SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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EPIC CANDLER LLC

Plaintiff,

- v -

LIVE NATION WORLDWIDE, INC.,

Defendant.

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INDEX NO. 656371/2020

MOTION DATE 03/26/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for LEAVE TO FILE.

The motion by plaintiff for leave to amend the complaint is granted in part and denied in part and the cross-motion by defendant for sanctions is denied.

Background

Plaintiff (landlord) brings this case relating to a commercial lease for an entire building in Manhattan. It claims it sent a removal notice on May 4, 2020 pursuant to the lease which required defendant (the tenant) to remove certain items in the retail space and restore the premises to its condition before the lease expired. Plaintiff alleges that defendant failed to send a removal notice to its subtenant (a McDonald's located on the first two floors) and that defendant did not remove items from the premises although it did surrender the premises to plaintiff.

Plaintiff contends that the restaurant area still had a freezer and refrigerators that were not removed. It also complains that the floors and ceilings were altered during the tenancy so that plaintiff will be forced to do work fixing the second floor in order to restore the space to the

condition it was prior to the lease. Plaintiff estimates that the cost of the removal and restoration work will cost nearly $4 million and alleges that defendant owes rent as a holdover tenant.

Previously, the Court dismissed plaintiff's second cause of action for a holdover tenancy on the ground that the instant dispute— the damage to the first two floors of a 24-story building—was a question of damages rather than about a holdover. The Court recognizes, however, that plaintiff contends that it cannot rent the entire building because of the purported damages to the restaurant.

Plaintiff now moves to amend to add a claim for damages to its first cause of action for breach of contract to reflect its inability to rent the entire building, a new cause of action for waste and to re-number the legal fees claim to be the fourth cause of action.

In opposition and in support of its cross-motion, defendant characterizes the instant application as simply an attempt by plaintiff to recover under its holdover theory, a theory rejected by this Court. Defendant claims that plaintiff's claim for waste cannot stand against a tenant. Defendant argues that it was permitted to perform a buildout of the restaurant area. It also insists that nowhere in the parties' agreement is there a provision that would entitle plaintiff to recover the consequential damages it seeks.

In reply, plaintiff maintains that there are no grounds for sanctions as the instant motion was neither malicious nor does it constitute harassment.

The Court observes that the parties submitted letters about the timeliness of plaintiff's reply. The Court will accept the reply as it was filed only a few hours late—this Court prefers to decide motions on the merits rather than technicalities.

Discussion

"[L]eave to amend pleadings should be freely granted in the absence of prejudice or surprise" unless "the proposed amendment is lacking in merit" (*Sepulveda v Dayal*, 70 AD3d 420, 421, 893 NYS2d 549 [1st Dept 2010] [internal quotations and citation omitted]).

The proposed amended complaint alleges that because of defendant's breach of a provision of the lease that required it to perform removal and restoration work, plaintiff is "unable to rent out the Premises or at least the Retail Premises. Because Plaintiff cannot rent out the Premises, or at least the Retail Premises, it has been damaged in an amount to be determined at trial" (NYSCEF Doc. No. 55, ¶¶ 28, 29). Admittedly, this language is facially vague; it is unclear whether plaintiff is seeking damages solely from the removal and restoration work or whether it is seeking damages from lost rent. Paragraph 30 of the amended complaint cites an estimate for the repair work ($3,396,827.00) and demands damages of at least that amount.

Therefore, the Court permits this amendment but observes that plaintiff would not be entitled to lost rent. "It is well settled that lost rent is not recoverable as damages for breach of a lease covenant requiring a tenant to keep the premises in good repair. An action alleging breach of such a covenant can be brought either before or after the expiration of the lease term" (*Bldg. Serv. Local 32B-J Pension Fund v 101 Ltd. Partnership*, 115 AD3d 469, 470, 981 NYS2d 682 [1st Dept 2014]). "[I]f the action is brought after the expiration of the lease term, the measure of the damages is the cost of putting the premises into repair" (*id*. at 471).

The Court denies the branch of the motion seeking leave to amend to add a waste cause of action. "The rule is well-established that a lease confers the use, not the dominion of the property demised and that the power of making an alteration does not arise out of a mere right of user. Thus, a tenant may not, without the consent of the landlord, make material changes or

alterations in the demised premises. Any alteration which materially injures the landlord's reversionary interest, or materially changes the nature and character of the demised premises constitutes waste" (*Harar Realty Corp. v Michlin & Hill, Inc.*, 86 AD2d 182, 185 [1st Dept 1982] [internal quotations and citation omitted]).

The issue here, as described by plaintiff in its proposed amended complaint, is not that an alteration was completed without permission. Rather, plaintiff complains that the premises were not returned to the same state as it was prior to the commencement of the lease. In other words, plaintiff alleges that it cannot rent the entire building because defendant did not restore the first few floors. That does not state a cause of action for waste—there is no allegation that these alterations were made without permission or violated a specific provision of the lease.

The Court denies the cross-motion for sanctions. Plaintiff was entitled to make a motion for leave to amend based on its view of the Court's previous decision. That the Court is denying a portion of the motion does not render it frivolous.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for leave to amend is granted only to the extent that plaintiff may add the proposed additional paragraphs to its breach of contract cause of action and denied as to the remaining relief requested including any request that it be awarded consequential damages for lost rent; and it is further

ORDERED that plaintiff shall upload an amended pleading that conforms to this decision on or before April 8, 2020 and defendant shall answer or respond pursuant to the CPLR.

ORDERED that the cross-motion by defendant is denied.

Remote Conference: June 28, 2021.

4/5/2021
DATE

ARLENE P. BLUTH, J.S.C.

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