# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. SABRINA KRAUS **PART** 57TR

*Justice*

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AUDTHAN LLC,

Plaintiff,

- v -

NICK & DUKE, LLC,

Defendant.

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**INDEX NO.** 652050/2015

**MOTION DATE** 2/10/2022

**MOTION SEQ. NO.** 026

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 026) 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066

were read on this motion to/for DISMISS.

## BACKGROUND

Defendant is the owner of 182-188 Eleventh Avenue, New York, New York (Subject Premises). Plaintiff was the lessee of the Subject Premises, pursuant to a long-term ground lease for a term from May 2013 through March 2053, with an option to renew at plaintiff's sole discretion for another 48 years. Both parties agree that said lease has been terminated but disagree as to what the basis of the termination was and when that termination took place.

In 2009, HPD issued a finding of harassment and imposed a restrictive declaration on the Subject Premises, barring any further development or the issuance of any building permits unless and until defendant cured the harassment finding by, among other things, creating 15,000 permanent square feet of low-income housing on the Subject Premises.

Pursuant to the lease between the parties, plaintiff planned to develop the complete zoning lot comprising Subject Premises and build a 58,000 square foot mixed-use building that would revert to defendant at the end of the lease term. Plaintiff agreed to take sole responsibility

for working out a cure to the HPD harassment finding and to develop the 15,000 square feet of low-income housing HPD required. As no building permit could issue until a cure agreement with HPD was signed, the lease further obligated defendant to cooperate in good faith with plaintiff in effectuating the harassment cure.

In December 2015, plaintiff and HPD had arrived at a proposed Cure Agreement, plaintiff sent the Agreement to defendant and asked that defendant execute the agreement so it could be submitted to HPD. Defendant did not execute the agreement.

## RELEVANT PROCEDURAL HISTORY

This action has been pending since 2015, and over the course of the last six plus years has really constituted several different claims.

Plaintiff commenced the action in June 2015. The original complaint asserted causes of action for breach of contract, a declaratory judgment and a preliminary and permanent injunction, all related to a dispute between the parties as to whether charges for attorneys' fees could properly be considered additional rent under the lease.

Shortly after the complaint was filed, plaintiff moved by order to show cause for an injunction preventing defendant from terminating the lease based on attorneys' fees alleged as additional rent. The Court (Reed, J) declined to sign the order to show cause finding it was contrary to the terms of the lease and that no irreparable harm had been alleged warranting an injunction.

On July 15, 2015, defendant issued a notice of termination asserting plaintiff was in default of its obligations under the lease in that it had failed to cure outstanding violations on the property within one year of taking possession as required. On July 29, 2015, plaintiff filed a second order to show cause seeking a *Yellowstone* injunction, along with an amended complaint

asserting six causes of action, including a cause of action alleging that defendant had breached the lease "… by … refusing to honor its obligation to review, sign or act upon Plaintiff's request for consent …" for documents need to go forward with the project. Plaintiff sought an order compelling defendant "to approve and/or execute" the necessary documents.

Pursuant to a decision and order dated February 10, 2016, the Court (Reed, J) granted the order to show cause to the extent of granting a *Yellowstone* injunction, directing plaintiff to pay ongoing use and occupancy and directing the parties to submit a proposed order providing for an undertaking.

On March 28, 2016, plaintiff moved for an order requiring defendant to immediately "approve and execute" the Cure Regulatory Agreement, as well as a lease amendment and other documentation. The motion was denied pursuant to a decision and order of the Court (Reed, J) dated May 31, 2017, which held that plaintiff had not satisfied any of the required elements to receive injunctive relief. While the court noted that defendant did not contradict certain allegations, which would suggest that defendant was not acting in good faith in regards to the Cure Agreement, the court found that there were issues of fact as to whether defendant was justified in refusing to execute the Cure Agreement. Additionally, the court noted defendant raised a valid issue regarding eight units which had rent stabilized tenancies and whether the necessary square footage, which was to revert to defendant, was preserved in light of those ongoing tenancies.

The court held "… the impact of these four units on the Lease and Cure Agreement and on the square footage discrepancy creates an issue of fact. Moreover, the court is not persuaded that these units, although rent stabilized, can still be counted toward the low-income Cure amount." The court concluded that the balance of equities favored defendant because the

preliminary injunction sought would change the *status quo*, and that denial of the motion would preserve the *status quo* until the issue of the units was resolved.

On May 16, 2016, defendant issued yet another notice of default alleging plaintiff had failed to cure outstanding violations under the lease. The court again granted plaintiff a *Yellowstone* injunction conditioned on continued payment of use and occupancy and an increased undertaking.

On October 9, 2017, defendant issued a third notice of termination alleging that plaintiff had failed to cure outstanding violations on the Subject Premises as and when required by the lease. Pursuant to a decision and order dated August 28, 2018, the court again granted a *Yellowstone* injunction.

On February 14, 2020, defendant served a fourth notice of termination alleging plaintiff failed to obtain insurance coverage as required under the parties' lease agreement. Pursuant to a decision and order dated July 2, 2020, the court (Reed, J) granted a fourth *Yellowstone* injunction and issued an order barring defendant from issuing any further termination notices against defendant without prior approval from the court.

On June 4, 2021, defendant's counsel wrote a letter to HPD regarding the Cure Agreement. In said letter, counsel stated in pertinent part:

> Owner will not, and will never, approve any version of a PCA, because no cure is warranted in light of adjudicated harassment of tenants by both Audthan and CHDC. Owner will not be put in a position whereby Owner must commit to sign the PCA before HPD determines whether "the Cure Agreement is still warranted." In light of the information already provided to HPD, we suggest that HPD should simply issue an order of denial and revoke the draft PCA.

In response on July 26, 2021, plaintiff sent defendant a letter stating that the June 4, 2021 declaration that defendant would never sign a PCA constituted a repudiation by defendant of the

lease and plaintiff was treating the lease as terminated and surrendering possession effective July 30, 2021.

On August 9, 2021, the court (Kelly, J) issued an order granting plaintiff's application to serve a third amended complaint. The Third Amended Complaint asserts causes of action for breach of contract, breach of the covenant of quiet enjoyment, for an order directing the return of plaintiff's security deposit and for a dissolution of the undertakings.

**THE PENDING MOTION**

On October 27, 2021, defendant moved for an order pursuant to CPLR §§3211(a)(1), 3211(a)(5) and 3211(a)(7) dismissing the third amended complaint and entering a money judgment against plaintiff in the amount of $147,358.45.

On February 10, 2022, the court heard oral argument and reserved decision. The motion is granted to the extent set forth below.

**DISCUSSION**

For the purposes of a motion to dismiss, a pleading is to be afforded a liberal construction in the light most favorable to the plaintiff. *Leon v. Martinez*, 84 NY2d 83, 88 (1994). "Nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Sud v. Sud*, 211 AD2d 423, 424 (1st Dept 1995) (*citing Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 (1st Dept 1991)). Dismissal under CPLR§ 3211(a)(7) is warranted when the facts, as alleged, do not "fit within any cognizable legal theory." *M & E 73-75, LLC v. 57 Fusion LLC*, 189 AD3d 1, 5 (1st Dept 2020). A motion to dismiss under CPLR§ 3211(a)(1) "should be granted where the essential facts have been negated beyond substantial question by

the affidavits and evidentiary matter submitted." *Biondi v. Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999).

***Defendant's motion to dismiss the First Cause of Action to the Extent it Asserts Breach of Contract for Failure to Execute the Cure Agreement is Denied***

Defendant argues that §33.09 of the Lease bars plaintiff's claims for damages based on the failure to execute the Cure Agreement.

Section 33.09 of the Lease, entitled "Approval," states:

> Whenever [Defendant's] or [Plaintiff's] consent or approval is required under the terms of this Ground Lease, such consent or approval shall not be unreasonably withheld, conditioned or delayed unless otherwise specified herein. Each of [Defendant] and [Plaintiff[ hereby waives to the fullest extent permitted by law any right to damages (actual, incidental or consequential) based upon either party's actually or allegedly wrongfully withholding, conditioning or delaying any consent or approval under or in connection with this Ground Lease. Such party's sole remedy for any wrongfully withheld, conditioned or delayed consent or approval shall be the right to seek injunctive relief.

Plaintiff argues that the failure to execute the cure agreement had nothing to do with approval. However, that is not the position they took in this litigation. As noted above, plaintiff expressly came to this court and asked that the court compel defendant to approve and execute the Cure Agreement.

The court agrees that plaintiff's claim for damages based on defendant's failure to consent to and execute the Cure Agreement is prohibited by the terms of the lease agreement. Such limitations on remedies found in commercial leases are enforceable (*Gladliz, Inc. v. Castiron Court Corp.*, 177 Misc. 2d 392, 397; *Drip & Chat, Inc. v. 88 Greenwich Owner LLC*, 2006 WL 8081701; *Arlona Ltd. Partnership v The 8th of January Corp.* 2007 WL 6196214).

Plaintiff alleges the cause of action seeks damages based on defendant's more general obligation under Section 33.10 of the lease. Section 33.10 of the lease however also references approval and provides:

> Cooperation. Each of Lessor and Lessee agrees to cooperate with the other party in executing any and all documents necessary or appropriate under this Lease where requested by such other party and otherwise to give its approval to such documents as may be requested by such other party provided that such documents comply with Legal Requirements and are reasonable, and further provided that the requesting party pays all the other party's reasonable professional costs (including architectural, engineering and legal costs) actually incurred. Each of Lessor and Lessee shall not unreasonably withhold, condition or delay its approval of such documents, or the execution thereof, Each of Lessor and Lessee shall indemnify, hold harmless and defend the other party against any responsibility or liability that it may incur as a result of its execution and delivery of such documents to the other party and/or the appropriate governmental agency.

However, plaintiff also argues, and defendant concedes that a limitation of the kind contained in Section 33.09 does not apply to bad faith misconduct that is willful, undertaken with malice, or otherwise involves intentional wrongdoing. *Banc of Am. Sec. LLC v. Solow Bldg.* Co. II, L.L.C., 47 A.D.3d 239, 244-45 (1st Dept. 2007). The court agrees with plaintiff that the complaint sets forth facts sufficient to allege that defendant's conduct, including its letter to HPD stating it would never sign any cure agreement, is sufficient to deny a 3211 motion to dismiss. Plaintiff alleges that defendant's bad faith includes knowing submission of false testimony, repeated baseless notices of termination, and misrepresentations to HPD, which were intended to deliberately harm plaintiff by preventing the development of the Subject Premises.

Thus the court finds that even though Section 33.09 applies, it is premature to dismiss plaintiff's claims at this juncture because plaintiff's allegations suffice to raise an issue as to whether defendant's bad faith misconduct precludes it from relying on Section 33.09. Therefore the motion to dismiss that part of the first cause of action which seeks damages for breach of contract is denied.

***The Complaint Fails to State a Cause of Action for Anticipatory Repudiation of Contract***

As held by the Court of Appeals:

> An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty **before** the time fixed in the contract for ... performance has arrived" (10–54 Corbin on Contracts § 54.1 [2017]; *see* 13 Williston on Contracts § 39:37 [4th ed.] ).
> An anticipatory breach of a contract—also known as an anticipatory repudiation—"can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach" (*Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 705 N.E.2d 656 [1998] [internal quotation marks omitted]; *see* 2B N.Y. PJI2d 4:1 at 35–36 [2017] ).

*Princes Point LLC v. Muss Dev. L.L.C.*, 30 N.Y.3d 127, 133, (2017).

In this action, plaintiff's position has been that defendant's obligation to execute the Cure Agreement was past due at the time of the June 4th letter by defendant's counsel to HPD. In its first amended complaint dated July 28, 2015, plaintiff asserted breach of contract and a cause of action for specific performance based on defendant's failure to approve and execute the proposed Cure Agreement with HPD. That same claim of breach is asserted in the third cause of action for the second amended complaint dated December 21, 2020.

While it is true that defendant's letter to HPD was a more complete statement that it would not sign any agreement in the future, plaintiff had already alleged that such conduct, in regards to the same obligation asserted under the lease, was a breach as early as 2015. Indeed, plaintiff filed two complaints seeking damages for breach of that obligation.

> Technically speaking, there is no cause of action for 'anticipatory breach of contract.' There is only a claim for breach of contract, and in the context of anticipatory repudiation, "the promisee gets to choose whether the breach occurs at the time of the *anticipatory repudiation*, or at the time for *performance*." *Lucente v. Int'l Bus. Machs. Corp.*, 146 F. Supp. 2d 298, 309 n.5 (S.D.N.Y. 2001) (emphasis in original).

*St. Christopher's, Inc. v. Forgione*, No. 17-CV-4757 (CS), 2019 WL 3035375, at 7 (S.D.N.Y. July 11, 2019), *aff'd in part, rev'd in part and remanded sub nom. St. Christopher's, Inc. v. JMF Acquisitions, LLC*, No. 20-3808-CV, 2021 WL 6122674 (2d Cir. Dec. 28, 2021).

Plaintiff had steadfastly maintained that the time for performance had passed. Plaintiff elected its remedy of suing for breach based on defendant's failure to perform. Because the breach referred to in the June 4th letter pertains to the same obligation plaintiff alleges had existed since 2015, plaintiff has already asserted the time for performance has passed. There can not be an anticipatory repudiation of an obligation for which time for performance has already passed. "By definition an anticipatory breach cannot be committed by a party already in material breach of an executory contract." *Kaplan v. Madison Park Grp. Owners, LLC*, 94 AD3d 616, 618 (1st Dept 2012).

> Plaintiff's breach of contract claim is predicated on Defendant's failure to pay installments that are alleged to have been due . . . . Defendant was in material breach of the contract by not making any payment by January 15. . . . Plaintiff cannot bring an anticipatory breach claim for alleged communications by Defendant that it would not perform after non-performance had already occurred. Accordingly, Plaintiff's . . . cause of action is dismissed.
> *Mr. Olympia, LLC v. Ultimate Nutrition, Inc.*, No. 17 CV 1346 (ALC), 2018 WL 1322201, at *4 (S.D.N.Y. Mar. 13, 2018)

Based on the foregoing, the motion to dismiss that part of the first cause of action that is based on repudiation is granted.

***The Motion to Dismiss the Second Cause of Action for Breach of Quiet Enjoyment is Denied***

Plaintiff's second cause of action alleges a breach of quiet enjoyment. Plaintiff alleges that defendant intentionally acted to prevent a Cure Agreement with HPD and thus deprived plaintiff of the primary purpose of the lease which was the development of the Subject Premises.

"An implied covenant, or an express covenant . . . for quiet enjoyment, in effect is an agreement on the part of a landlord that for the period of the demised term the tenant shall not be disturbed in his quiet enjoyment of the demised premises by the wrongful act of the landlord, . . . or by the enforcement of any title superior to take of the landlord." (Rasch, N.Y. Landlord & Tenant, Sec. 890). "As a general rule, an eviction, actual or constructive is necessary to constitute a breach of a covenant of quiet enjoyment." (Rasch, N.Y. Landlord & Tenant, Sec. 893; *Sears Roebuck & Co. v. 9 Avenue 31st Corp*., 274 N.Y. 388, 398; *McQuade v. Carvel Stores of Penn*., 8 Misc.2d 659; *House of Chan v. Dykman*, 14 Misc.2d 595. When breach of this covenant is asserted as a basis for a damage claim, it is the act of the landlord which must preclude the tenant from beneficial enjoyment of his leasehold. (*Barash v. Pennsylvania Terminal Real Estate Corp*., 26 N.Y.2d 77; *Dave Hornstein Co. v. Columbia Pictures Corp*., 4 N.Y.2d 117).

The court agrees with plaintiff that the cause of action sounds in contract not in tort and may be asserted with other breach of lease claims.

Plaintiff claims that when defendant stated unequivocally that it would never sign any Cure Agreement to HPD, this was the point at which they were denied the beneficial use of the premises and vacated. These allegations are sufficient to set forth a cause of action for breach of quiet enjoyment.

***The Motion to Dismiss the Third Cause of Action Based on Breach of Contract is Denied***

Plaintiff's third cause of action alleges that the termination notices issued by defendant while this action was pending were issued in bad faith. Plaintiff alleges a violation of paragraph 15 of the lease and of the lease's implied covenant of good faith and fair dealing.

Plaintiff alleges that damages as a result of said breach include legal fees incurred in defending against the notices as well as the return of all sums paid under protest.

Defendant argues that plaintiff may not seek legal fees as damages as they are not provided by statute or the parties contract. The court agrees that plaintiff is not entitled to seek as damages the legal fees incurred as a result of defending against the notices. *Baker v. Health Mgmt. Systems, Inc.*, 98 NY2d 80, 88 (2002). The cases cited by plaintiff are not applicable to the facts in this case. In *Aero Garage Corp. v Hirschfeld* [185 AD2d 775, 776 (1st Dept 1992)], the plaintiff was awarded attorneys' fees because it incurred those fees by performing an obligation defendant had under the lease and failed to perform. The plaintiff in *Aero Garage Corp.* was not awarded attorneys' fees in connection with litigating the subject action, and the Appellate Division limited its holding to the unusual facts of that action.

However, plaintiff also asserts as damages a claim for the return of "additional rent" which was paid under protest. Plaintiff has set forth a valid cause of action for said claim and does seek damages which would flow if plaintiff proves its claim at trial.

Based on the foregoing the third cause off action is dismissed only to the extent that it seeks damages for attorneys' fees incurred in defense of the termination notices issued by defendant.

***The Motion to Dismiss the Fourth Cause of Action Seeking a Preliminary and Permanent Injunction is Denied***

Defendant argues this cause of action must be dismissed because plaintiff did not properly terminate the lease. While the court has dismissed the claim based on repudiation, the fourth cause of action does set forth a viable claim under §7-103 of the General Obligations Law. General Obligations Law § 7–103(1) forbids landlords from commingling security deposit monies with their own funds.

In this action defendant's admitted commingling of plaintiff's security deposit vested in plaintiff an "immediate right" to receive those monies. *Tappan Golf Drive Range, Inc. v. Tappan Prop., Inc.*, 68 A.D.3d 440, 440 (2009) (*citing LeRoy v. Sayers*, 217 A.D.2d 63, 68–69, 635 N.Y.S.2d 217 [1995]. "Upon breaching its fiduciary duty not to commingle the money, defendant 'forfeited any right [it] had to avail [it]self of the security deposit for any purpose' (*Dan Klores Assocs. v. Abramoff*, 288 A.D.2d 121, 122, 733 N.Y.S.2d 388 [2001])." *Id.*

Based on the foregoing, defendant's motion to dismiss the fourth cause of action is denied.

***The Motion to Dismiss the Fifth Cause of Action is Denied***

Plaintiff's fifth cause of action seeks dissolution of undertakings which total $518,000.00.

Defendant argues "the undertaking will be addressed by the Court if and when the *Yellowstone* injunction is vacated." At oral argument, both parties agreed on the record that the lease had been terminated (albeit for different reasons), and possession had been surrendered, as a result both parties agreed the *Yellowstone* Injunctions herein should be vacated.

Based on the foregoing, all *Yellowstone* Injunctions previously granted in this action are hereby vacated and the motion to dismiss the fifth cause of action is denied.

***Defendant's Motion for a Immediate Entry of a Money Judgment for Use and Occupancy Accruing After Plaintiff Surrendered Possession Is Denied and the Prior Order Directing Payment of Use Occupancy Pendente Lite is Vacated***

As noted above the original order directing payment of use and occupancy was issued in conjunction with the *Yellowstone* Injunctions which are now vacated. Use and Occupancy is typically awarded during litigation to preserve the *status quo ante* and as a condition of a tenant's ongoing right to possession while the various claims are litigated.

Now that plaintiff has surrendered possession and the *Yellowstone* Injunctions have been vacated, any claims that defendant wants to make about remaining sums due pursuant to the lease or any alleged breach thereof can be sought as damages.

Based on the foregoing, defendant's motion for a money judgment for post possession use and occupancy is denied.

**CONCLUSION**

Wherefore it is hereby:

ORDERED that defendant's motion to dismiss that part of the first cause of action for anticipatory repudiation of contract is granted; and it is further

ORDERED that defendant's motion to dismiss that part of the third cause of action that seeks attorneys' fees for defending against termination notices is granted; and it is further

ORDERED that all prior *Yellowstone* injunctions issued herein, as well as all prior orders directing payment of use and occupancy *pendente lite* are vacated; and it is further

ORDERED that all other relief sought in the motion has been considered and is denied; and it is further

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

ORDERED that counsel are directed to appear for a virtual status conference on April 13, 2022, at 11 AM; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that this constitutes the decision and order of this court.

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2/16/2022
DATE

SABRINA KRAUS, J.S.C.

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