

<b>Roth v 49 E. 86th St., Inc.</b>
2020 NY Slip Op 30829(U)
March 19, 2020
Supreme Court, New York County
Docket Number: 654482/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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DAVID ROTH,

Plaintiff,

- v -

49 EAST 86TH STREET, INC.,

Defendant.

-----X

INDEX NO. 654482/2019
MOTION DATE 01/08/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7-29 were read on this motion for summary dismissal.

In his complaint, plaintiff seeks damages from defendant cooperative corporation for failing to reimburse him for repair costs and an abatement of common charges, all stemming from a fire in his apartment. He advances three causes of action for various breaches of defendant's proprietary lease, a cause of action for unjust enrichment based on defendant's failure to reimburse him for the damages alleged in his causes of action for breach of the proprietary lease, and a cause of action for breach of the covenant of good faith and fair dealing based also on the causes of action for breach of the proprietary lease. In his sixth cause of action, plaintiff seeks a judgment declaring his legal rights with respect to, inter alia, the proprietary lease. (NYSCEF 1).

Now, by notice of motion, defendant seeks an order pursuant to CPLR 3211(a)(7) an order dismissing plaintiff's fourth and fifth causes of action. Plaintiff opposes.

## I. CONTENTIONS

### A. Defendant (NYSCEF 7-9)

Defendant argues that as a valid and enforceable written contract, namely the proprietary lease referenced by plaintiff in each of his contract causes of action, governs the subject matter of his claims, plaintiff is precluded from recovering on his claim for unjust enrichment as it arises from the same subject matter. In addition, it maintains that the plaintiff's cause of action for breach of the covenant of good faith and fair dealing likewise fails, and observes that the monetary damages claimed for that cause of action equals the sum of the damages claimed for the three cause of action for breach of contract.

### B. Plaintiff (NYSCEF 11-23)

In opposition, plaintiff complains that as defendant has neither filed a pleading admitting that the "contracts" referenced in the complaint "are controlling" or an affidavit from defendant identifying the contracts as controlling, defendant's motion to dismiss should be denied. It also contends that, consonant with CPLR 3014, the cause of action for unjust enrichment is properly pleaded in the alternative in the event defendant claims that the proprietary lease is not enforceable "and/or does not provide for the relief sought by [plaintiff] in his breach of contract claims." (NYSCEF 23).

### C. Defendant's reply (NYSCEF 24-28)

In reply, defendant through its counsel, asserts that its position is that the proprietary lease governs the dispute here and is binding on it. It offers in support a recognition agreement by which it specifically recognized the existence of the proprietary lease between the parties (NYSCEF 25), a letter to plaintiff's counsel from defendant's counsel reflecting that recognition

(NYSCEF 26), and the proprietary lease which, “as the fundamental document governing the relationship between the parties,” clearly applies to this dispute (NYSCEF 27). Defendant also observes that in its motion, it provided a judicial admission that the lease governs the dispute (NYSCEF 8).

## II. ANALYSIS

It is well-settled that a cause of action for unjust enrichment is quasi-contractual (*Comm’r of Dep’t of Soc. Servs. of City of New York v New York-Presbyterian Hosp.*, 164 AD3d 93, 106–07 [1st Dept 2018], *lv denied* 33 NY3d 901[2019]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]), and that “a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Where, however, “there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies.” (*Joseph Sternberg, Inc. v Walber 36th St. Assocs.*, 187 AD2d 225, 228 [1st Dept 1993]).

Here, having conceded numerous times that the proprietary lease governs here, defendant sufficiently demonstrates that there is no bona fide dispute as its existence nor as to whether it governs the dispute in issue. Thus, plaintiff’s cause of action for unjust enrichment is precluded, even if it had been pleaded in the alternative.

Additionally, a cause of action for a breach of the implied duty of good faith and fair dealing “cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract.” (*Bd. of Managers of Soho N. 267 W. 124th St. Canondo. v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]; *Bostany v Trump Org. LLC*, 73

AD3d 479, 481 [1st Dept 2010]). As plaintiff’s cause of action for breach of the implied duty of good faith and fair dealing seeks the sum of the damages he seeks for his three causes of action for breach of contract, the damages allegedly resulting from the breaches of contract are intrinsically tied to the breach of the implied duty.

Plaintiff’s suggestion that defendant acted improperly in filing this motion instead of a pleading is entirely baseless, especially in light of plaintiff’s refusal to agree to an extension for filing a responsive pleading.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant 49 East 86<sup>th</sup> Street, Inc.’s motion for an order summarily dismissing the fourth and fifth causes of action for, respectively, unjust enrichment and breach of the implied duty of good faith and fair dealing, is granted, and those claims are severed and dismissed; it is further

ORDERED, that defendant file its responsive pleading 45 days from the date of this decision; and it is further

ORDERED, that the parties appear for a preliminary conference on May 13, 2020 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

3/19/2020

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: