D&D Bldg. Co., LLC v
Allegro Pianos of Manhattan Corp.

2023 NY Slip Op 30791(U)

March 17, 2023

Supreme Court, New York County

Docket Number: Index No. 158385/2016

Judge: James E. d'Auguste

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

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D & D BUILDING COMPANY, LLC,

Plaintiff,

- v -

ALLEGRO PIANOS OF MANHATTAN CORP.,

Defendant.

----------X

INDEX NO. 158385/2016

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff D & D Building Company, LLC brings this action against defendant Allegro Pianos of Manhattan Corp. for allegedly breaching a commercial lease. Plaintiff moves for an order, pursuant to CPLR 3212, for summary judgment on the issue of defendant's liability for a money judgment of $711,315.50, excluding costs, interest and attorneys' fees, and for an order, pursuant to CPLR 3013, CPLR 3211 (a) (1), (6), (7), CPLR 3211 (b), and CPLR 3212, dismissing defendant's affirmative defenses and counterclaims. Defendant opposes the motion and cross-moves for summary judgment on its counterclaims.

Background Information and Procedural History

Pursuant to a written lease dated November 11, 2015 (the Lease), plaintiff, as landlord, leased a portion of the fifteenth floor known as Showroom 1540 (the Premises) in the building located at 979 Third Avenue, New York, New York (the Building), to defendant, as tenant, for a term (the Term) beginning on the "Commencement Date" (the Commencement Date) and ending on an "Expiration Date" (the Expiration Date) that was five years and five calendar months after

the "Rent Commencement Date" (the Rent Commencement Date) (NYSCEF Doc No. 40, Stephen A. Fredericks [Fredericks] aff, exhibit A at 5-6 [§§ 1.01 and 2.01 (a) and (c)]). The Commencement Date is the date parties executed the Lease, after which "Landlord and Tenant are bound by this Lease … [and] each shall perform all of their respective obligations that apply during the Term" (*id.* [§ 2.01 (a)]). Section 2.01 (b) defines the Rent Commencement Date as "the earlier of (i) the date that Landlord shall have substantially completed 'Landlord's Work' (as defined in Schedule B) in the Demised Premises, or (ii) the date that Tenant shall have commenced the operation of its business in the Demised Premises" (*id.* at 6). Plaintiff may request that defendant execute a statement "confirming the Rent Commencement Date and Expiration Date … provided, however, that the execution of such statement shall not be necessary for the Rent Commencement Date to occur" (*id.* at 7 [§ 2.05]). Schedule B defines the scope of the "Landlord's Work" (Landlord's Work), and reads:

> "1. Landlord, at Landlord's expense, will provide work, materials and service to perform the following work in the Demised Premises ('Landlord's Work'), all of which shall be of materials, manufacturer, design and capacity of the building standard adopted by Landlord for the Building:
> (a) Fully demise the Demised Premises.
> (b) Demolish the remaining details of the previous installation including, but not limited to, moldings and flooring tiles.
> (c) Install a building standard air conditioning return; install a Building standard smoke detector; and connect the smoke detector to the Building's fire safety system.
> (d) Partially relocate air-conditioning ductwork serving the adjacent premises.
> (e) Place in good working order the perimeter convector units.
> (f) Replace all broken window panes and weather stripping"

(*id.* at 77). In addition, Section 2.02 states:

> "Except as set forth on Schedule B, Landlord shall have no obligation to perform any other work in connection with preparing the Demised Premises for Tenant's occupancy. Landlord's Work shall be deemed to be substantially completed even though minor

> details or adjustments, none of which materially interfere with Tenant's access to and use of the Demised Premises may not then have been completed, but Landlord agrees, at its sole cost and expense, to promptly thereafter complete all unfinished work. Landlord shall deliver possession of the Demised Premises to Tenant on the Rent Commencement Date"

(*id.* at 6).

Defendant agreed to take possession of the Premises on the Rent Commencement Date in "'As Is' condition, subject to the substantial completion of the Landlord's Work" (*id.* at 7 [§ 2.03] and 80 [Schedule C]). If defendant wished to perform alteration work, it was required to obtain plaintiff's prior consent, including approval of its architect, contractor and plans (*id.* at 11 [§ 5.01 (a)] and 80 [Schedule C]). Defendant agreed to furnish plans to plaintiff for approval within 30 days of the Commencement Date, and if plaintiff did not approve, defendant had 14 days to submit revised plans (*id.* at 80 [Schedule C]).

The Lease obligated defendant to pay a fixed minimum annual rent (Minimum Rent) from the Rent Commencement Date forward (*id.* at 7-8 [§ 3.01 (a)]). Minimum rent on a prorate basis (the Per Diem Rate) for any "Partial Month," as that term is defined in Section 2.01 (c), was $356.16 per day (*id.* at 8). Provided defendant was not in default under the Lease, it was entitled to a rent abatement for each of the first five full calendar months of the first year of the Term (*id.* [§ 3.02 (a)]). Upon execution of the Lease, defendant agreed to pay plaintiff $10,833.33, to be applied to the monthly rent due for the sixth month of the first year (*id.* [§ 3.03]). The Lease also required defendant to pay certain charges as additional rent, such as real estate tax escalations (*id.* at 42 [§ 22.01]) and electric charges (*id.* at 48 [§ 23.04]), and to pay a security deposit of $55,000 (*id.* at 67 [§ 39.01]).

The "Permitted Use" of the Premises was for the display and sale of musical instruments and related accessories (*id.* at 9 [§ 4.01 (a)]). Under Section 4.01 (b) (i), defendant is " 'Open

For Business' … when the Demised Premises is open for business for the Permitted Use …. The 'Opening Day' is the first day that the Demised Premises shall be Open For Business" (*id.* at 9). If defendant did not "Open for Business" by the "Target Opening Day," which was 180 days after the Rent Commencement Date, plaintiff was entitled to recover a "Per Diem Rate of $356.16 per day" in damages until defendant opened for business (*id.* at 10 [§ 4.01 (b) (ii)]).

If the Term expired before the Expiration Date because of defendant's default, then defendant was liable for all amounts due on the Lease through the Expiration Date and any other damages that survived an early termination (*id.* at 6 [§ 2.01 (c)]). Under Section 2.06, defendant waived its right to rescind or terminate the Lease under Real Property Law § 223-a and its "right to recover any damages, direct or indirect, which may result from Landlord's failure to deliver possession of the Demised Premises on the Rent Commencement Date. Tenant agrees that the provisions of this Section are intended to constitute 'an express provision to the contrary' within the meaning of RPL § 223-a" (*id.* at 7). The Lease could not be orally modified or terminated (*id.* at 58 [§ 32.01]), and the Lease and annexed schedules constituted the parties' entire agreement, with all prior negotiations merged therein (*id.* at 59 [§ 32.05]).

On January 27, 2016, Fredericks, vice president for plaintiff's managing agent, nonparty Cohen Brothers Realty Corp. (CBRC), notified Ori Bukai (Bukai), defendant's president, that plaintiff had substantially completed the Landlord's Work and requested that defendant execute a "Commencement Date Agreement" (the CDA) (NYSCEF Doc No. 41, Fredericks aff, exhibit 2 at 3-4). The CDA set January 26, 2016, as the Rent Commencement Date and June 30, 2021, as the Expiration Date (*id.* at 2). Defendant did not sign the CDA.

By letter to defendant dated April 15, 2016, Andrew M. Smith (Smith), senior vice president at CBRC, repeated plaintiff's position that January 26, 2016, was the Rent

Commencement Date whether or not the CDA was signed; rent for the "Partial Month" of January was due; defendant was entitled to a rent abatement for February through June; and defendant had to "Open for Business" by July 25, 2016, or else face a per diem charge of $356.15 as damages until it did so ((NYSCEF Doc No. 42, Fredericks aff, exhibit 3).

Defendant's counsel replied by letter on April 18, 2016, writing that defendant had toured the Premises on January 28 and determined that the Landlord's Work was neither substantially completed nor code compliant (NYSCEF Doc No. 43, Fredericks aff, exhibit 4). Defendant's counsel wrote that efforts to reach the building manager, John D. Woytowicz (Woytowicz), were futile, and as a result, defendant was exercising its right of rescission to terminate the Lease (*id.*).

Plaintiff commenced this action on October 5, 2016, by filing a summons and complaint pleading a single cause of action for breach of contract. It seeks to recover all rent due under Section 3.01 (a) of the Lease and monthly rent for February through June 2016 under Section 3.02 (b) (NYSCEF Doc No. 1, complaint ¶¶ 13). Defendant served an answer asserting nine affirmative defenses and three counterclaims for breach of contract, promissory estoppel and unjust enrichment. On the first counterclaim, defendant alleges that plaintiff breached the lease by failing to substantially complete the Landlord's Work, by failing to deliver possession of the Premises, by demanding that defendant work outside the Premises, and by failing to approve of defendant's architectural plans (NYSCEF Doc No. 6, answer ¶ 48). On the second counterclaim based on the theory of promissory estoppel, defendant alleges that it relied on plaintiff's promise to substantially complete the Landlord's Work before the Rent Commencement Date to its detriment (*id.*, ¶ 63). On the third counterclaim, defendant alleges that plaintiff was unjustly enriched by refusing to return the security deposit and one month's rent (*id.*, ¶¶ 69-72). Plaintiff has replied to the counterclaims (NYSCEF Doc No. 8).

Plaintiff now moves for summary judgment on the complaint and for dismissal of defendant's affirmative defenses and counterclaims. The motion is supported by affidavits from Fredericks and Steven M. Cherniak (Cherniak); the Lease; Frederick's email from January 27; Smith's April 15 letter; and the April 18 response from defendant's counsel. Defendant opposes and cross-moves for summary judgment on its counterclaims. It relies on an affidavit from Bukai and email correspondence between the parties.

Discussion

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion must "demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" (*Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 517 [1st Dept 1980]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

A. Plaintiff's Cause of Action and Defendant's Counterclaim for Breach of Contract

Plaintiff argues that it substantially completed the Landlord's Work, which then triggered defendant's obligation to pay Minimum Rent and additional rent, but defendant has not performed. Fredericks avers that the Landlord's Work was substantially complete as of January

26, 2016 (NYSCEF Doc No. 39, Fredericks aff, ¶ 7). Fredericks attests that after defendant sent a list of what Fredericks described as punchlist items, Fredericks investigated and inspected the Premises and confirmed with Building staff that the Landlord's Work had been substantially completed as of January 26 (*id.*, ¶¶ 8-9). Cherniak, CBRC's chief operating officer, avers that plaintiff is owed $711,315.50 in rent arrears through February 1, 2021 (NYSCEF Doc No. 44, Cherniak aff, ¶¶ 1 and 18).

Defendant counters that the conclusory and self-serving affidavits are insufficient to demonstrate that plaintiff had achieved substantial completion. In addition, defendant disputes whether plaintiff substantially completed the work. Bukai avers that he was advised the Premises would be demised in a manner that met building codes and standards and would include a working electrical power feed and a connected fire alarm (NYSCEF Doc No. 53, ¶¶ 6-7). When he inspected the Premises, Bukai found several deficiencies, which he detailed in a lengthy email to Fredericks on January 29, 2016 (*id.*, ¶ 22-24). The deficiencies included a missing fire alarm; perimeter convector units that did not appear to be in good working order; broken windowpanes; nails protruding from the concrete floor; and garbage and other debris in the space (NYSCEF Doc No. 57, Bukai aff, exhibit C). Although Fredericks and Woytowicz responded that these issues had or will be corrected (*id.*), Bukai noted the fire alarm had been installed in another showroom and the cracked window had not been replaced (NYSCEF Doc No. 59, Bukai aff, exhibit E). In addition, Bukai avers an issue arose whether the power delivered to the Premises met the capacity and standard described in the Lease, which impacted his ability to obtain an accurate cost estimate for any proposed alterations and the ability of his architect or electrician to devise accurate plans (NYSCEF Doc No. 53, ¶¶ 32-35; NYSCEF Doc Nos. 57 and 58). Bukai avers that Woytowicz and others failed to respond to his queries

(NYSCEF Doc No. 53, ¶¶ 36-39 and 42-46; NYSCEF Doc No. 60, Bukai aff, exhibit F). Bukai states that he visited the Premises in March 2016 and observed that the broken windowpane had not been repaired and the fire alarm strobe had not been installed (NYSCEF Doc No. 53, ¶ 40). Additionally, Bukai objected to plaintiff's rent requests, and demanded a return of defendant's security deposit and $10,833.33 it had paid in advance for rent (*id.*, ¶ 49; NYSCEF Doc Nos. 61-62, Bukai aff, exhibits H-I),

Plaintiff, in reply, argues that Bukai has previously admitted the Landlord's Work was complete, as evidenced in his emails to Fredericks, Woytowicz and architect Wayne Turret (Turret) (NYSCEF Doc No. 57; NYSCEF Doc No. 68, Harwood affirmation, exhibit 1). Plaintiff attributes the lack of receipts, invoices or photographs to the fact that the Landlord's Work was performed "in-house" by Ryan Mapes (Mapes) (NYSCEF Doc No. 67, Harwood reply affirmation, ¶ 19).

In response, Bukai avers that his claimed admissions were not admissions at all because he saw no reason to inform Turett that plaintiff had not yet completed material parts of the Landlord's Work (NYSCEF Doc No. 74, Bukai reply aff, ¶¶ 4-7). In any event, Bukai states that he advised Fredericks the windowpane had not been repaired and the fire alarm strobe was located outside the Premises (*id.*, ¶¶ 21-22; NYSCEF Doc No. 78, Bukai reply aff, exhibit D).

The elements for a cause of action for breach of contract are the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (*Fawer v Shipkevich PLLC*, — AD3d —, 2023 NY Slip Op 00485, *1 [1st Dept 2023]). Because a lease is a contract (*Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d 1102, 1103 [2d Dept 2009]), a lease that is clear and unambiguous should be enforced according to its terms (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

Here, plaintiff relies on Fredericks' affidavit to establish that, except for minor punchlist items, plaintiff had substantially completed the Landlord's Work by January 26, 2016. However, Fredericks' conclusory statements are insufficient to satisfy plaintiff's prima facie burden on summary judgment (*see TDS Leasing, LLC v Tradito*, 148 AD3d 1079, 1081 [2d Dept 2017] [conclusory, self-serving affidavit insufficient]; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 434 [1st Dept 2010] [same]). Fredericks' affidavit is not supported by any business records, and he appears to rely, in part, on what he was told by unnamed Building staff, which is inadmissible hearsay (*see Residential Credit Solutions, Inc. v Gould*, 171 AD3d 638, 638 [1st Dept 2019] [affidavit citing unnamed employees and unproduced work records lacks probative value]). Fredericks fails to proffer specific details about the work, such as who performed the work or when. Fredericks's January 27 email states only that the Landlord's Work was substantially complete. Cherniak's affidavit is unhelpful, as Cherniak points to Fredericks's affidavit to establish that the Landlord's Work was substantially completed (NYSCEF Doc No. 44, ¶ 13). Because plaintiff has not demonstrated its entitlement to summary judgment, its motion is denied without regard to the sufficiency of defendant's opposition.

Assuming plaintiff had met its prima facie burden, defendant's proof is sufficient to raise a triable issue of fact whether the Landlord's Work was substantially completed. The conflicting statements in the parties' affidavits about the scope of the remaining work calls for the court to weigh a witness' credibility, which is improper on a motion for summary judgment (*Romano v New York City Tr. Auth.*, — AD3d —, 2023 NY Slip Op 00830, *4 [1st Dept 2023] [denying summary judgment where the testimony raised factual and credibility issues]). Additionally, the email correspondence does not conclusively establish that plaintiff had achieved substantial completion, given defendant's ongoing complaints about the fire alarm and the broken

windowpane. Notably, plaintiff has not produced any documentary or testimonial evidence to rebut defendant's assertion that plaintiff had not satisfied those two elements of the Landlord's Work. Plaintiff's explanation concerning the lack of any records documenting the Landlord's Work is contained within a reply affirmation from plaintiff's counsel. The affirmation lacks probative value as there is no indication that counsel has personal knowledge of the facts (*see Nationstar Mtge., LLC v Thompson*, 179 AD3d 541, 541 [1st Dept 2020]). Furthermore, the email correspondence fails to identify Mapes as an "in house" contractor. Accordingly, plaintiff's motion for summary judgment on the complaint is denied. Defendant's cross-motion for summary judgment on the first counterclaim for breach of contract is, likewise, denied as defendant has not dispelled all issues of material fact for the same reasons described above.

B. Defendant's Second Counterclaim for Promissory Estoppel

Plaintiff and defendant both move for summary judgment on the second counterclaim. Defendant argues that plaintiff's failure to substantially complete the Landlord's Work prevented it from completing its own alteration work at the Premises.

"The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance' " (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). The conduct underlying a promissory estoppel claim must arise out of a duty independent of the parties' contract (*Coleman & Assoc. Enters., Inc. v Verizon Corporate Servs. Group, Inc.*, 125 AD3d 520, 521 [1st Dept 2015]), otherwise the claim is duplicative of a breach of contract claim (*Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]).

Here, plaintiff fails to advance any arguments specifically addressing this counterclaim, stating only that it is entitled to summary judgment. This is insufficient to satisfy its initial, prima facie burden. Thus, plaintiff's motion for summary judgment on the second counterclaim is denied. As for defendant's cross-motion, the cross-motion is also denied as defendant has not identified a clear and unambiguous promise separate and apart from the Lease (*see Coleman*, 125 AD3d at 521;). The case cited by defendant in support, *Bistro Shop LLC v N.Y. Park N. Salem, Inc.* (175 AD3d 1181, 1182 [1st Dept 2019]), is distinguishable because that action concerned a request for prejudgment interest on a claim for rescission.

C. Defendant's Third Counterclaim for Unjust Enrichment

Plaintiff and defendant both move for summary judgment on the third counterclaim. Defendant posits that plaintiff has been unjustly enriched by its receipt of a security deposit and first month's rent.

"The doctrine of unjust enrichment invokes an 'obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned' " (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012], *rearg denied* 20 NY3d 1075 [2013] [citation omitted]). That said, a party cannot recover in unjust enrichment if a valid contract that governs the dispute exists (*id.*; *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012], *rearg denied* 19 NY3d 637 [2012] [unjust enrichment unavailable if the claim merely duplicates a breach of contract claim]).

Plaintiff fails to advance any arguments specifically addressing this counterclaim, stating only that it is entitled to summary judgment. This is insufficient to satisfy its prima facie burden. Accordingly, plaintiff's motion insofar as it seeks summary judgment on the third second counterclaim is denied. Defendant's cross-motion for summary judgment on the third counterclaim is also denied as defendant does not dispute that the Lease is a valid contract.

D. Defendant's Affirmative Defenses

Plaintiff moves to dismiss defendant's affirmative defenses as wholly conclusory and vague. Defendant did not address this branch of plaintiff's motion.

A plaintiff moving to dismiss affirmative defenses under CPLR 3211 (b) must demonstrate that the defenses are without merit as a matter of law *(534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011]). "In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*id.* at 542).

The first affirmative defense of failure to state a cause of action is "harmless surplusage" (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]). Indeed, this legal assertion need not be pled as an affirmative defense (*Riland v Todman & Co.*, 56 AD2d 350, 352 [1st Dept 1977]). Nonetheless, the first affirmative defense is dismissed to avoid any potential confusion as to burdens of proof at trial. The burden on proving an actual affirmative defense rests on a defendant, but plaintiff has the legal burden of demonstrating an entitlement to judgment on its cause of action for breach of contract. In any event, plaintiff's pleading states a cause of action for breach of contract, but there is an issue of fact concerning an entitlement to recover under this cause of action.

The second affirmative defense alleges that the claims are barred by documentary evidence. Defendant's proof, above, raises a triable issue of fact, and does not utterly dispose of plaintiff's claim (*see Rosenfeld v Southgate Owners Corp.*, 2020 NY Slip Op 34377[U], *67 [Sup Ct, NY County 2020]). As such, the second affirmative defense is stricken and dismissed.

The third defense alleging equitable estoppel, laches, ratification, waiver and/or release is entirely conclusory in the absence of any supporting factual allegations and is dismissed (*see*

Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden, 169 AD3d 569, 569 [1st Dept 2019]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372 [1st Dept 2008]).

Likewise, the fourth affirmative defense of unclean hands, as pled, is too conclusory to state a defense, and is dismissed (*see Blueberry Invs. Co. v Ilana Realty*, 184 AD2d 906, 907 [3d Dept 1992]).

The fifth affirmative defense alleges that the claims are barred by plaintiff's negligent acts, omissions and/or culpable conduct, and the ninth affirmative defense alleges that plaintiff's damages were caused, in whole or in part, by plaintiff's culpable conduct. Negligence and culpable conduct, however, are not defenses to a breach of contract claim (*American Express Equip. Fin. Corp. v Mercado*, 34 AD3d 880, 882 [3d Dept 2006]; *Viacom Intl. v Midtown Realty Co.*, 235 AD2d 332, 332 [1st Dept 1997]). The fifth and ninth affirmative defenses are dismissed.

Plaintiff has established that the sixth affirmative defense lacks merit as plaintiff was under no duty to mitigate its damages (*see BP 399 Park Ave. LLC v Pret 399 Park, Inc.*, 150 AD3d 507, 508 [1st Dept 2017]). The sixth affirmative defense is dismissed.

The seventh affirmative defense based on the statute of limitations is without merit as a cause of action for breach of contract is subject to a six-year statute of limitations (*see* CPLR 213), and plaintiff has shown that it timely commenced this action. The seventh affirmative defense is dismissed.

Triable issues of fact, however, preclude dismissal of the eighth affirmative defense, which alleges that defendant is excused from performing under the contract, obligation or agreement referenced in the complaint due to plaintiff's actions, breaches, failure to satisfy a condition precedent and/or the occurrence of a condition subsequent. The factual allegations in

the answer pertaining to plaintiff's failure to substantially complete the Landlord's Work raise a question of fact sufficient to warrant a trial.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its cause of action for breach of contract and for summary judgment or dismissal on defendant's affirmative defenses and counterclaims (motion sequence no. 002) is granted to the extent of dismissing defendant's first, second, third, fourth, fifth, sixth, seventh and ninth affirmative defenses, and the balance of the motion is otherwise denied; and it is further

ORDERED that the cross-motion of defendant for summary judgment (motion sequence no. 002) is denied.

This constitutes the decision and order of this Court.

3/17/2023
DATE

James E. d'Auguste, 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