's proof that Dryland had breached this section of the Lease. Dryland has not demonstrated that it maintained a "first class office building," nor has it supplied a definition for that term as it was used in the Lease. To the extent Dryland and Rhino assert that the second cause of action is duplicative of any other cause of action, the argument is unpersuasive. A "simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Whether Dryland breached its contractual obligation to maintain a "first class office building" is an independent and separate cause of action from the nuisance claim. Summary judgment on the second cause of action is denied to FAC and Dryland.

2. Sections 1.2 and 22.1

The third cause of action pleads a breach of sections 1.2 and 22.1 of the Lease. Section 1.2 states, in relevant part, that the Premises is "zoned to permit use of the Entire Demised Premises as a medical office" (NYSCEF Doc No. 265 at 2). Section 22.1 (a) partially states that "the Demised Premises shall be used by Tenant solely as a Medical Office Space, specifically for out-patient care incorporating Radiation Oncology, Therapeutic Radiology, Diagnostic Radiology, Urology ..." (NYSCEF Doc No. 265 at 22).

A reading of these provisions indicates that neither imposes a specific contractual obligation upon Dryland capable of being breached. Indeed, the language cited above dictates that the Premises shall be used by FAC as a medical office, and FAC has not alleged that it was legally impermissible to operate a medical office at the Premises. Consequently, summary judgment is granted to Dryland on the third cause of action, and the third cause of action is dismissed.

3. Sections 20.1 and 20.2

The sixth cause of action alleges that Dryland breached section 20.1 of the Lease, which allowed FAC "twenty four (24) hour a day, seven (7) day a week access to the Demised Premises," and section 20.2, which required Dryland to give FAC "reasonable advance notice of proposed entry or access" to the Premises (NYSCEF Doc No. 265 at 21).

Here, Dryland has demonstrated that it did not impede or refuse access to the Premises. Shotwell testified that he could only recall one instance where he had encountered a problem entering the Premises, and the issue was resolved when Zimmar told him to retrieve a key from the Building's concierge (NYSCEF Doc No. 222 at 65). Shotwell further testified that he assumed he had been given a permanent key thereafter (*id.*). To the extent Ingersoll testified that FAC often had to request a key from Zimmar (NYSCEF Doc No. 224 at 30), he never testified that FAC was not permitted to keep the key once it had been given. Thus, FAC's claim that Dryland restricted its access to the Premises is not supported. Likewise, Dryland has demonstrated that one of the three times it entered the Premises without giving FAC prior notice was for the sole purpose of carrying out an emergency repair. Furthermore, Dryland has established that FAC has not incurred damages from an alleged breach because FAC was able to access the Premises.

FAC, in response, does not address the merits of this cause of action and has not furnished the court with proof of its damages on this claim. Therefore, it has failed to raise a triable issue of

material fact. Thus, summary judgment is granted to Dryland on the sixth cause of action, and the sixth cause of action is dismissed.

4. Sections 6.3 and 7.5

The eighth cause of action pleads a claim for breach of section 6.3 of the Lease requiring Dryland to furnish FAC with "a computation of the amount payable together with such supporting documentation as Tenant may reasonably require" of FAC's proportionate share of the real estate taxes (NYSCEF Doc No. at 6). FAC alleges that it has been deprived of its right to contest those amounts, as was permissible under section 7.5 (a), because Dryland never furnished it with the statement to which it was entitled.

As with the sixth cause of action, merely pleading the existence of a breach of contract claim, as FAC has done here, is insufficient. FAC, in response to Dryland's motion, has not shown that Dryland's calculations were faulty, thereby causing it to pay more than its proportionate share. As noted earlier, the seventh cause of action seeking damages for a rent overcharge was dismissed previously. Consequently, the eighth cause of action must be dismissed for FAC's failure to furnish proof of its damages. Accordingly, summary judgment is granted to Dryland on the eighth cause of action, and the eighth cause of action is dismissed.

5. Section 1.2

In its twelfth cause of action, FAC alleges that Dryland breached that part of section 1.2 of the Lease in which Dryland warranted that the Premises is "free from contamination of any hazardous or toxic substances, waste, or constituents" (NYSCEF Doc No. 265 at 2).

FAC alleges that there was asbestos found in the Premises, but Dryland has demonstrated that this contention is not supported. Shotwell testified that he was not aware of any asbestos in the Premises (NYSCEF Doc No. 222 at 122). An asbestos assessment report for the Premises

dated January 30, 2012 indicates that there was no asbestos in the space that involved "Renovation of existing space for medical office" (NYSCEF Doc No. 256, Shaw affirmation, exhibit NN at 1). A second asbestos assessment report dated February 26, 2015 indicates that asbestos was found in the fireproofing for a subcellar housekeeping room, but the report references a different block and lot number (NYSCEF Doc No. 255, Shaw affirmation, exhibit OO at 1). FAC fails to address this part of Dryland's motion in its opposition. Accordingly, summary judgment is granted to Dryland on the twelfth cause of action, and the twelfth cause of action is dismissed.

G. Rescission Due to Illegality or Fraud

The ninth cause of action pleads a claim for fraud based on a misrepresentation in the Lease and seeks rescission of the Lease on that ground.

A cause of action for fraud requires "a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [internal quotation marks and citation omitted]). A plaintiff asserting a claim for fraud must furnish "clear and convincing evidence as to each element of the claim" (*Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017] [internal quotation marks and citation omitted]). To that end, the plaintiff must establish both transaction causation and loss causation (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). The first, transaction causation, concerns whether a defendant's alleged misrepresentation induced the plaintiff to enter into the transaction (*id.*). The second, loss causation, concerns whether the defendant's alleged misrepresentation proximately caused the plaintiff's injury (*id.*).

Rescission is an equitable remedy that "is to be invoked only when there is lacking complete and adequate remedy at law and where the *status quo* may be substantially restored"

(*Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972] [citation omitted] [italics in original]). Rescission is not available if a party against whom it is sought "has changed his [or her] position and cannot be returned to the status quo ante" (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]).

As applied herein, FAC has failed to meet its prima facie burden on the fraud claim. First, FAC has not established that Dryland intended to misrepresent the Premises as a commercial unit for the sole purpose of inducing it to execute the Assignment. Second, FAC has not shown that it was induced into leasing the Premises because of a misrepresentation or omission. None of the witnesses testified that FAC had agreed to the Assignment solely because the Premises consisted of commercial units. Nor has FAC established that it reasonably relied on the erroneous property classification to its detriment. Shotwell testified that the type of condominium unit did not prevent FAC from moving forward on the Project, and the Building's Fourth Amendment to Declaration dated April 22, 1993 states that the subcellar units may be used "for retail purposes or any other lawful use ... provided such use complies with all applicable governmental regulations ..." (NYSCEF Doc No. 252 at 2-3). Therefore, whether FAC could complete the Project was not dependent upon the fact that the Premises was made up of office units, not commercial units (*see Nat's Pizzeria, Inc. v. 165 Lexington Ave. Assoc.*, 304 AD2d 389, 389 [1st Dept 2003] [reasoning that the defendant's representation was not material to the plaintiff's decision to enter the lease]).

FAC's contention that Dryland perpetuated the fraud by overbilling its proportionate share of the real estate taxes and operating expenses is unavailing because FAC is not a unit owner for purposes of seeking damages for a violation of the Building's declarations (*see* Real Property Law 339-j). Furthermore, the seventh cause of action for a rent overcharge has been dismissed. Since Dryland has demonstrated that FAC cannot meet each element necessary to sustain a claim for

fraud, its motion seeking to dismiss the fraud claim must be granted (*see Guicha Inc. v A.M.A.A. Realty Corp.*, 172 AD3d 442, 442 [1st Dept 2019]). Accordingly, summary judgment on the ninth cause of action is denied to FAC and granted to Dryland, and the ninth cause of action is dismissed.

H. Breach of the Implied Covenant of Good Faith and Fair Dealing

The tenth cause of action for breach of the implied covenant of good faith and fair dealing is predicated upon Dryland's erroneous property classification for the Premises and its deliberate concealment of the results of SMW's acoustical testing (NYSCEF Doc No. 310, ¶ 178).

"[I]mplicit in every contract is a covenant of good faith and fair dealing, which encompasses any promises that a reasonable promisee would understand to be included" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] [citations omitted]). The covenant of good faith is breached "where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other" (*Rayham v Multiplan, Inc.*, 153 AD3d 865, 868 [2d Dept 2017] [internal quotation marks and citation omitted]). The conduct complained of must affirmatively prevent the other party from performing (*see Chemical Bank v Stalhl*, 272 AD2d 1, 14 [1st Dept 2000]). The "implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract" (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]).

Applying these standards here, FAC has failed to demonstrate that the erroneous property classification prevented it from receiving the benefits of the Lease, as discussed above. FAC complains that Dryland concealed the results of the SMW report, but it fails to establish how doing so constitutes a breach. The Lease did not include a contractual provision directing Dryland to exchange the results of any noise or vibration test, and FAC was already aware at the time SMW completed its report that the disturbances emanating from the Gym were untenable. The evidence

further establishes that FAC sought to continue with the Project even though Dryland never exchanged the report. Therefore, Dryland's failure to exchange SMW's report did not deprive FAC of its right to enjoy the benefits of the Lease.

Nor has FAC offered anything other than conjecture or speculation to show that Dryland sought to evict FAC from the Premises so as to let the Premises to Rhino. FAC ceased paying rent beginning in February 2015 (NYSCEF Doc No. 213, ¶ 14). FAC has not refuted Dryland's assertion that it had ceased paying rent, and Dryland's commencement of the L&T Action for nonpayment of rent is consistent with the Lease terms (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). Moreover, the fact that Dryland subsequently re-let the Premises to an entity affiliated with Rhino or one of its principals does not conclusively prove the claim. The testimony shows that FAC found Rhino's proposal to take over the Premises unsatisfactory, and FAC declined to pursue it as a viable option. The evidence also demonstrates that Dryland served Rhino with a 30-day notice in 2013 to compel Rhino to address the noise and vibration issue, but granted Rhino "leeway based on its promise to install ... [a] new flooring system" (NYSCEF Doc No. 218, ¶ 49). Significantly, FAC and Rhino were engaged in discussions about Rhino taking over the Premises during this "leeway" period. Thus, summary judgment on the tenth cause of action is denied to FAC and granted to Dryland, and the tenth cause of action is dismissed.

I. The Security Deposit

The eleventh, fourteenth and fifteenth causes of action concern the Security Deposit. FAC alleges that Dryland improperly converted the Security Deposit and breached its fiduciary duty by failing to maintain the funds in a segregated bank account.

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]). 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]). A landlord's breach of its fiduciary duty to maintain a tenant's security deposit in a separate account in accordance with General Obligations Law § 7-103 gives rise to a conversion claim (*see 23 E. 39th St. Mgt., Corp. v 23 E. 39th St. Dev., LLC*, 134 AD3d 629, 631 [1st Dept 2015]; *Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 [1st Dept 2009]).

It is settled that the issuance of a warrant of eviction annuls the relationship between a landlord and tenant (*see Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.*, 76 AD3d 468, 469 [1st Dept 2010]; *Iltit Assoc. v Sterner*, 63 AD2d 600, 600 [1st Dept 1978]). In addition, a landlord is generally precluded from seeking rent from a tenant who has been evicted unless the parties' lease provides that the tenant shall be liable for post-eviction rent (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]; *Fisk Bldg. Assoc. LLC*, 76 AD3d at 469). Hence, the release of the Security Deposit depends, in part, on whether the judgment obtained in the L&T Action was proper. While FAC challenges the validity of the judgment of possession and warrant of eviction entered in the L&T Action, as discussed *infra*, the judgments are valid and have not been vacated or reversed on appeal. As such, Dryland could not have converted the Security Deposit or breached its fiduciary duty with respect to those funds based on a violation of General Obligations Law § 7-103 because

the judgments rendered in the L&T Action terminated the landlord-tenant relationship. Moreover, the bank statements show that Dryland held the Security Deposit in a separate interest-bearing savings account in accordance with the Lease until April 2016, when it transferred funds totaling $321,245.79 into a separate checking account (NYSCEF Doc No. 305, Solomon affirmation, exhibit O at 1).

The court turns next to the Lease terms to determine whether it was permissible for Dryland to retain the Security Deposit. Two provisions of the Lease are relevant here. Section 4.10 permits Dryland to apply all or part of the Security Deposit toward the payment of rent or additional rent. Section 13.2 provides, in pertinent part:

> "13.2 In case of any such termination, Tenant shall indemnify Landlord against all loss of rent and other payments provided herein to be paid by Tenant to Landlord between the time of such termination and the expiration of the term of this Lease ... [and] [i]t is understood and agreed that at the time of such termination or at any time thereafter Landlord may rent the Demised Premises, for a term which may expire after such expiration of the term of this Lease specified in Article 4.1 hereof, without releasing Tenant from any liability whatsoever ..."

(NYSCEF Doc No. at 13).

When read together, sections 4.10 and 13.2 allow Dryland to apply the Security Deposit to the unpaid rent after the Lease is terminated. Furthermore, "[a]lthough an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please" (*Holy Props.*, 87 NY2d at 134). Since "the parties clearly contracted to make the defaulting tenant liable for rent after such termination" (*Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 222 [1st Dept 2006]), Dryland properly retained the Security Deposit (*see Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 481 [1st Dept 2010]). Accordingly, summary

judgment on the eleventh, fourteenth and fifteenth causes of action is denied to FAC and granted to Dryland, and the eleventh, fourteenth and fifteenth causes of action are dismissed.

J. Declaratory Judgment

In the thirteenth cause of action, FAC seeks a judgment declaring that the judgment of possession entered in the L&T Action is a nullity because it is jurisdictionally defective.

Upon further review, a declaratory judgment is not warranted. "A declaratory judgment is a discretionary remedy" (*Bower & Gardner v Evans*, 60 NY2d 781, 783 [1983]). An award of declaratory relief requires a justiciable controversy (*see* CPLR 3001). The party seeking a declaratory judgment must also "have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to" that party (*American Ins. Assoc. v Chu*, 64 NY2d 379, 383 [1985], *cert denied* 474 US 803 [1985]; *Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Vehs.*, 127 AD3d 1049, 1049 [2d Dept 2015] [stating that a declaratory relief cannot be supported based on a hypothetical injury]). That said, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action" (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Here, FAC has an adequate remedy at law, namely vacatur of the judgment of possession and warrant of eviction entered on default in the L&T Action in Civil Court (*see 342 E. 67 Realty LLC v Jacobs*, 106 AD3d 610, 611 [1st Dept 2013] [stating that a traverse hearing should be held in Civil Court before relief under CPLR 5015 may be granted to a tenant against whom a judgment had been entered in default]). As such, FAC's argument concerning a "sham" service of process is more properly heard in that forum (*see Bassett v West Side Equities*, 306 AD2d 70, 70-71 [1st Dept 2003] [advising the plaintiff tenant to present her new evidence concerning a new violation

to Civil Court]). Accordingly, summary judgment on the thirteenth cause of action is denied to FAC and granted to Dryland, and the thirteenth cause of action is dismissed.

K. Dryland's First Counterclaim and Fourth Cause of Action

The first counterclaim against FAC and the fourth cause of action against MMD plead claims for breach of the Lease provision regarding the payment of rent and additional rent through the end of the Lease term. Constantin avers the Premises and Gym were re-let on March 10, 2016 to nonparty Project Human LLC, now known as Neou LLC (Neou) (NYSCEF Doc No. 213, ¶ 15). He states that the monthly rent due between February 1, 2015 and August 31, 2016 under the Lease equals $455,553.48.

As discussed earlier, section 13.2 provides that upon termination of the Lease, the "Tenant" shall indemnify Dryland for all rent and other payments through the expiration of the Lease. FAC, though, argues that MMD has been discharged from liability as of the date of the Assignment of that contract (*Mandel v Fischer*, 205 AD2d 375, 376 [1st Dept 1994]).

Generally, an assignor is not released from its obligations under a contract based solely on the assignment of that contract (*see Mandel*, 205 AD2d at 376). In order to effectuate a release of an assignor's contractual lease obligations, there must be "an express agreement to that effect or one that can be implied from facts other than the lessor's mere consent to the assignment and its acceptance of rent from the assignee" (*City of New York v Evanston Ins. Co.*, 129 AD3d 760, 760 [2d Dept 2015]; *accord 185 Madison Assoc. v Ryan*, 174 AD2d 461, 461 [1st Dept 1991]).

Section 17.8 of the Lease states that "[n]otwithstanding any assignment of Tenant's interest in this Lease ... unless Landlord shall have agreed in writing to release Tenant therefor, Tenant shall remain primarily liable for performance of all agreements of Tenant hereunder" (NYSCEF

Doc No. 225, Shaw affirmation, exhibit J at 17). Neither Dryland nor FAC have proffered a writing in which Dryland expressly released MMD from all contractual liability.

Likewise, Dryland's execution of the Second Lease Modification Agreement is insufficient to infer that Dryland impliedly discharged MMD from liability. Although that document defines FAC as the "New Tenant," it modifies only that portion of the Lease pertaining to the Security Deposit (NYSCEF Doc No. 228, Shaw affirmation, exhibit M at 1 and 3). Such action does not merit a finding that Dryland recognized FAC as the new tenant because it did not effectuate a new right or privilege under the tenancy not previously afforded to MMD. For instance, in *Mid Val. Assoc., LLC v Foot Locker Specialty, Inc.* (28 AD3d 206, 206 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]), cited by FAC, the landlord in that action granted the assignee an additional renewal not included in its original lease with the assignor. The Second Lease Modification Agreement in this action does not affect FAC's rights as a tenant because the document only served to increase the amount of the Security Deposit.

As to FAC, its assertion that the commencement of the L&T Action severed its liability under the Lease is unpersuasive. It is well settled that "an assignee will be liable for covenants that run with the land only while in privity of estate" (*Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP*, 22 AD3d 936, 937 [3d Dept 2005]). However, if an assignee expressly agrees to carry out the terms of a lease, then the assignee shall be liable even if privity of estate is broken (*id.*; 1 Robert F. Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 9:34 [5th ed 2019]; 74A NY Jur 2d Landlord and Tenant § 845). The Assignment reads in relevant part:

> "Assignment. Assignee hereby accepts such transfer and assignment of the Lease, specifically assuming all of Assignor's duties and obligations hereafter occurring under the Lease with respect to the Premises, and agrees faithfully to perform and observe each and every term, covenant and condition of the Lease to be

> performed or observed by the lessee therein for and during the remaining term thereof"

(NYSCEF Doc No. 229 at 1). Such language implies that FAC expressly agreed to carry out all terms of the Lease (*see Mann v Munch Brewery*, 225 NY 189, 195 [1919]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147 [2d Dept 2009]).

In view of the foregoing, Dryland has demonstrated its entitlement to summary judgment against MMD and FAC, but only as to liability. Dryland's damages calculation is based, in part, on the monthly rent Neou paid for the Gym and the Premises, and the tenant statement submitted in support lists the total amount of rent for both spaces (NYSCEF Doc No. 260, Shaw affirmation, exhibit SS at 1). Accordingly, Dryland's motion for summary judgment on the issue of FAC's liability on the first counterclaim and MMD's liability on the fourth cause of action is granted.

L. Third-Party Complaint

Rhino and Reebok also move for summary judgment dismissing the third-party complaint against them on the ground that FAC's complaint should be dismissed. Neither addressed the merits of the third-party claims against them.

A third-party complaint may be "dismissed as a necessary consequence of dismissing the complaint in its entirety" (*Turchioe v AT&T Communications*, 256 AD2d 245, 246 [1st Dept 1998]). Because the second cause of action for breach of section 7.2 of the Lease remains a viable claim, the motions seeking to dismiss the third-party complaint are denied.

The court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion of plaintiff Fifth Ave. Center LLC for partial summary judgment on the issue of defendant Dryland Properties LLC's liability on the first, second, fifth,

ninth, tenth, eleventh, thirteenth, fourteenth, and fifteenth causes of action (motion sequence no. 006) is denied; and it is further

ORDERED that the motion of third-party defendant Reebok International Ltd. for summary judgment dismissing the third-party complaint (motion sequence no. 007) is denied; and it is further

ORDERED that the part of the motion of defendant Dryland Properties LLC for summary judgment dismissing the complaint (motion sequence no. 008) is granted to the extent of dismissing the first, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action and the first, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the part of the motion of defendant Dryland Properties LLC for summary judgment on its first counterclaim against plaintiff Fifth Ave. Center LLC and on its fourth cause of action against third-party defendant Manhattan Medical Development LLC in the third-party complaint (motion sequence no. 008) is granted with regard to liability only; and it is further

ORDERED that the motion of third-party defendant Rhino Fitness Co LLC for summary judgment dismissing the third-party complaint (motion sequence no. 009) is denied.

Dated: January 2, 2020

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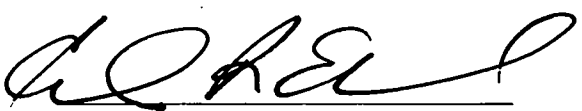

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.