SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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ONH 14 53RD ST LLC

Plaintiff,

- v -

HUNT SLONEM, LLC,

Defendant.

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INDEX NO. 651240/2022

MOTION DATE 12/05/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 54

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss is granted in part and denied in part, in accordance with the following memorandum decision.

Background

Pursuant to a lease between plaintiff landlord's predecessors-in-interest, nonparties SL Whale Realty LLC and Brickell 13 Whale LLC, and defendant tenant, dating from 2014, tenant leased portions of the second and sixth floors of the building located at 14 53rd Street, Brooklyn, New York, sometimes referred to as the "Whale Building" (the "premises") (Lease, NYSCEF Doc. No. 2). As relevant to the instant motion, the lease contains several provisions allocating and limiting damages and requiring tenant to procure insurance. Regarding repairs, the lease provides that:

> "Except as specifically provided in Article 9 or elsewhere in this lease, there shall be no allowance to Tenant for a diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others making or failing to make any repairs, alterations, additions, or improvements in or to any portion of the building or the demised premises, or in and to the fixtures, appurtenances or equipment thereof . . . It is specifically agreed that Tenant shall not be entitled to any setoff or reduction of

> rent by reason of any failure of Owner to comply with the covenants of this . . . article of this lease. Tenant agrees that tenant's sole remedy at law in such instance will be by way of an action for damages for breach of contract. The provisions of this Article 4 with respect to the making of repairs shall not apply in the case of fire or other casualty with regard to which Article 9 hereof shall apply"

(Lease, NYSCEF Doc. No. 2, Art. 4). Article 9, bearing the subtitle "Destruction, Fire, and Other Casualty," provides that in the event of such casualty, and upon "immediate notice" of the same from tenant, landlord shall, at its own expense, repair any damages caused by the casualty, and the rent shall be abated in proportion to the damage to the premises (*id.*, Art. 9). Article 8, regarding damage to tenant's property, provides that

> "Owner or its agents shall not be liable for any damage to property of Tenant or of others entrusted to employees of the building, nor for loss of, or damage to, any property of tenant by theft or otherwise, nor for any injury or damage to property resulting from any cause of whatsoever nature, unless caused by, or due to, the negligence of Owner, its agents, servants, or employees"

(*id.*, Art. 8). The insurance procurement provision included in the lease rider requires tenant to procure and maintain a commercial general public liability insurance policy covering "personal injury, bodily injury, death and/or third-party property damage," as well as insurance against "loss or damage by fire and such other risks and hazards (including . . . water damage . . . within the premises) as are insurable under then available standard forms of 'all risk' insurance policies, to Tenant's personal property and business equipment and fixtures" (*id.*, ¶¶ 54.1.1, 54.1.2). Such all-risk policy was to include a waiver of subrogation (*id.*, ¶ 54.4). Finally, each of landlord and tenant

> "waive[d] all rights of recovery, claim, action, cause of action and release[d] the other party with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damage, or destruction with respect to its property . . . to the extent to which such party is insured under a policy containing a waiver of subrogation or naming the other party as an additional insured, as provided in this Article. If, notwithstanding the recovery of insurance proceeds by either party for loss, damage, or destruction of its property .

> . . the other party is liable to the first party with respect thereto or is obligated under this Lease to make replacement, repair, or restoration . . . the amount of the net proceeds of the first party's insurance against such loss damage or destruction shall be offset against the second party's liability to the first party therefor"

(*id.*, ¶ 54.5).

Landlord commenced this action seeking payment of rental arrears, as well as a warrant of ejectment removing tenant from the premises. Tenant, in its answer, asserts ten counterclaims for, among other things, breach of contract, constructive eviction, and negligence, related to landlord's maintenance and operation of the Whale Building. Many of tenant's claims date back to before landlord acquired the Whale Building, and in that context the court notes in the record an estoppel certificate signed by tenant's principal Hunt Slonem ("Slonem"), dated March 14, 2018 (estoppel certificate, NYSCEF Doc. No. 14). In the estoppel certificate, Slonem attested that

> "[n]either tenant nor landlord is in default under any terms , covenants or provisions of the lease and tenant knows of no event which, but for the passage of time or the giving of notice, or both, would constitute a default under the lease by tenant or landlord. Tenant has no claims against landlord under the lease and there are no offsets or defenses to the payment of the rents, additional rents, or other sums payable under the lease"

(*id.*, ¶ 8). Though not said in so many words, the parties effectively agree that any actionable issues at the property must postdate the estoppel certificate. Moreover, the court relies on tenant's assertion that landlord purchased the Whale Building in or about September 2020, as landlord itself does not allege the date in the verified complaint (verified answer, NYSCEF Doc. No. 33, ¶ 106). What follows is a summary of tenant's allegations that can be arguably traced to a time after landlord bought the Whale Building.

Tenant utilized the buildings freight elevator to move artwork and supplies from its sixth floor studio down to its second floor shipping facility, but such elevator was frequently out of

service, persisting into at least 2019 (*id.*, ¶¶ 133-138). Pursuant to the lease, tenant was given the use of one interior and two exterior parking spaces for use of its "officers, employees, and guests" (Lease, NYSCEF Doc. No. 2, ¶ 85.3), but asserts that the two exterior spaces were not allowed to be used for guests in contravention of the lease, and that the indoor parking space was frequently flooded (verified answer, NYSCEF Doc. No. 33, ¶¶ 143-147). Finally, due to landlord's alleged failure to maintain the roof, water leaked into the premises during rainstorms causing damage to tenant's property (*id.*, ¶¶ 178-179). Landlord was aware of the leaks at the time it purchased the Whale Building, but despite tenant's requests did nothing to remediate the problem (*id.*, ¶¶ 181-186, 191-197). As a result of these conditions, tenant vacated the premises on April 4, 2022 (*id.*, ¶ 199). Landlord maintains that such early vacatur of the premises did not terminate the lease.

Tenant alleges ten counterclaims: breach of the covenant of quiet enjoyment (first counterclaim); breach of contract for failure to maintain the building to prevent damage to tenant's property (second counterclaim); constructive eviction (third counterclaim); breach of contract regarding use of the parking spaces (fourth counterclaim); negligence (fifth counterclaim; gross negligence regarding the failure to maintain the building (sixth counterclaim); commercial tenant harassment in violation of Administrative Code of the City of New York § 22-902 (seventh counterclaim); nuisance (eighth counterclaim); breach of the covenant of good faith and fair dealing (ninth counterclaim); and attorneys' fees (tenth counterclaim). Landlord presently moves to dismiss the second, fifth, sixth, eighth, and ninth counterclaims. In the alternative, if the court sustains the sixth and eighth counterclaims, landlord moves to dismiss so much of those counterclaims as seek punitive damages.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the [pleading] as true, accord[ing the nonmovant] the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in the nonmovant's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Breach of Contract – Second Counterclaim

The second counterclaim for breach of contract alleges that landlord failed to maintain the roof and exterior of the building, in violation of Article 4 of the lease, causing significant water damage to various items of tenant's personal property. Landlord argues that this claim is precluded by the insurance procurement and waiver of subrogation provisions of the lease, as the parties allocated the risk of water damage by requiring tenant to procure insurance of at least $3,000,000 coverage. As an initial matter, in making this argument landlord conflates two of the insurance procurement provisions of the lease. The $3,000,000 property damage coverage is to be part of a commercial general public liability policy and apply to the property damage claims

of third-parties (Lease, NYSCEF Doc. No. 2, ¶ 54.1.1). The water damage coverage is to be part of all risk insurance policy, and the lease does not require a minimum per occurrence (*id.*, ¶ 54.1.2). Thus, the fact that tenant seeks $2,000,000 in property damage does not require that its claims be limited to potential insurance coverage, as landlord suggests.

Landlord next argues that Article 4 specifically exempts landlord from liability for failure to make repairs to the building which causes property damage. Article 4 provides, however, that the limitation on liability is limited by both Article 9 and any other relevant provision of the lease (*id.*, Art. 4). Article 9 relates to fire or other casualty, which is not adequately alleged here (*Andreas v 186 Tenants Corp.*, 208 AD3d 406, [1st Dept 2022] ["this Court has also found that when the term 'fire,' as employed in a lease, 'is placed in the same category' with the term 'casualty,' it also clearly evidences a sudden damage-causing event like a fire"]; *Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.*, 189 AD3d 496, 497 [1st Dept 2020] ["Here, all of defendants' witnesses testified that the leaks and flooding were a common occurrence, and in fact, the basement flooded every time it rained"]).

Other provisions, however, provide more fertile ground for tenant. Article 8 explicitly preserves landlord's liability for damage to tenant's property caused by landlord's negligence (Lease, NYSCEF Doc. No. 2, Art. 8). Article 54 provides, in pertinent part, that tenant released landlord from liability for property damage caused by negligence or otherwise, to the extent that such damage is covered "under a policy containing a waiver of subrogation," and further established that if the amount of the damage exceeds the insurance coverage, then any such coverage may be offset against landlord's liability (*id.*, ¶ 54.5). "While parties to an agreement may waive their insurer's right of subrogation, a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (*Kaf-Kaf, Inc. v Rodless*

Decorations, Inc., 90 NY2d 654, 660 [1997]). Thus, a waiver of subrogation provision does not conflict with a provision preserving liability for damages caused by landlord's negligence (*id.* at 661). Indeed, as tenant notes, any agreement entirely exempting landlord from liability for its own negligence would be void as against public policy and unenforceable (General Obligations Law § 5-321). Indeed, as the Appellate Division, First Department has held, a waiver of subrogation clause included in a lease article declaring a tenant's obligation to obtain coverage does not operate as a general exculpatory provision (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 234 [1st Dept 2006] ["Indeed, if article 47 (i) (J) were construed, without regard to its context, to apply to all claims, whether or not insured or subject to an insurance requirement under the lease, the clause apparently would violate General Obligations Law § 5-321"]).

"An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation. Therefore, where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 A.D.3d 985, 986-87 (1st Dept 2009]). Here, the most harmonious interpretation of the plain language of the lease provisions is that landlord is exempted from liability for its own negligence only to the extent that a loss is covered by insurance, which explains the provision for an offset of any insurance payment against uncovered damages. As tenant points out, its insurer denied its claim for damages on the grounds that the roof was in poor condition, and that the leaks had occurred for a prolonged period of time (denial letter, NYSCEF Doc. No. 49 at 2). Thus, there is no coverage to offset landlord's potential liability, and tenant's claim is not barred (*Gap, Inc. v Red Apple Companies, Inc.*, 282 AD2d 119 [1st Dept 2001] ["Absent coverage and payment of an insured loss, there is no right to subrogation and, thus, the waiver clause has no application"]).

Landlord's reliance on *Great N. Ins. Co. v Interior Const. Corp.* (7 NY3d 412, 419 [2006]) to the contrary is unavailing, as there the Court of Appeals was addressing the landlord and tenant's right to allocate the risk of injury to third-parties through insurance coverage. Here, by contrast, tenant seeks damages due to landlord's negligent conduct towards itself rather than towards a third party.

Negligence and Gross Negligence – Fifth and Sixth Counterclaims

As relates to landlord's asserted negligent conduct, the fifth and sixth counterclaims also seek recovery for damages caused by the leaking from the roof, as well as allegedly poor and unsafe construction practices and the limited use of the parking spaces. These allegations are the subject of the sustained second counterclaim, as well as the first, third, and fourth counterclaims, which landlord is not moving to dismiss. Generally speaking, claims that arise from the same facts and seek the same damages are subject to dismissal as duplicative (*e.g. Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]). Moreover, a negligence claim that fails to allege a duty independent of the contract should be dismissed for the same reason (*Von Sengbusch v Les Bateaux De New York, Inc.*, 128 AD3d 409, 410 [1st Dept 2015]). Tenant fails to allege such a duty here.

Moreover, and specifically with regard to the counterclaim for gross negligence, "gross negligence is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC*, 214 AD3d 111, 132 [1st Dept 2023] [internal quotation marks and citations omitted]). "[G]ross negligence differs in kind, not only degree, from claims of ordinary negligence" (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823 [1993]). Here, the allegations in support of the counterclaim for gross negligence do not materially differ from

those supporting the counterclaim for ordinary negligence. *Liberman v Cayre Synergy 73rd LLC* (108 AD3d 426, 428 [1st Dept 2013]), cited by tenant, is not to the contrary, as there the landlord owed a nondelegable statutory duty to maintain the property under the Multiple Dwelling Law.

Nuisance – Eighth Counterclaim

A person or entity is liable for nuisance where "the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable," and more specifically where the complaining party shows "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Copart Indus., Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 570 [1977]). A tortfeasor's negligence "[N]ot every annoyance will constitute a nuisance . . . Nuisance imports a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [internal quotation marks and citations omitted]). "The term use and enjoyment encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance" (*id.* [internal quotation marks and citations omitted]).

Here, the only allegations which may be definitively placed as subsequent to the estoppel certificate are those related to water infiltration and damage, about which tenant alleges that water infiltrated the sixth floor of the premises any time there was a rainstorm (verified answer, NYSCEF Doc. No. 33, ¶ 178), which was caused by landlord's failure to fix the roof, and which landlord was aware of (*id.*, ¶¶ 181-182, 188-190). At the motion to dismiss stage, these allegations are enough to show a substantial and unreasonable interference with tenant's right to use and enjoy the premises. Moreover, tenant successfully alleges that landlord knew the flooding was happening due to its failure to replace the roof, or was "substantially certain to

result from his conduct" (*Berenger v 261 W. LLC*, 93 AD3d 175, 183 [1st Dept 2012]). Landlord argues that tenant's allegations are too vague as to the frequency of the leaks, but cites no authority requiring tenant to allege by date every time water entered the premises.

Having sustained the counterclaim as a general matter, however, the court agrees with landlord that the punitive damages piece of the counterclaim must be dismissed. "Punitive damages are awarded in tort actions where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 [1993] [internal quotation marks and citation omitted]). "There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*id.*). "Something more than the mere commission of a tort is always required for punitive damages" (*id.*) Here, tenant's allegations simply do not meet this high bar.

Breach of the Implied Covenant of Good Faith and Fair Dealing – Ninth Counterclaim

Implicit in every contract is a covenant of good faith and fair dealing (*Dalton v. Educational Testing Serv.*, 87 NY2d 384 [1995]). The implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties" (*Murphy v Am. Home Products Corp.*, 58 NY2d 293, 304 [1983]). 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]). Where the facts underlying the claim for breach of the implied covenant are the same as those underlying the breach of contract claim, the claim for breach of the implied covenant should be dismissed as duplicative (*Baker v. 16 Sutton Place Apartment Corp.*, 2 AD3d

119, 121 [1st Dept 2003]). Here, the facts underlying the claim for breach of the implied covenant are substantially identical to those underlying tenant's first, second, and fourth counterclaims, and thus the ninth counterclaim should be dismissed as duplicative.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the fifth, sixth, and ninth counterclaims, as well as so much of the eighth counterclaim as seeks punitive damages, asserted in the verified answer to the amended complaint are dismissed; and it is further

ORDERED that plaintiff is directed to serve reply to the counterclaims 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 status conference in Room 1166, 111 Centre Street, New York, New York, on November 8, 2023, at 2:15 PM.

This constitutes the decision and order of the court.

Louis L. Nock

10/3/2023
DATE

LOUIS L. NOCK, J.S.C.

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