SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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CAST IRON CO., LLC

Plaintiff,

- v -

CAST IRON CORP.,

Defendant.

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INDEX NO. 656785/2022

MOTION DATE 06/24/2024, 06/24/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 69, 93, 94, 95, 96, 97, 99, 101, 103, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 126, 128, 133, 134, 135, 136, 137, 138, 139, 140

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 65, 67, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 98, 100, 102, 104, 105, 122, 123, 124, 125, 127, 129, 130, 131, 132, 141, 142, 143, 144

were read on this motion to/for DISMISS.

Upon the foregoing documents, plaintiff's motion is denied, and defendant's motion is granted in part and denied in part.[1]

Background

Cast Iron Co., LLC ("Plaintiff") is a tenant under eight commercial leases (the "Leases") for a portion of the ground and cellar floors of the premises located at 67 East 11th Street, New York, New York. Plaintiff has subleased several of the spaces, and the building is owned by Cast Iron Corp. ("Defendant"), a co-operative corporation. The building is a seven-story structure consisting of 140 rental apartments located on floors two through seven, with eight commercial units on the ground floor. In the late 1980s, there was a series of litigation between Plaintiff and

[1] The Court would like to thank Ziwei Wang for his assistance in this matter.

Defendant that resulted in a settlement agreement, whereby Defendant agreed among other things not to dispute the validity of the Leases. Contained in the Leases was an Exchange option ("Paragraph 39") that would allow Plaintiff to exchange the Lease for proprietary leases and shares in the co-op, under certain conditions. Relevant for these motions, these conditions include 1) that the commercial spaces can be converted to residential "as-of-right" under zoning and building code law; and 2) that a published ruling from the IRS shows that the exchange could be conducted without imperiling the co-op's tax status under IRS Code § 216(b)(1)(B).

In February of 2022, Plaintiff attempted to exercise this option by written notice to Defendant. It wanted to surrender the eight commercial leases for fourteen proprietary leases, containing the special rights listed in Paragraph 39, and newly issued shares of stock in the co-op. Along with their written notice, Plaintiff attached supporting documentation, including an opinion letter from Olshan, Frome Wolosky LLP (the "Tax Letter") stating that under Revenue Ruling 90-35, the proposed exchange would not prevent the co-op from meeting the requirements under IRS Code § 216(b)(1)(B) and a zoning opinion letter from Greenberg Traurig (the "Zoning Letter") stating that, in their opinion, the New York City Department of Buildings ("DOB") would find that the proposed conversion could be done as of right, without the need for a variance. Defendant ended up rejecting the exchange attempt, reasoning that the two opinion letters did not suffice to indicate that the zoning and tax preconditions were met according to Paragraph 39.

In response, Plaintiff brought the underlying proceeding in June of 2022. Their complaint contains four causes of action, seeking 1) a declaratory judgment that Defendant is obligated to deliver the shares of stock and proprietary leases; 2) an order granting specific performance of Paragraph 39, compelling Defendant to turn over the shares of stock and proprietary leases; 3)

damages should the exchange not be effectuated by July 8, 2025, as certain provisions in Plaintiff's subleases require payment by Plaintiff in this scenario; and 4) in alternative to the specific performance cause of action, damages as a result of Plaintiff being unable to enter into subleases for the remainder of the commercial spaces and their inability to sell the commercial spaces. Defendant has answered. Since filing the complaint, Plaintiff has obtained a letter (the "BSA Letter") from the executive director of the New York City Board of Standards and Appeals ("BSA") regarding the zoning variance issue. Defendant, in response to this letter, has submitted an email (the "BSA Email") from the BSA's general counsel regarding the BSA Letter. In the present motions, both parties seek summary judgment in their favor.

Standard of Review

Under CPLR § 3212, a party may move for summary judgment and the motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016). The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

Discussion

In motion sequence 001, Plaintiff seeks summary judgment on the first, second, and fourth causes of action. In motion sequence 002, Defendant seeks summary judgment in their favor, dismissing the complaint in the entirety. Plaintiff argues that they have established that the

purported exchange attempt was valid under Paragraph 39, and Defendant argues that Plaintiff has failed to establish that the zoning and tax preconditions have been met and therefore they were entitled to reject the exchange attempt. The initial issue presented here, therefore, is whether there are any questions of material fact that the two relevant preconditions under Paragraph 39 of the Leases have been met.

Essentially, if there are any questions of material fact regarding Plaintiff's satisfaction of any of the Leases' preconditions for the exchange, their summary judgment motion must be denied. Should Defendant establish that there are no issues of material fact regarding satisfaction of one of the preconditions, their motion for summary judgment must be granted, as Plaintiff will not have established a basis for their claims (which all rely on the contention that the purported exchange was valid under the Leases). For the reasons that follow, plaintiff's motion is denied as there are triable issues of fact regarding whether the proposed conversion would satisfy the zoning and tax preconditions in the Leases. Defendant's motion is granted as to the third cause of action, which is speculative and unripe. It is denied, however, as to the remaining causes of action because there are triable issues of fact and competing expert affidavits.

Zoning Precondition Involves Triable Issues of Fact Not Resolved by the BSA Letter or Email

As stated above, one of the preconditions in the Leases that Plaintiff must satisfy before being able to exercise the exchange option is that the spaces can be converted "as of right" under existing building codes and zoning law. The Zoning Letter provided by Plaintiff in their exchange attempt opines that the conversion could be made "as of right" under building and zoning law. Defendant provides their own opinion letter from a zoning expert, saying that the "conversion of the Commercial Spaces to residential use is incapable of being as-of-right" under the relevant zoning law, due to an existing variance for the building. Both sides and their

respective opinion letters dispute whether other factors, such as the light and air requirements and other size requirements would preclude "as of right" conversion.

In an attempt to resolve the "as of right" dispute, Plaintiff reached out to BSA. The BSA Letter sent as a response stated that based on the information provided to BSA by Plaintiff, in which Plaintiff "represents that the conversion would as of right" pursuant to zoning regulations, the BSA would have no objection to the conversion "should the [DOB] determine that" the conversion was permitted under the relevant zoning regulation. Defendant sent a follow-up inquiry to BSA, who in their BSA Email in response stated that "changes to the Premises may require BSA review and approval" and that the import of the BSA Letter was to "direct the interpretive/legal zoning questions […] to be determined by the Department of Buildings." While Plaintiff argues that the two responses from BSA establish that they will be able to make the conversion "as of right", the plain language of both responses establish that any approval by BSA is dependent in part on the DOB determination.

Both sides have produced multiple expert opinions and reports with conflicting interpretations of whether or not the proposed conversion could be made "as of right". The BSA Letter and the BSA Email do not remove this material question of fact, as any BSA approval is clearly conditioned on the outcome of the DOB determination, which has not occurred yet. Because there are issues of fact on whether the conversion will be treated "as of right" under the applicable zoning regulations, and because this is a necessary precondition to exercise the exchange option, neither side has met their burden on a summary judgment motion as to the zoning precondition. The First Department has recently confirmed that "conflicting expert affirmations raise issues of fact that cannot be resolved on a motion for summary judgment." *Casiano v. Riverdale SNF, LLC*, 230 A.D.3d 1057, 1058 (1st Dept. 2024). As addressed above,

Plaintiff would need to establish that there are no triable issues of fact as to any of the exchange option preconditions in order to succeed on their motion for summary judgment. Therefore, Plaintiff's motion is denied in its entirety.

Tax Precondition

For Defendant to succeed on their motion for summary judgment, they must show that there are no triable issues of fact that at least one of the exchange option preconditions was not met. Therefore, the analysis then turns to the tax precondition. In order to exercise the exchange option, Plaintiff must show that the proposed conversion would not endanger the co-op's tax status. There were three ways listed in the Leases of achieving this, but the parties agree that under the current circumstances Plaintiff must do this by showing that a published IRS ruling would permit the conversion. In support of this condition, Plaintiff argues that Revenue Ruling 90-35 satisfies this condition, and Defendants oppose. This ruling addresses when a co-op may issue shares to non-resident units and still retain co-op certification. Rev. Rul. 90-35, 1990-1 C.B. 48 (1990). It states that when there is a "substantial legal impediment" to the conversion, it would remove the co-op's tax status. It further states that a zoning restriction that "precludes the conversion of the units to residential use without obtaining a zoning variance" constitutes a substantial legal impediment.

Both parties have submitted expert opinions as to whether Revenue Ruling 90-35 applies to this present scenario or if there are factual inconsistencies. Furthermore, the plain language of the ruling states that the requirement for a zoning variance would constitute a substantial legal impediment to the conversion. As addressed above, there are issues of fact as to whether a zoning variance is needed for the conversion. Therefore, as with the zoning precondition, neither

party has met their burden on a motion for summary judgment as to the tax precondition. Defendant's motion will be denied as to this portion.

The Third Cause of Action is Not Ripe

Defendant has also moved for summary judgment dismissing the third cause of action as unripe. In this cause, Plaintiff alleges that there are provisions in some of the subleases that would require Plaintiff to pay certain amounts to the sublessees if the conversion does not occur before July 8, 2025. This cause of action is clearly speculative and premature. Therefore, dismissal of this cause of action is proper. *See Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 514 (1986) (affirming the dismissal of an unripe cause of action on a motion for summary judgment).

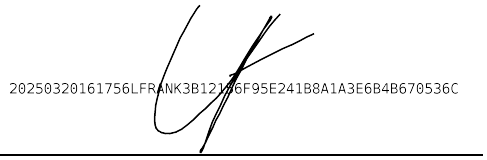
The Fourth Cause of Action Is Sufficiently Pled

Defendant argues that the fourth cause of action for damages, pled alternatively to the claim for specific performance, should be dismissed because it directly undercuts the claims for specific performance and declaratory relief. When the same factual issues underlay a claim for breach of contract and a claim for specific performance, the trial court is to determine whether money damages or specific performance is an adequate remedy. *Cho v. 401-403 57th St. Realty Corp.*, 300 A.D.2d 174, 175 (1st Dept. 2002). Therefore, dismissal of this cause of action would be improper. The Court has considered the parties' other arguments and found them unavailing. Accordingly, it is hereby

ADJUDGED that plaintiff's motion is denied; and it is further

ORDERED and ADJUDGED that defendant's motion is granted as to dismissal of the third cause of action and that cause of action is hereby dismissed; and it is further

ADJUDGED that defendant's motion is denied as to the remaining causes of action.



3/20/2025
DATE

LYLE E. FRANK, J.S.C.

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