Ermenegildo Zegna Corp. v L&M 825 LLC
2022 NY Slip Op 30578(U)
February 17, 2022
Supreme Court, New York County
Docket Number: Index No. 655204/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** 18
Justice

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ERMENEGILDO ZEGNA CORPORATION **INDEX NO.** 655204/2016

Plaintiff,

- v -

L&M 825 LLC,

Defendant.

---X

DECISION AFTER TRIAL

Plaintiff Ermenegildo Zegna Corporation (plaintiff or Zegna), a commercial tenant, commenced the instant action on or about September 30, 2016 seeking to rescind the lease between it and the defendant-landlord L&M 825 LLC (defendant) on the grounds of mutual mistake (first cause of action). The complaint also asserts breach of contract in the second and third causes of action for the defendant's failure to deliver the premises as described in the lease and failure to cooperate with plaintiff in obtaining required permits and a certificate of occupancy. In the fourth and fifth causes of action, plaintiff asserts claims alleging breach of the implied covenant of good faith and fair dealing and unjust enrichment.

Defendant filed and served an answer asserting affirmative defenses and three counterclaims for plaintiff's breach of the lease in failing to pay rent and additional rent; a declaratory judgment that plaintiff breached the lease and must comply with the same; and attorneys' fees (see NYSCEF Doc No. 6). Plaintiff replied to the counterclaims, asserting various affirmative defenses (see NYSCEF Doc No. 10).[1]

[1] Plaintiff's post-trial memorandum requests that the Court conform the proof to the pleadings so that plaintiff may assert affirmative defenses that were not originally plead, which is discussed infra (see NYSCEF Doc No. 97 at 42, n 4).

A nonjury trial was conducted on November 21, 2019 and January 28, 2020 before the Hon. Carol Ruth Feinman. The lease and other documents were admitted into evidence during the trial. Robert Aldrich, plaintiff's Chief Executive Officer for the Americas region and Giovanni Ballielo, Zegna's Corporate Store Planning Director, testified on November 21, 2019. Theodore Bodnar of Bodnar Architecture P.C., the defendant's architect, and William Friedland, a principal of Friedland Properties, testified on January 28, 2020.[2] The matter was administratively re-assigned to the undersigned in January 2021 and, after conference with the Court, the parties stipulated to having the trial decided on the record rather than re-try the case (see NYSCEF Doc No. 102).

The Court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

FINDINGS OF FACT

In late 2012, plaintiff began searching for a location in Manhattan to lease space for a retail store. In December 2012, plaintiff learned of retail space located at 823 Madison Avenue. At the time, the retail space on the first, second, and third floors of that location was combined with 825 Madison as a single space. Defendant advertised the retail space as two separate spaces, divided by a wall — a wall that did not yet exist and needed to be erected (the Wall). Plaintiff's representatives visited the location on two occasions and negotiated the terms of the lease between December 2012 and April 2013. Plaintiff was represented by the law firm Cleary Gottlieb Steen & Hamilton LLP for the lease negotiations and execution.

On April 12, 2013, the parties executed a lease for the space at 823 Madison, comprised of three levels on the first (ground), second, and third floors, totaling 5,225 square feet of space (the retail space), and part of a basement (together, the premises). The lease term commenced August 1, 2013 for a term of

[2] Citations to the witnesses' testimony is referred by the witnesses' last name and transcript page, without the transcript date as it is understood that the four witnesses testified on the above-referenced dates.

10 years, expiring July 31, 2023, with annual base rent at $2.5 million per year in 2014 with annual increases until 2023. The lease contains relevant provisions as follows:

- The premises are leased for the purpose of the retail sale of goods and no other purpose;
- Plaintiff inspected the premises and takes the premises in its "as-is" condition;
- Defendant made no representation as to the condition of the premises, or fitness or sufficiency of the premises for "Tenant's use or requirements";
- Plaintiff assumed responsibility for costs and expenses for the plaintiff's work "necessary to enable Tenant to be open same for business in accordance with the Legal Requirements" and provisions of the lease;
- Such legal requirements included provisions related to the Certificate of Occupancy (CO) of the building;
- Plaintiff's work included constructing the demising Wall, constructing customer stairways and building exits such as fire exists or fire stairs in accordance with "Legal Requirements";
- Plaintiff acknowledged it reviewed and is familiar with the CO for the building; and
- Defendant shall cooperate with plaintiff in connection with obtaining required permits and CO.

Plaintiff admittedly had not reviewed the CO prior to signing the lease and failed to provide testimony as to any due diligence performed with respect to the CO, or alterations and work plaintiff assumed under the lease (Aldrich at 63-65). After signing the lease on April 12, 2013, plaintiff hired Space 4 as an architect and Code LLC was hired as a permit expediter.

At this time, it appears as though the parties believed that a CO dated November 6, 2003 governed the premises (Aldrich at 26; Bodnar at 29), which listed retail use of the first, second, and third floors (see pltf ex 5) (the 2003 CO).

In June of 2013, plaintiff's architect Space 4 and defendant's architect/expeditor, Bodnar, coordinated on an application for a permit to construct the Wall. The parties discussed what type of application should be filed. In e-mail correspondence dated June 19, 2013, Space 4 e-mailed Bodnar noting that "the current [CO] 823 Madison Avenue accessible on the BIS indicates retail use of the ground floor only"; and that the landlord should be responsible for establishing the retail use of the two upper floors, which could be done with an Alt 1 application (deft ex A, L&M 739-740 [emphasis in original]). Ultimately, following a meeting between Space 4 and Bodnar, plaintiff decided to submit an Alt 2 application. An Alt 2 application is filed by a professionally certified architect and implies that the work to be performed does not itself affect egress. As recapped in a June 21, 2013 e-mail by Space 4: "The application [for the Wall] will depict solely the partitions to be installed for the purpose indicated; it will not include or dictate the proposed layout of the tenant's space, nor illustrate egress, which will be addressed in the individual applications filed by the tenant's appointed professionals" (deft ex A, L&M 728). In other words, plaintiff's professionals would address the issues of "[e]gress, use, occupation" and "would need design drawings, construction drawings in order to . . . address that" (Bodnar at 57). The Wall was subsequently constructed in August of 2013.

Around September or October 2013, plaintiff's expediter Code LLC advised plaintiff that the 2003 CO may have only governed 825 Madison and the prior COs for 823 Madison permitted retail use only on the first/ground floor but not the second or third floors. Further, the Wall had now cut 823 Madison off from 825 Madison, leaving only one code-compliant means of egress at the premises.

Plaintiff requested a meeting with defendant, which took place on or about October 30, 2013.[3] Plaintiff advised defendant it was having problems obtaining permits for retail use of the second and third floors and requested defendant's assistance. Plaintiff claims that the defendant was dismissive of

[3] Additional findings of fact related to the failure to cooperate and breach of the implied covenant of good faith and fair dealing are set forth in the legal discussion infra.

its concerns or requests and advised that plaintiff should be able to get the permits based on the 2003 CO (Aldrich at 39; see pltf ex 8). Following the meeting, plaintiff planned to submit two alternate applications, hoping that if the Department of Buildings (DOB) accepted the approach with the existing 2003 CO, then plaintiff might be able to avoid delays (see pltf ex 8). Plaintiff's experts also filed for three "determinations" with the DOB requesting permission for certain items in plaintiff's applications. The applications were either denied, or approved if certain conditions were met, such installing sprinklers (see pltf exs 12-14). Plaintiff appealed those determinations but was unsuccessful.

Plaintiff was unable to open its store in January 2014 as expected; rather plaintiff opened a temporary Zegna "pop-up" store on the first floor in July 2014.

About a year later, plaintiff requested a meeting with defendant, which was held on April 15, 2015. Plaintiff explained the impasse with respect to the DOB and defendant offered Bodnar to help. By November 2015, Bodnar was able to obtain approval regarding one of the objections from the DOB, permitting the use of the shared hallway and staircase as a required means of egress from the second and third floors (Bodnar at 35). Plaintiff would still have to "add[] fire resistance ratings, upgrad[e] fire resistance ratings and sprinklers throughout the building" (Aldrich at 49), which plaintiff understood to mean the residential apartment spaces located above the commercial floors. Ballielo testified that the additional work would have taken approximately a year to complete and would cost approximately $3 million (Ballielo 147-148).

Plaintiff vacated on September 30, 2016 because the required alterations would be too costly (Aldrich 50-52), and it commenced this action on the same day. Defendant refused to accept plaintiff's surrender and terminate the lease. Plaintiff has not paid rent since it vacated.

CONCLUSIONS OF LAW

I. Recission Due to Mutual Mistake

Plaintiff's complaint alleges that "[p]rior to and at the time Landlord and Zegna entered into the Lease, both Landlord and Zegna mistakenly believed that Zegna would be able to use floors 1, 2, and 3 of the Premises for retail sales immediately upon commencement of the Lease" (NYSCEF Doc No. 1 at ¶ 42).[4]

"As a general rule, where a mistake in contracting is both mutual and substantial, there is an absence of the requisite 'meeting of the minds' to the contract and relief will be provided in the form of rescission" (County of Orange v Grier, 30 AD3d 556, 556-57 [2d Dept 2006], quoting Sunlight Funding Corp. v Singer, 146 AD2d 625, 626 [2d Dept 1989] [internal quotation marks omitted]). "The mutual mistake must exist at the time the contract is entered into and must be substantial" (County of Orange, 30 AD3d at 557 [2d Dept 2006], quoting Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist., 81 NY2d 446, 453 [1993]).

> A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient (Restatement [Second] of Contracts § 154 [1981]).

The evidence suggests that the "mistake" was that both sides apparently believed that the 2003 CO governed not only 825 Madison but 823 Madison as well and that retail use of the space was permitted on the upper floors, and not just the ground floor.

Even if the "mistake" was mutual, the Court first finds that the risk of the putative mistake was allocated to the plaintiff. The lease states that the plaintiff takes the space "as is"; and that it had

[4] Although the complaint states "for retail sales immediately upon commencement of the Lease," the lease commenced when plaintiff took possession in August of 2013 and it has been plaintiff's position that it would not actually engage in retail sales until January 1, 2014 because the work had to be performed (e.g., erection of the Wall and other alterations to fit the space to plaintiff's specifications).

reviewed the CO and that it was responsible for its use of the space, including construction of basic building exits in accordance with legal requirements, including obtaining DOB permits, approval and compliance with the CO and related issues. Notably, there is nothing in the lease that states the defendant had reviewed the applicable CO, or made any representations of the same, or that defendant was responsible for any of the work/alternations that plaintiff needed to do to legally use the space for retail use (see generally Kosher Konvenience, Inc. v Ferguson Realty Corp., 171 AD2d 650, 651 [2d Dept 1991] ["The lease will be considered a valid contract if the bar to legal use of the premises is readily correctible and the language used in the lease indicates that the parties intended that the defect be corrected and the premises legally occupied"]; cf. P.K. Dev. v Elvem Dev. Corp., 226 AD2d 200, 201-02 [1st Dept 1996] [where there was no express provision and the court allocated the risk of the mistake regarding occupancy to the defendant-landlord, who was in the best position to ascertain the existence of the fact]).

Additionally, the doctrine of mutual mistake "may not be invoked by a party to avoid the consequences of its own negligence" (P.K. Dev., 226 AD2d at 201; see Restatement [Second] of Contracts § 154 [b] [1981]). Thus "[w]here a party 'in the exercise of ordinary care, should have known or could easily have ascertained' the relevant fact[,] . . . that party is deemed to have been '[c]onscious[ly] ignoran[t]' and barred from seeking rescission or other damages" (Eisenberg v Hall, 147 AD3d 602, 604-05 [1st Dept 2017] [internal citations omitted], quoting P.K. Dev., 226 AD2d at 202). "Even where a party must go beyond its own efforts in order to ascertain relevant facts (such as obtaining experts' reports), courts have held that the party must bear the risk of mistake if it chooses to act on its otherwise limited knowledge" (P.K. Dev., 226 AD2d at 202).

Thus, the Court finds that the plaintiff is also barred from rescinding the lease based on the putative mistake due to its own lack of due diligence. Plaintiff admittedly testified it did not do any due

diligence prior to signing the lease. The fact that the 2003 CO did not apply to demised premises, i.e., 823 Madison, could have been discovered prior to signing the lease. Notably, it could have been looked up on the DOB website and, indeed, Space 4 found and shared links to the CO which appeared to be applicable to 823 Madison as early as June 2013. Further, when a wall is put up in between a space, it is not unreasonable to expect that legally compliant egress may be at issue and might change the legal or permitted occupancy.

Moreover, there is nothing in the record to infer that plaintiff should have reasonably relied on Bodnar or his Alt 2 application to the extent plaintiff suggests. The plaintiff's architect was coordinating on the Wall application with Bodnar and recognized the differences in the types of applications it could submit. Both sides are highly sophisticated and were represented by counsel in the lease negotiation and execution (cf. Lakshmi Grocery & Gas, Inc. v GRJH, Inc., 138 AD3d 1290, 1292-93 [3d Dept 2016] ["Supreme Court credited [plaintiff-tenant's representative's] testimony that a level of trust existed between them [defendant's representatives] and found that plaintiff's exercise of due diligence, although minimal, was reasonable"]).

Had plaintiff reasonably inquired as to the applicable CO for the premises it leased and realized the implications of the obligations it assumed in the lease, prior to signing the lease, as it had done in June of 2013 after hiring an architect and expeditor, the confusion may have been avoided. Even knowing in June of 2013 that the construction of the Wall may change the legal use of the space, and plaintiff's actions in proceeding on the *hope* that the DOB would approve plaintiff's plans to use the premises for retail use on the upper floors, irrespective of such apparent conflict with the applicable CO, falls on the plaintiff (see generally P.K. Dev., 226 AD2d at 202 ["The failure of events to develop or continue as expected — no matter how well-founded the expectation — does not entitle the disappointed party to rescission or avoidance of the contract"] [internal citation omitted]; In re Schenck Tours, Inc.,

69 BR 906, 914 [Bankr EDNY 1987], affd 75 BR 249 [EDNY 1987] ["Contract avoidance on the grounds of mutual mistake is not permitted just because one party is disappointed in the hope that the facts accord with his wishes"]).

II. BREACH OF LEASE: FAILURE TO DELIVER PREMISES

To sustain a cause of action for breach of contract, plaintiff must prove the existence of a contract, plaintiff's performance, defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Plaintiff's second cause of action alleges that defendant failed to deliver the premises. Plaintiff claims that the lease defines the premises as the first, second and third floors, and that those spaces could only be used for "the sale at retail" and "no other purpose whatsoever." In asserting that the 2003 CO did not permit retail use of the upper floors, plaintiff claims that defendant failed to deliver the premises.

The Court finds that defendant did not breach its obligation to deliver the premises. Plaintiff began occupying the space as the parties intended. That the plaintiff had to comply with various legal requirements to use the space for retail is clearly set forth in the lease as part of plaintiff's obligation(s). The Court declines to construe a reading of the lease that essentially negates or undermines what the parties explicitly set forth in the lease as to each party's respective obligations (see Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002] ["'The best evidence of what parties to a written agreement intend is what they say in their writing.' Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"], quoting Slamow v Del Col, 79 NY2d 1016, 1018 [1992]; Greenfield, 98 NY2d at 569-70 ["if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"]).

III. BREACH OF LEASE: FAILURE TO COOPERATE

Plaintiff's third cause of action asserts that defendant failed to cooperate with plaintiff in violation of the lease which states that defendant "shall cooperate with [plaintiff] in connection with [plaintiff] obtaining the required permits and a Certificate of Occupancy for [plaintiff's] alterations."

The additional findings of fact relating to this claim are as follows:

Aldrich testified that Friedland "was not cooperative, he didn't offer to assist us"; rather Friedland believed that they could all move forward with the 2003 CO, which was "obviously . . . the wrong prescription for the problem" (Aldrich at 112). Aldrich also believed that defendant was in the better position to know more about the building "to at least shed some light to point [plaintiff] in the right direction" (Aldrich at 112-113).

Friedland testified that after the October 2013 meeting and until April 2015, defendant was not aware of any request for help or assistance in working with the DOB (Friedland at 100-101).

Aldrich and Friedland both testified that defendant never refused to sign off on anything requested by plaintiff, including e.g., plans submitted by plaintiff's design professionals (Aldrich at 61; Friedland at 115).

Plaintiff references its request for an easement in October of 2014, citing Friedland's testimony at 101-103, wherein he testified that an easement between 825 Madison and 823 Madison was requested by plaintiff and received two months later, but there is no apparent reason why it took two months. The other document plaintiff cited in support, exhibit 34, is an October 16, 2014 internal e-mail between plaintiff and its agents indicating that an easement was going to be requested. There is no proof as to when the easement was granted, whether it was two months, more, or less, or any proof as to why two months would or would not be reasonable under the circumstances.

During the April 15, 2015 meeting, Ballielo testified that defendant asked Bodnar to help and that defendant "would support [plaintiff] in obtaining a favorable outcome of the determination" before the DOB (2019 tr at 139). Bodnar allegedly represented it would be "quick" because he had good relations with the DOB. Plaintiff contends that Bodnar's failure to move on the request for "help" was a lack of cooperation. Although plaintiff contends that Bodnar had come up with excuses for failing to move on the request, and only ultimately did so under a threat of litigation in November of 2015, plaintiff submits no evidence that this delay was unreasonable. Rather Bodnar testified that, once he was requested to help in April of 2015, he began researching and analyzing how to approach the objection; met with the borough commissioner in July of 2015; created drawings as requested by the commissioner that verified information that was previously missing in plaintiff's application; went back in twice to verify additional items; and ultimately requested an emergency appointment, which took place in November, to get the approval on the objection (Bodnar at 35, 39-41).

Although the parties failed to provide case law as to what "cooperate" means under a lease,[5] the Court finds that under this record, the Court cannot say that defendant failed to "cooperate" with plaintiff — plaintiff's idea of cooperation would impose burdens that go well beyond what is contemplated in the clear terms of the lease (see generally Greenfield, 98 NY2d at 569-70). Notably, plaintiff conceded that the permitted use for retail sales by plaintiff as set forth in the lease was conditioned upon *plaintiff* complying with the legal requirements including the CO (Aldrich at 102, 109). Plaintiff also conceded that if the tenant could not comply with the existing CO, it would have to apply for a new CO or a temporary CO (Aldrich at 109-110). Nowhere does it state that defendant is

[5] Plaintiff's post-trial brief cites Long Term Capital Holdings v United States, 330 F Supp 2d 122, 168 [D Conn 2004]), which concerned a taxpayer's *statutory* obligation to "cooperate" with the government's request for information. The District Court there noted that there was no definition of the term in the statute, but referred to a dictionary definition, stating that the "ordinary meaning of the word is 'to act or operate jointly with another or others'" (id., citing Webster's New International Dictionary 585 [2d ed. (Unabridged) 1961]).

supposed to be doing it for them. Further, once the approval on the objection regarding egress was obtained by Bodnar, plaintiff would have to address the remaining items of the application, which plaintiff failed to do (see Bodnar at 35-36).

IV. Implied Covenant of Good Faith & Fair Dealing

"Implicit in every contract is a promise of good faith and fair dealing that is breached when a party acts in a manner that . . . would deprive the other party of receiving the benefits under their agreement" (Sorenson v Bridge Capital Corp., 52 AD3d 265, 266 [1st Dept 2008]). The implied covenant 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]). To the extent the claim "merely restates [a] breach of contract claim," it will be dismissed (Brook v Peconic Bay Med. Ctr., 152 AD3d 436, 438 [1st Dept 2017]).

The Court finds that this claim is duplicative of the breach of contract claim for failing to cooperate. In any event, it is without merit given the same facts above. To be sure, plaintiff's contentions that defendant incorrectly represented to plaintiff that the 2003 CO would still govern after constructing the Wall and Bodnar's filing for the Wall would not impact egress from the premises are untenable as those issues fall squarely within plaintiff's lease obligations. "The covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp., 25 AD3d 309, 310 [1st Dept 2006]).

V. Unjust Enrichment

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (Abacus Fed. Sav. Bank v Lim, 75 AD3d 472, 473 [1st Dept 2010]). To state a claim for unjust enrichment, "plaintiff must show that (1) the other party was enriched; (2) at that party's

expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (Kramer v Greene, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]). Plaintiff may plead both breach of contract and quasi-contract as alternative theories of recovery where "there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute at issue" (Hochman v LaRea, 14 AD3d 653, 654-655 [2d Dept 2005]). However, where a valid and enforceable written contract governing the subject matter exists, plaintiff is precluded from recovery on a quasi-contract claim (see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987]). Although plaintiff contends that it is inequitable to permit defendants to benefit from plaintiff's rent paid for the entire premises when it was only able to use the first floor for retail use, the claim is precluded by the existence of the lease and its applicable remedies (see Wachovia Sec., LLC v Joseph, 56 AD3d 269, 271 [1st Dept 2008] ["The record does not support Wachovia's allegations of injustice or unjust enrichment, but only supports a finding that Wachovia made a costly error due to its own conduct"]).

Accordingly, all of plaintiff's claims are dismissed.

VI. DEFENDANT'S COUNTERCLAIMS

Defendant asserted three counterclaims: breach of lease in failing to pay rent; declaratory judgment; and attorneys' fees.

The Court finds that defendant must prevail on its counterclaim for declaratory judgment that the lease remains in full force and effect, particularly in light of the Court's finding that plaintiff is not entitled to rescind the lease.

As for the breach of lease counterclaim, defendant must show "(i) the existence of a valid, binding lease, (ii) landlord's performance thereunder, (iii) tenant's failure to pay rent (or other breach), and (iv) damages suffered by landlord as a result of the breach" (A/R Retail LLC v Hugo Boss Retail,

Inc., 149 Misc 3d 627, 637 [Sup Ct, NY County 2021]; see Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]).

It is undisputed that plaintiff stopped paying rent after it vacated the premises on September 30, 2016. However, in its post-trial brief, plaintiff requests that the Court conform its pleading to the evidence presented at trial to assert a constructive eviction, impossibility of performance, and frustration of purpose.

An application pursuant to CPLR 3025 (c) to conform the pleadings to the evidence is "a matter within 'the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to subdivision (b), except that under (c) the possibly increased effect on orderly prosecution of the trial might be a factor to be taken into account'" (Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 23 [1981], quoting Murray v City of New York, 43 NY2d 400, 405 [1977]). "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (Loomis, 54 NY2d at 23).

The Court first notes that no formal application has been made to amend the pleadings before the trial justice. Even if an application had been made, the defendant has not been given an opportunity to oppose it. The Court declines to amend the pleadings sua sponte as, upon review of the record, the proposed defenses and potential claim do not appear to have been brought up before (see generally DuBose v Velez, 63 Misc 2d 956, 957-59 [Civ Ct, NY County 1970] ["why insist upon pleadings at all? Why not try the case first and write the pleadings later? . . . Self-evidently, we need pleadings — so that litigants may know what claims or defenses they must prepare to meet, so that issues are defined for trial, so that parties will be discouraged from tempering their testimony to meet the needs of the

occasion"]). The last-minute attempt to bring in new defenses and a claim for constructive eviction are interposed so late that the Court finds there would be prejudice to the defendant if the Court permitted it, particularly now in 2022, nearly 6 years after the action was filed and 2 years since being tried (cf. Padro v Bertelsman Music Group, 278 AD2d 61, 62 [1st Dept 2000]).

Plaintiff did not otherwise sufficiently contest the defendant's counterclaim for money due under the lease, nor the provision for attorneys' fees. The parties stipulated to submit a document setting forth the back rent due under the lease and the Court issues its judgment accordingly.

CONCLUSION

It is hereby ORDERED that judgment is granted in favor of the defendant on the plaintiff's complaint, and the complaint is dismissed in its entirety; and it is further

ORDERED that defendant's second counterclaim for declaratory judgment is granted; and it is further

ORDERED and ADJUDGED that the parties' lease is not rescinded and remains in effect; and it is further

ORDERED that defendant is granted judgment on its first counterclaim for rent and additional rent and fees due under the lease through November 30, 2019 and shall recover from plaintiff the amount of $13,242,279.80 together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that defendant's third counterclaim for attorneys' fees is severed and the issue of the amount of reasonable attorney's fees that defendant may recover against the plaintiff pursuant to the lease is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of entry of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[6] upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases*.[7]

DATE: 2/17/2022 ALEXANDER TISCH, JSC

Check One: [X] Case Disposed [ ] Non-Final Disposition

Check if Appropriate: [X] Other (Specify Attorneys' fees severed & referred to Special Referee)

[6] Available on the court's website at www.nycourts.gov/supctmanh under the "References" link on the navigation bar.

[7] The *Protocol* is accessible at the "E-Filing" page on the court's website: www.nycourts.gov/supctmanh.