At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of December, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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SEZ FOSTER LLC,

Plaintiff,

- against -

Index No. 522536/21

THE CITY OF NEW YORK, acting through THE DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	10-15 23
Opposing Affidavits (Affirmations)	26-42 43-45
Reply Affidavits (Affirmations)	43-45

In this action to reform the rent provision of a 1984 ground lease, defendant The City of New York, sued herein as "The City of New York, acting through The Department of Citywide Administrative Services" (the City) moves (M.S. 1) for an order: (1) dismissing the October 25, 2021 unverified complaint (complaint) pursuant to CPLR 3211 (a) (7); (2) dismissing the complaint, pursuant to CPLR 3211 (a) (1); and (3) dismissing the first cause of action (mutual mistake) and the sixth cause of action (declaring the 1984

rent provision is unconscionable and unenforceable) as it is barred by the applicable statute of limitations, pursuant to CPLR 3211 (a) (5).

Plaintiff SEZ Foster LLC (SEZ) cross-moves (M.S. 2) for an order, pursuant to CPLR 3025 (b), granting it leave to amend its complaint.

Background

On September 1, 2021, SEZ commenced this action by filing a summons with notice and simultaneously commenced a related special proceeding (under Index No. 522548/2021) to stay arbitration of the parties' dispute regarding the rent provision in the 1984 Lease.

On October 5, 2021, SEZ filed an unverified complaint in this action alleging:

> "[t]his is an action to reform and/or declare unenforceable a manifestly unconscionable rent increase provision in a [1984] ground lease between Plaintiff and the City. Pursuant to Article 22 of the [1984] Lease . . . if Plaintiff timely exercises its option to renew the Lease beyond the Initial Term [September 1, 1984 through December 31, 2015], the annual Basic Rent for the renewal terms are determined in accordance with a formula set forth in Section 22.02 of the Lease [based on the fair market value (FMV) of the Land and the average Treasury Bond rate]. In or about August 2015, the City served Plaintiff with an untimely notice pursuant to Section 22.02 of the Lease stating that based upon the City's alleged application of the Lease renewal rent formula, the Basic Rent payable for the Land for the First Renewal Term under the Lease would increase from $18,758 per annum [which was set in 1984] to $1,100,000 per annum upon the commencement of the First Renewal Term on January 1, 2016. Plaintiff rejected the City's determination of the Basic Rent for the First Renewal Term as set forth in the untimely notice on several grounds, including, *inter alia*, that certain of the provisions of Section 22.02 of the Lease setting forth the rent renewal formula [according to the Average Bond Rate and the FMV of the Land], *if applied as drafted* ***[in 1984]****, would yield a result that is unconscionable*

> *and manifestly unjust and would strip the Lease of all economic benefit to Plaintiff*. Instead, Plaintiff sought to modify the rent renewal formula contained in Article 22 of the Lease to accord with similar modifications that the City had previously agreed to with respect to other similar leases. However, the City refused to modify Plaintiff's Lease. (NYSCEF Doc No. 4, complaint at ¶ 1 [emphasis added]).

In addition to challenging the 1984 rent renewal formula, the complaint also alleges that the FMV of the Land is $2 million rather than the City's appraised value of $12 million.

The complaint further alleges that in August 2021, the City served SEZ with a notice to arbitrate the parties' ongoing dispute regarding the Basic Rent for the First Renewal Term, pursuant to Article 23 of the Lease, despite the fact that Section 23.03 of the 1984 Lease provides that "the arbitrators *shall have no power to modify* any of the provisions of this Lease . . ." (*id.* at ¶¶ 3 and 16 [emphasis added]). The complaint also alleges that "Section 22.03 of the Lease provides that '[i]f the parties are unable to agree on the FMV of the Land on or before June 30, 2015, with respect to the First Renewal Term . . . then the FMV shall be determined by arbitration as provided in Article 23 hereof".

The complaint alleges that SEZ rejected the City's proposed rent renewal and "[s]ince the inception of the First Renewal Term, which commenced on January 1, 2016 and at all relevant times up to the present, the City billed Plaintiff in the amount of the Basic Rent for the Initial Term and accepted same from Plaintiff without controversy". The complaint alleges that "on August 12, 2021 – over six years after the City served its August 2015 letter purporting to set the Basic Rent for the First Renewal Term – Plaintiff received a Notice of Intent to Arbitrate . . . pursuant to Article 23 of the Lease . . . with

respect to the [FMV] of the Land" (*id.* at ¶ 32). SEZ, in response, commenced this plenary action to reform the 1984 Lease and the related special proceeding to stay arbitration pending the resolution of this action (*id.* at ¶ 33).

The complaint asserts the following six causes of action: (1) reformation of Section 22.02 of the 1984 Lease regarding the Basic Rent renewal formula based on mutual mistake of non-party REA, SEZ's predecessor in interest, and the City "to reflect the parties' true intent that a rent increase upon renewal should be based on a reasonable understanding of interest rate behavior and fluctuations at the time the renewal term commenced [on January 1, 2016]" (*id.* at ¶ 40); (2) a judgment declaring that the City is precluded from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term for failure to satisfy the condition precedent in Section 22.03 of the 1984 Lease, which required the City "to serve its Renewal Term Rent Notice, advising Plaintiff of the increase in Basic Rent on or before June 30, 2015" (*id.* at ¶¶ 43 and 47); (3) a judgment declaring that the City waived its right to arbitrate the FMV of the Land and enforce any increase in Basic Rent during the First Renewal Term because: (a) it billed SEZ in the amount of the Basic Rent for the Initial Term since the inception of the First Renewal Term [on January 1, 2016], and (b) it failed to timely notice its intention to commence arbitration, and thus, "knowingly, voluntarily and intentionally abandoned and relinquished its rights under Sections 22 and 23 of the Lease" (*id.* at ¶¶ 53 and 55); (4) a judgment declaring that "the City is precluded from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term based on the equitable doctrine of laches" (*id.*

at ¶ 64); (5) a judgment declaring that "the City is equitably estopped from seeking to arbitrate the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term" (*id.* at ¶ 71); and (6) a judgment declaring that Section 22.02 (ii) of the 1984 Lease "as applied by the City in the Renewal Term Rent Notice is unconscionable and unenforceable under Real Property Law [RPL] § 235-c".

The 1984 Lease

The 1984 Lease contains arbitration clauses requiring that *any disputes or disagreements* between the parties arising with respect to the FMV of the Land regarding the formula for calculating the Basic Rent for the First Renewal Term "shall be determined by arbitration" before a panel of three arbitrators "of recognized competence in the field involved" (NYSCEF Doc No. 5, 1984 Lease at §§ 22.02, 22.03 and 23.02). Section 22.02 (ii) sets forth the rent renewal formula based on the FMV of the Land and the average coupon rate for the ten-year Treasury Bond. Section 23.01 of the 1984 Lease thus provides that:

> "*[a]ny disputes or disagreement* arising between the parties with respect to the FMV of the Land under Article 22 hereof *shall be determined by arbitration*, such arbitration shall be conducted in the manner specified in this Article" (*id.* at § 23.01 at 59 [emphasis added]).

Section 23.03 of the 1984 Lease provides that the arbitrators' power and jurisdiction is limited such that they cannot modify any of the provisions in the 1984 Lease:

> "in rendering their award, *the arbitrators shall have no power to modify any of the provisions of this [1984] Lease*, and the jurisdiction of the arbitrators is expressly limited accordingly.

> Judgment may be entered on the award of the arbitrators so rendered and may be enforced in accordance with the Laws of the State of New York" (*id.* at § 23.03 at 61 [emphasis added]).

The 1984 Lease does not provide that arbitrability would be determined by the arbitrators, and thus, "the question of arbitrability is an issue . . . for judicial determination in the first instance" (*Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 45 [1997]).

The City's Pre-Answer Dismissal Motion

On November 8, 2021, the City filed a pre-answer motion to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7). The City argues that "any cause of action seeking to modify the Lease [based on mutual mistake in 1984 about interest rates in 2016 (first cause of action) and the alleged unconscionability of the renewal rate formula (sixth cause of action)] is barred by the six-year statute of limitations, which began running when the [1984] Lease was executed [by REA and the City in September 1984].

The City asserts that SEZ "succeeded to REA's rights and obligations as lessee [under the 1984 Lease] in or after 2002, and subsequently exercised its right to an additional twenty-five year term commencing on January 1, 2016" (*id.*). In addition to a copy of the 1984 Lease, the City submits a March 8, 2016, Interim Rent Letter Agreement executed by Martin O'Hara, Assistant Director of NYC Citywide Administrative Services, and Azriel Zakheim, Manager of SEZ, memorializing the parties' agreement that:

> "the date set forth in Article 22.03, is extended through May 1, 2016, for Landlord and Tenant to meet and negotiate a mutually agreeable fair Market Value ('FMV') of the land for the First Renewal Term of the above referenced Lease.

> "In the event that the parties cannot reach agreement on the FMV by May 1, 2016, Article 23 of the Lease provides for either party to seek arbitration to determine FMV of the land constituting the demised premises. I will be contacting you shortly to set up a mutually convenient time to commence good faith negotiations on this matter.
>
> "I am in receipt of your client's rent payments for January and February 2016 in the same amount as the December 2015 rent. Landlord will accept and deposit the enclosed payments *without prejudice, until the issue of FMV is resolved either by negotiation or arbitration*, Lessee will continue to pay Rent in amount equal to Lessee's December 2015 rent; as such terms are defined in the [1984] Lease.
>
> * * *
>
> "Landlord and tenant each reserve all rights under the [1984] Lease. *AII terms and conditions of the [1984] Lease shall remain in full force and effect*" (NYSCEF Doc No. 14, Interim Rent Agreement).

Additionally, the City argues that the complaint fails to state a cause of action regarding the interest rate provision in Section 22.02 of the 1984 Lease because: (1) the allegedly mutual mistake relates to a future contingency (i.e., what the interest rate

environment would be) *decades* after the Lease was executed in 1984, "while a claim for reformation based upon mutual mistake *must be based upon facts in existence at the time of the agreement*[,]" and (2) "a party, particularly a sophisticated operator like SEZ, cannot rely upon the doctrine of unconscionability to avoid the results of a prior business decision that it has come to regret, especially after having long enjoyed the benefit of the bargain" (NYSCEF Doc No. 19 at 3-4 [emphasis added]).

The City contends that the complaint fails to state a cause of action based on the doctrines of laches, waiver and/or equitable estoppel, or the City's purported failure to satisfy a condition precedent because: (1) "nothing in the [1984] Lease required the City to serve SEZ with a notice of the City's . . . rental calculation at all, no less than by any particular date, in order to preserve the City's right to a rent increase [in 2016], or to serve a notice of intention to arbitrate by any particular date in order to preserve the City's arbitration rights[,]" and (2) "the City has been accepting a lower interim rent *without prejudice* as expressly allowed by the parties' [Interim Rent Agreement]" (NYSCEF Doc No. 19 at 4 [emphasis added]).

SEZ's Opposition

SEZ, in opposition, submits an attorney affirmation and a memorandum of law arguing that "[t]he Complaint adequately states claims against the City and raises inherently factual issues that can only be resolved through discovery, necessitating that the City's motion to dismiss be denied in its entirety" (*see* NYSCEF Doc No. 24 at 1). SEZ also argues that:

> "in tacit recognition of the unconscionability of the Average [Treasury] Bond Rate Provision contained in the rent renewal formula, the City renegotiated other, similar ground leases for City-owned property within the same Flatland Industrial Park to eliminate [it] from those leases. However, the City refused to extend the same treatment to Plaintiff and refused to amend Plaintiff's Lease when Plaintiff raised this issue with the City . . ." (*id.* at 11).

SEZ's attorney submits a supplemental affirmation annexing City leases for other, unrelated properties in the Flatland Industrial Park (*see* NYSCEF Doc Nos. 27-42).

SEZ's Cross Motion to Amend

On May 23, 2022, SEZ cross-moved to amend its unverified complaint based only on a notice of cross motion and a memorandum of law *without any exhibits* (NYSCEF Doc Nos. 23-24). The cross-motion, which did not include a proposed amended pleading, is based on counsel's assertion that SEZ can "cure" any "deficiencies" with an amended pleading.

Discussion

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]). "In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]). It has

been held that "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, [and] *contracts*" constitute documentary evidence under CPLR 3211 (a) (1) (*Ralex Servs., Inc. v Sw. Marine & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2017] [emphasis added]).

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired" (*Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2015]). "The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*id.*).

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2011]; *see also Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]).

Particularly relevant here, where the complaint seeks several declaratory judgments, "the court should make a declaration, even though the plaintiff is not entitled to the

declaration that he seeks," rather than to dismiss the claim (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *see also Dodson v Town Bd. Of the Town of Rotterdam*, 182 AD3d 109 [2020]).

The First Cause of Action

"A cause of action seeking reformation of an instrument on the ground of [mutual] mistake . . . is governed by the six-year statute of limitations pursuant to CPLR 213 (6), which begins to run on the date the mistake was made [when the instrument was executed]" (*see Rely-On-Us, Inc. v Torres*, 165 AD3d 719, 721 [2018] [quoting *Lopez v Lopez*, 133 AD3d 722, 723 [2015]).

Here, the first cause of action in the complaint seeks reformation of Section 22.02 of the 1984 Lease regarding the Basic Rent renewal formula based on the alleged mutual mistake of non-party REA and the City is time-barred by the six-year statute of limitations, which began to accrue when the 1984 Lease was executed by those parties in September 1984 (*see* NYSCEF Doc No. 5). The six-year statute of limitations for reformation of the 1984 Lease expired six years later, or in September 1990, before SEZ even succeeded to REA's rights and obligations as lessee under the 1984 Lease. Consequently, the first cause of action is subject to dismissal as barred by the six-year statute of limitations.

The Second Cause of Action

The second cause of action in the complaint seeks a judgment declaring that the City is precluded from arbitrating the parties' rent dispute for failure to satisfy a condition precedent in Section 22.03 of the 1984 Lease, which, according to SEZ, required the City

to serve a Renewal Term Rent Notice advising SEZ of the increase in Basic Rent on or before June 30, 2015.

However, Section 22.03 of the 1984 Lease, by its plain and express terms, does not contain any such condition precedent. Rather, Section 22.03 of the 1984 Lease provides that "[i]f Lessor and Lessee are unable to agree on the FMV of the Land on or before June 30, 2015, with respect to the First Renewal Term . . . then the FMV shall be determined by arbitration as provided in Article 23 hereof (*see* NYSCEF Doc No. 5, 1984 Lease at § 22.03 at 58). Contrary to SEZ's contention, Section 22.03 does not set a June 30, 2015, deadline for the City to serve SEZ with any notification, nor does Section 22.03 of the 1984 Lease impose or even mention any condition precedent to arbitration.

The Third, Fourth and Fifth Causes of Action

The complaint alleges that "[s]ince the inception of the First Renewal Term, which commenced on January 1, 2016 and at all relevant times up to the present, the City billed [SEZ] in the amount of the Basic Rent for the Initial Term and accepted same from [SEZ] without controversy" (NYSCEF Doc No. 4, complaint at ¶ 31; *see also* ¶ 2 ["the City continued to bill Plaintiff, and Plaintiff continued to pay the City, the Basic Rent under the (1984) Lease in the amount of $18,758 from the commencement of the First Renewal Term on January 1, 2016 through the present"]).

However, the City demonstrated that it has been accepting a lower interim rent from SEZ *without prejudice* to its contractual right to arbitrate the parties' rent renewal dispute, as expressly set forth in the parties' Interim Rent Agreement:

> "I am in receipt of your client's rent payments for January and February 2016 in the same amount as the December 2015 rent. [The City] will accept and deposit the enclosed payments *without prejudice, until the issue of FMV is resolved either by negotiation or arbitration*, Lessee will continue to pay Rent in amount equal to Lessee's December 2015 rent; as such terms are defined in the Lease" (*see* NYSCEF Doc No. 14, Interim Rent Agreement at 1 [emphasis added]).

Based on the express terms of the Interim Rent Agreement, the City specifically preserved its contractual right to arbitrate the parties' rent dispute.

Based on the clear terms of the parties' Interim Rent Agreement, SEZ is not entitled to a judgment declaring that the City waived its right to arbitrate the FMV of the Land and enforce an increase in Basic Rent during the First Renewal Term or that it knowingly, voluntarily and intentionally abandoned and relinquished its right to arbitrate the rental dispute under Sections 22 and 23 of the 1984 Lease, as alleged in the third cause of action. Similarly baseless in light of the Interim Rent Agreement is SEZ's fourth cause of action for a judgment declaring that the City is precluded from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term based on the equitable doctrine of laches. Finally, the fifth cause of action seeks a judgment declaring that the City is equitably estopped from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term, despite the clear terms of the parties' Interim Rent Agreement, which proves otherwise.

The Sixth Cause of Action

SEZ's sixth cause of action seeks a judgment declaring that that Section 22.02 (ii) of the 1984 Lease, which sets forth the rent renewal formula, is unconscionable and unenforceable under RPL § 235-c. However, the Second Department has held that "[t]he enactment of section 235-c of the Real Property Law did not give rise to a new cause of action . . . but was merely designed to codify the common-law doctrine of unconscionability and make clear the availability of *the defense* in the landlord-tenant context" (*75 Henry St. Garage, Inc. v Whitman Owner Corp.*, 79 AD2d 1001, 1001 [1981] [emphasis added]). In any event, the rent renewal provision in Section 22.02 (ii) does not appear to be unconscionable since the 1984 Lease was negotiated by REA and the City, two represented parties who executed an arms-length commercial lease. Finally. SEZ's production of similar leases with other unrelated parties that the City agreed to modify in or about 2008 does not support SEZ's unverified allegation that the rent provision in Section 22.03 of the 1984 Lease between REA and the City is unconscionable (*see* NYSCEF Doc No. 26 at ¶¶ 4-5 and NYSCEF Doc Nos. 27-42).

For the foregoing reasons, the City has demonstrated that all six of the causes of action in SEZ's unverified complaint are subject to dismissal.

SEZ's Cross Motion to Amend

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99

[2007], *aff'd*, 10 NY3d 941 [2008]). CPLR 3025 (b) expressly states that "[a]ny motion to amend or supplement pleadings ***shall be accompanied by*** *the proposed amended or supplemental pleading* clearly showing the changes or additions to be made to the pleading" and "the decision to allow or disallow an amendment is left to the motion court's sound discretion" (*Buckholz v Maple Garden Apartments, LLC*, 38 AD3d 584, 584 [2007] [emphasis added]).

SEZ's cross motion for leave to amend the complaint is denied as deficient because SEZ failed to submit an amended complaint showing any proposed amendments, as explicitly required by CPLR 3025 (b), and SEZ failed to submit an affirmation or affidavit describing how it seeks to amend its pleading to correct the deficiencies in its current pleading. Under these circumstances, denial is patently warranted because it is impossible to determine whether SEZ proposes a meritorious amendment to the complaint that would not be prejudicial to the City. Accordingly, it is hereby

ORDERED that the City's motion to dismiss is granted as to the first cause of action, pursuant to CPLR 3211 (a) (5), as barred by the six-year statute of limitations; and it is further

ORDERED, ADJUDGED AND DECLARED that the City's motion to dismiss is further granted to the extent that: (1) the court declares that the City is not precluded from arbitrating the FMV of the Land and/or enforce any increase in Basic Rent during the First Renewal Term for failure to satisfy a condition precedent in Section 22.03 of the 1984 Lease; (2) the court declares that the City did not waive its right to arbitrate the FMV of

the Land and/or enforce any increase in Basic Rent during the First Renewal Term and the City did not knowingly, voluntarily and intentionally abandoned and relinquished its right to arbitrate under Sections 22 and 23 of the 1984 Lease; (3) the court declares that the City is not precluded from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term based on the equitable doctrine of laches; (4) the court declares that the City is not equitably estopped from arbitrating the FMV of the Land and enforcing any increase in Basic Rent during the First Renewal Term; and (5) the court declares that Section 22.02 (ii) of the 1984 Lease is not unconscionable and/or unenforceable under RPL § 235-c. The City's dismissal motion is otherwise denied; and it is further

ORDERED, that SEZ's cross motion (M.S. 2) for leave to amend the complaint, pursuant to CPLR 3025 (b), is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.