Board of Mgrs. of the 80th at Madison Condominium v 1055 Madison Ave. Owners LLC
2025 NY Slip Op 31854(U)
May 22, 2025
Supreme Court, New York County
Docket Number: Index No. 160134/2019
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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The BOARD OF MANAGERS OF THE 80TH AT MADISON CONDOMINIUM

Plaintiff,

- v -

1055 MADISON AVENUE OWNERS LLC,

Defendant.

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INDEX NO. 160134/2019

MOTION DATE 10/17/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211

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

Defendant moves for: (i) pursuant to CPLR 3212, summary judgment on all of its counterclaims and affirmative defenses asserted against plaintiff; (ii) pursuant to CPLR 3211(b), dismissal of plaintiff's affirmative defenses to defendant's counterclaims; and (iii) pursuant to CPLR 3212, dismissal of the complaint.

Plaintiff opposes and cross-moves pursuant to CPLR 3212, for: (i) partial summary judgment on its first, second, third, fourth, and seventh causes of action, and (ii) partial summary judgment dismissing defendant's affirmative defenses to plaintiff's first, second, third, fourth and seventh causes of action. Defendant opposes the cross-motion.

I. Background

Plaintiff Board "is the duly elected representative of the 80th at Madison Condominium (the Condominium) . . ., responsible for overseeing the operations of the Condominium at 45 East 80th Street, New York, New York (the Building), in accordance with the Condominium's

Declaration and By-Laws (the Declaration and By-Laws, respectively)" (second amended complaint [complaint] [NYSCEF 174]). Defendant owns the sole commercial unit (Commercial Unit) in the Building, occupying its cellar, first, and second floors (*id.* ¶¶ 2 and 4).

Plaintiff's first complaint was filed on October 18, 2019, containing five causes of action (NYSCEF 1). On November 5, 2019, plaintiff filed an amended complaint (NYSCEF 2), which contained six causes of action.

On December 18, 2019, defendant filed its answer (NYSCEF 5), in which it generally denies plaintiff's allegations and asserts numerous affirmative defenses, as well as three counterclaims: (1) a declaration that, under the Declaration and By-Laws, it has the authority to make alterations to the interior and exterior of the Commercial Unit, without plaintiff's approval (*id.* ¶¶ 32-42); (2) a declaration that the Declaration and By-Laws gave it the right to alter the exterior walls of the Commercial Unit, without plaintiff's approval (*id.* ¶¶ 43-51); and (3) an award of the attorneys' fees it incurred in this action (*id.* ¶¶ 52-54).

On June 13, 2022, plaintiff was granted leave to amend its complaint a second time to add a seventh cause of action seeking injunctive relief (NYSCEF 126). Plaintiff alleges that the defendant breached the By-Laws by failing to obtain plaintiff's consent and: (i) performing structural alterations to the façade of the Building, in order to carve the Commercial Unit into three separate retail stores and adding two new store entrances to afford public access to the subdivided Commercial Unit (complaint, ¶¶ 3[a], 6); (ii) performing structural alterations to the interior of the Commercial Unit by demolishing its existing mezzanine level and catwalks, thereby interfering with the Condominium's access to pipes and valves in the Commercial Unit's

ceiling (Ceiling Pipes and Valves) (*id.* ¶¶ 3[b] and 17-19),[1] and (iii) affixing signage advertising the business of defendant's tenant, by the name of "Reformation," to the façade of the Building, above the entrance to that tenant's portion of the newly-subdivided Commercial Unit (*id.* ¶¶ 3[c] and 21-22).

Plaintiff asserts seven causes of action; in its first cause of action, it seeks a declaration that defendant violated the Declaration and By-Laws by wrongfully making structural alterations to the façade of the Building and is therefore obligated to restore the Building's exterior walls to their original condition.

In its second cause of action, plaintiff seeks a declaration that defendant violated the Declaration and By-Laws by wrongfully making structural alterations to the interior of the Commercial Unit that prevent the Condominium from accessing the Ceiling Pipes and Valves.

In its third cause of action, plaintiff seeks a declaration that defendant violated the Declaration and By-Laws by wrongfully erecting signage on the façade of the Building, and that neither defendant nor any of its subtenants may place any signage on the exterior of the Building without plaintiff's consent.

In its fourth cause of action, plaintiff seeks a permanent injunction (i) directing defendant to remove the "Reformation" signage immediately from the Building's façade, eliminate changes to the façade, and restore the façade to its original condition; and (ii) barring defendant from affixing any further signage to the façade.

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[1] "Ceiling Pipes and Valves" are defined in paragraph 3(b) of the complaint as "the pipes, valves, equipment and traps, located within and without the Commercial Unit, which deliver and control the flow of hot and cold water and glycol to the Building's residential Units and the Building's air conditioning system."

In its fifth cause of action, plaintiff seeks an award of attorneys' fees and expenses, as provided under Sections 9.2(A) and 9.4 of the By-Laws, as a result of defendant's default on its obligations under the Declaration and By-Laws.

In its sixth cause of action, it seeks an award, pursuant to Section 9.4 of the By-Laws, reimbursing it for the professional, engineering, and other costs and fees it incurred as a result of defendant's breach of the By-Laws and Declaration.

In its seventh cause of action, plaintiff seeks a permanent injunction, restoring the Condominium's easement within the Commercial Unit to access the Ceiling Pipes and Valves,[2] by: (i) directing that defendant immediately restore the mezzanine floor and catwalks that it wrongfully removed; (ii) following such restoration, directing that defendant keep the mezzanine floor and catwalks free from obstructions and mandating that the Condominium and its contractors, employees, engineers, and architect are allowed unobstructed, unlimited access to the mezzanine floor for the purposes provided for in the Declaration and By-Laws; (iii) mandating that defendant and its design professionals comply with all safety requirements while the mezzanine floor and catwalks are being reconstructed; and (iv) barring defendant from impairing or interfering with any easements within the Commercial Unit, or, in the alternative, (v) directing defendant, at its own expense and in compliance with all relevant laws and regulations, to provide the Condominium a means by which to access the Ceiling Pipes and Valves.

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[2] In ¶ 87 of the complaint, plaintiff alleged that the defendant "wrongfully performed structural alterations of removing the mezzanine floor and catwalks . . . which had provided critical access to a roof terrace and the building's Ceiling Pipes and Valves" and in ¶ 88 alleges that "its current and ongoing inability to access, inspect, repair, restore and/or replace the Ceiling Pipes and Valves" makes injunctive relief appropriate.

In its answer to the second amended complaint (NYSCEF 175), defendant generally denies plaintiff's allegations and asserts sixteen affirmative defenses, discussed below. Defendant did not, however, include any counterclaims therein.

In a decision and order dated February 22, 2021 (NYSCEF 40), plaintiff's motion seeking partial summary judgment on its third and fourth causes of action was denied, and it was determined, as pertinent here, that "questions of fact remain . . . as to whether the plaintiff [Board] acted arbitrarily or unreasonably in refusing to approve the exterior façade signage." Thus, the court denied the motion for partial summary judgment seeking a declaration and a permanent injunction, without prejudice to refiling at the completion of discovery.

Sometime after the action was commenced, the parties attempted to negotiate a "Comprehensive Alteration Agreement," which was intended to resolve the issues raised herein, and they conferred as to how plumbers and other tradespeople could be given ready access to the Ceiling Pipes and Valves. Defendant asserts that plaintiff knew of its intent to remove the catwalks and mezzanine beforehand and did not object but instead requested that defendant provide it with a mechanical scissor lift to access the Ceiling Pipes and Valves in the Commercial Unit. According to defendant, the parties considered this solution adequate but plaintiff quashed that proposal by insisting that defendant buy a two-person scissor lift, which cost $17,500 more than the one-person scissor lift that defendant had already agreed to buy (Dweck affirmation [NYSCEF 136], ¶ 28).[3]

Plaintiff acknowledges that "there was a misunderstanding between the parties as to what model scissor-lift was to be purchased, and further, there was no agreement on who would be

[3] In ¶ 1 of his affidavit, Mr. Dweck identifies himself as "the Director of J. Safra Real Estate, the managing entity of" the defendant.

responsible for the costs of future maintenance of the lift" (NYSCEF 184). Plaintiff also asserts that it learned after this action began that the scissor-lift was not "a viable option" because none of the Building's staff has the necessary training to operate such lifts, and it did not consider reliance on scaffolding to be a viable solution either because of the damage that might occur while the scaffolding is being erected and the additional costs that such assembly would entail.

Plaintiff also submits the affidavit of Ivan Pollak, a New York State-licensed engineer, dated February 28, 2022 (NYSCEF 195), whom plaintiff hired to examine the Commercial Unit and to identify alternatives for resolving this part of their dispute. Pollak noted that the Ceiling Pipes and Valves are located just below the Commercial Unit's ceiling, which he estimated to be 20 feet high, and stated that such inaccessibility violates the New York City's Plumbing Code. Further, the fire hose mounted approximately 12 feet above the floor in the Unit, which is also inaccessible because of the removal of the mezzanine and catwalks, violates New York City's Building Code.

Pollak did not recommend use of a portable mechanized lift to access the Ceiling Pipes and Valves because, among other reasons, portable lifts are "not a code-complaint [*sic*] means to access shut off valves" and require users to comply with the strict safety, training, certification, and maintenance regulations promulgated by the United States Occupational Safety and Health Administration (OSHA). Instead, he proposed three options to restore plaintiff's easement and access: (1) leaving the valves where they are and installing "OSHA compliant catwalks" at their level, reached by "permanent ladders," which would cost about $165,000 to install; (2) "extending piping [downward] to lower the valves to a level that would not require" catwalks or ladders to access, at an estimated cost of about $240,000; and (3) extending the pipes to lower the control valves into the basement, which he believed would cost about $290,000 (*id.*).

ANALYSIS

Summary Judgment Standard

"It is well established that 'the proponent of a summary judgment motion 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'" (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]). "Once the movant makes the proper showing, 'the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*id. quoting Alvarez,* 68 NY2d at 324).

"The facts must be viewed in the light most favorable to the non-moving party" (*id.* [internal quotation marks and citation omitted]). "However, bald, conclusory assertions or speculation and 'a shadowy semblance of an issue' are insufficient to defeat summary judgment" (*id.* [internal quotation marks and citation omitted])," as are merely conclusory claims" (*id.* [citation omitted]).

II. Defendant's Motion

In its motion, defendant seeks: (i) a grant of summary judgment on all counterclaims and affirmative defenses that it has asserted against plaintiff; (ii) dismissal of all plaintiff's affirmative defenses asserted with respect to defendant's counterclaims; and (iii) dismissal of plaintiff's complaint.

A. Counterclaims

Defendant did not re-assert its counterclaims in its answer to plaintiff's second amended complaint. While "the court has the discretionary power to dispense with responses to amended

pleadings" where appropriate under CPLR 3025(d) (6B Carmody-Wait 2d § 39:155, *citing Stephanie R. Cooper, P.C. v Robert* (78 AD3d 572, 573 [1st Dept 2010]), plaintiff's amendment of the complaint to add a seventh cause of action for a permanent injunction "require[d] a fresh answer" (Patrick M. Connors, Prac Commentaries, McKinney's Consol Laws of New York, CPLR 3025:21).

In order to preserve its counterclaims, defendant was required to have included them in its second answer (*see Bahar v Sanieoff*, 210 AD3d 459, 460 [1st Dept 2022]). As defendant failed to do so, it is deemed to have abandoned them, and thus may not move for summary judgment on them.

B. Dismissal of the complaint

1. Removal of the Mezzanine Floor and Catwalks

Defendant argues that it was entitled to demolish the mezzanine floor and catwalks in the Commercial Unit under the Declaration and By-Laws. While plaintiff concedes that Section 5.2 of the By-Laws generally permits defendant to make alterations to the Commercial Unit without first obtaining plaintiff's consent, it argues that, under Article 11(a) of the Declaration and Section 5.9 of the By-Laws, it has an easement over and the right to access the "General Common Elements" located in the Commercial Unit, which include the Ceiling Pipes and Valves,[4] which were readily accessible by use of the mezzanine floor and catwalks. Plaintiff asserts that defendant's removal of those structures impaired the Condominium's easement and access rights and made it necessary for plaintiff to inspect the Commercial Unit, "and to install,

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[4] Article 7 of the Declaration defines "Common Elements" to include the "General Common Elements," and defines the "General Common Elements" to include "all central and appurtenant installations and Facilities for services such as. . . drainage, hot and cold water distribution, . . . air-conditioning and other mechanical and electrical systems. . .."

operate, maintain, repair, alter, rebuild, restore and replace any of the Common Elements located therein. . ." (Declaration, Article 11 [a] [NYSCEF 186]).

Defendant also points to Section 5.8(b)(II) of the By-Laws, which permits any "Unit Owner . . . to raze or incorporate in his unit a wall, space, or other area forming part of the Common Elements *which service or enclose and benefit only such Unit and do not affect access to any other Unit*" (By-Laws, at 38 [NYSCEF 187] [emphasis added]). The Common Elements at issue, however, are the Ceiling Pipes and Valves, "which are important components of the Building's residential plumbing infrastructure . . . and some control pipes and valves are located in the ceiling area of the Commercial Unit" (affirmation of Gerald A. Novack [Novack affirmation] [NYSCEF 184], ¶ 8).[5] Plaintiff contends that the Ceiling Pipes and Valves service and benefit the entire Building, and so they cannot be said to "service . . . and benefit" only the Commercial Unit.

Defendant does not dispute this, but instead asserts that plaintiff's easement claim is a "red herring," contending that even if were true that plaintiff had an easement over the Ceiling Pipes and Valves and a right to access them, it could not prevail on its seventh cause of action because granting a mandatory injunction requiring defendant to restore the mezzanine floor and catwalks would not be permitted, as it would "unreasonably interfere with the [defendant's] use of the [Commercial Unit] for [its] permitted purposes," as permitted by Article 11(a) of the Declaration.

While defendant may have violated Article 11(a) of Declaration and § 5.9 of By-Law by removing the catwalks and mezzanine, thereby impairing plaintiff's easement over and access

[5] Mr. Novack is a member of plaintiff Board of Managers (Novack affirmation, ¶ 1).

right to the Ceiling Pipes and Valves in the Commercial Unit, plaintiff is not entitled to the mandatory injunction it seeks in its seventh cause of action, based on the facts adduced here.

"A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it *will* suffer irreparable harm absent the injunction" (*Rockefeller v Leon,* 233 AD3d 904, 907 [2d Dept 2024] [internal quotation marks and citations omitted, emphasis added]).

> "To establish prima facie entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor"

(*id.* [citations omitted]).

A mandatory injunction, i.e. one that directs a party to take an affirmative act rather than maintaining the status quo, is an "extraordinary and drastic remedy that is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (*Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, 177 AD3d 924, 927 [2d Dept 2019]).

"Further, irreparable injury, for the purposes of equity, means any injury for which money damages are insufficient" (*id.* at 907-08, *citing, inter alia*, *Benaim v S2 Corona, LLC,* 214 AD3d 760, 761 [2d Dept 2023]). "In contrast, where an injury can be adequately compensated by money damages, injunctive relief is inappropriate" (*id.* at 908, *citing Benaim,* 214 AD3d at 761; *see also Chicago Research and Trading v New York Futures Exch., Inc.*, 84 AD2d 413, 416-17 [1st Dept 1982] [granting motion to dismiss for failure to state a cause of action "because declaratory and injunctive relief [sought] are inappropriate in a case such as this, where plaintiff will have adequate remedy at law"] [citations omitted]).

The lack of ready access to the Ceiling Pipes and Valves has apparently been a continuing concern but plaintiff waited years before asserting its seventh cause of action, even though, pursuant to Article 11(a) of the Declaration, plaintiff had the right, on advance notice, to remedy its loss of its easement over, and access to, the Ceiling Pipes and Valves by undertaking any one of the solutions proposed by its expert three years ago. Further, plaintiff has the right to recover its costs in restoring its easement and access under the indemnity provision set forth in Section 9.4 of the By-Laws. On these facts, plaintiff cannot demonstrate that it will suffer irreparable harm or that it has no adequate remedy at law, both of which are necessary to obtain injunctive relief (*Reich*, 2017 NY Slip Op 30197 [U], *7).

Accordingly, defendant's motion for summary dismissal of plaintiff's second and seventh causes of action is granted.

2. The Building Façade and Reformation Sign

In seeking summary dismissal of plaintiff's First, Third and Fourth causes of action, seeking declaratory and injunctive relief, defendant argues that it was entitled to alter the Building's façade without plaintiff's consent and that plaintiff unreasonably and arbitrarily withheld its approval of Reformation's exterior signage.

Plaintiff alleges that it will suffer irreparable harm if the exterior signage is not removed but does not assert what particular harm it will suffer. Plaintiff stated in the complaint that it was unwilling to grant permission for the signage "based on the proposed design" (NYSCEF 174, ¶ 8).

Defendant, however, notes that the tenant which occupied the Commercial Unit before it had affixed "substantially similar" signage on the Building's façade (Dweck affirmation [NYSCEF 136], ¶ 69). Defendant also asserts that plaintiff's Board members expressed approval

of the signage plans and told it that the Board's approval would be "just a formality" (*id.*, ¶ 75, *quoting* ex CC thereto [Aug 13, 2019 email thread [NYSCEF 164]). Defendant considers plaintiff's decision to assert claims for declaratory and injunctive relief with respect to exterior signage to be retaliation against it for refusing to pay the "exorbitant" attorney's fees plaintiff seeks to recover in its Fifth cause of action, and to pay for the "costly 2-person [scissor] lift" plaintiff wanted it to provide to permit Ceiling Pipes and Valves access (*id.* ¶ 78).

Coupled with its failure to demonstrate that it has, and is, suffering irreparable harm, plaintiff does not demonstrate that the equities balance in its favor. The complaint suggests that plaintiff's objection to the signage is based in aesthetics. Defendant, on the other hand, has subdivided the Commercial Unit into three shops, and thus has a considerable interest in attracting and retaining subtenants.

In balancing the equities here, the court must deny injunctive relief where it appears "the injunction would cause greater hardship to the party opposing it than would its refusal to the applicant" (67A NY Jur 2d Injunctions § 23, *citing*, *inter alia*, *Wing Ming Props. (USA) Ltd. v Mott Operating Corp.*, 79 NY2d 1021 [1992]). Accordingly, defendant's motion for dismissal of plaintiff's First, Third, and Fourth causes of action is granted.

3. Attorneys' and Professionals' Fees

Defendant contends that plaintiff should not be permitted to recover the attorneys' and professionals' fees which it expended to address defendant's alterations of the Commercial Unit and the Building's façade, because the amounts charged were "exorbitant" and were incurred pursuing plaintiff's "meritless claims."

Applications for legal and professional fee awards are not amenable to summary disposition (*Law Firm of Joel R. Brandes, P.C. v Ferraro*, 257 AD2d 610, 610 [2d Dept 1999]).

"[A]n adversarial hearing" will be required "at which the reasonable value of the services may be determined" (*Kumble v Winsor Plaza Co.*, 128 AD2d 425, 426 [1st Dept 1987]), and thus the defendant's motion for dismissal of plaintiff's fifth and sixth causes of action for legal and professional fees is denied.

Finally, defendant asserts that plaintiff's first, second, and third affirmative defenses to defendant's counterclaims are meritless and must be dismissed. However, defendant has abandoned its counterclaims, mooting this argument.

C. Defendant's Affirmative Defenses

In its answer (NYSCEF Doc No. 128), defendant asserts 16 affirmative defenses, misnumbered First through Thirteenth. The First affirmative defense, for failure to state a cause of action, is denied as moot, as the Court has already determined that plaintiff cannot maintain its First, Second, Third, Fourth and Seventh causes of action, and the Fifth and Sixth causes of action may not be resolved on summary judgment.

Defendant's Second affirmative defense based upon documentary evidence, that is, that the Condominium's Declaration and By-Laws permit defendant to make alterations to the exterior and interior of the Commercial Unit, and Third affirmative defense, that the Declaration and By-Laws establish that plaintiff is not entitled to a declaration that defendant lacks authority to alter the Commercial Unit's exterior walls, is denied as moot because declaratory and injunctive relief is barred where plaintiff cannot demonstrate it will suffer irreparable harm or that remedy at law would be inadequate.

Defendant's Fourth affirmative defense, seeking to deny plaintiff a declaration that defendant lacks authority to demolish the catwalk and mezzanine floor in the Commercial Unit's interior because plaintiff "approved, consented and/or acquiesced to the demolition," and Fifth

affirmative defense, seeking to deny plaintiff a permanent injunction, barring exterior signage, is also denied as moot because, as noted above, declaratory and injunctive relief is barred where plaintiff cannot demonstrate it will suffer irreparable harm or that a remedy at law would be inadequate.

In its Sixth affirmative defense, defendant contends that plaintiff's claims are asserted "in bad faith and as a form of harassment" against it. These assertions were addressed briefly in defendant's motion papers, as an aspect of its claim that plaintiff had acted arbitrarily and unreasonably in refusing consent to installation of exterior signage. As questions of fact remain as to whether plaintiff's refusal to approve exterior signage was arbitrary or unreasonable, summary judgment is inappropriate.

In its Seventh affirmative defense, defendant asserts that plaintiff is not entitled to recover because it failed to mitigate damages, in its Eighth affirmative defense, it asserts that plaintiff is not entitled to recover attorney's fees under the By-Laws because defendant did not breach the Declaration or By-Laws, and in its Thirteenth affirmative defense (misnumbered as Tenth), defendant asserts that any alleged breach of the Declaration and By-Laws was minor and not material and plaintiff has suffered no damages. As the issue of whether defendant breached the Declaration or By-Laws has not been resolved, summary judgment is denied as to these affirmative defenses.

Defendant's Ninth affirmative defense, that plaintiff unduly frustrated defendant's right to subdivide the Commercial Unit, and Tenth affirmative defense, that plaintiff's causes of action are barred by the doctrines of waiver, estoppel, laches and/or ratification, touch on allegations that defendant has asserted in its motion, but absent a prima facie showing on those issues, this part of its motion is denied.

Defendant's Eleventh, Twelfth (misnumbered as Eleventh), Fourteenth (misnumbered as Twelfth), Fifteenth (misnumbered as Twelfth), and Sixteenth (misnumbered as Thirteenth) affirmative defenses are conclusory and boilerplate,[6] and "for which there appears to be no basis to raise in this case" (*Scholastic Inc. v Pace Plumbing Corp.*, 128 AD3d 75, 79 [1st Dept 2015] ["catch-all" list of sundry affirmative defenses asserted in "attempt to preserve any and all potential defenses/objections for future use without affording notice" required under CPLR 3013 and 3014 held defective]). Accordingly, summary judgment on these defenses is denied.

III. Plaintiff's Cross-Motion

A. Timeliness

Defendant maintains that plaintiff's cross-motion for summary judgment was filed after the applicable 120-day deadline and thus may not be considered here. However, an untimely summary judgment motion may be considered "with leave of court on good cause shown" (CPLR 3212 [a]).

Plaintiff contends that its untimeliness was due to a series of serious illnesses, hospitalizations, and deaths suffered by its attorney and his family in late 2023 into January 2024, when its attorney was finally able to prepare and submit the cross-motion (NYSCEF 185).

CPLR 3212 (a) provides that:

> "the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date

[6] The Eleventh affirmative defense asserts that plaintiff's causes of action are barred by its own culpable conduct, and that of its attorneys and agent. The Twelfth asserts that plaintiff is not entitled to prevail on its claims because it caused any damages it allegedly suffered. The Fourteenth asserts that plaintiff's claims are barred, in whole or in part, by the parole evidence rule. The Fifteenth asserts plaintiff is not entitled to recover on its claims against defendant because any damages it allegedly suffered were caused by the "actions, omissions, inaction, culpable conduct, carelessness, contributory negligence or assumption of the risk by third parties, and not defendant." In the Sixteenth affirmative defense, defendant asserted that it "reserves right to add additional affirmative defenses."

> is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown"

(*Brill v City of New York*, 2 NY3d 648, 651 [2004]).

"'[G]ood cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute – only the movant can *show* good cause – as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*id.* at 652 [emphasis in original]).

Based on the detailed allegations set forth in counsel's affirmation, plaintiff's counsel has provided a satisfactory explanation for his untimeliness and thus has shown good cause for the delay in making the cross-motion.

B. Merits

Plaintiff's cross-motion with respect to its First, Second, Third, Fourth and Seventh causes of action is denied, however, because, as noted above, plaintiff failed to show it faces irreparable harm with respect to the claims made thereunder.

CONCLUSION

Accordingly, it is hereby

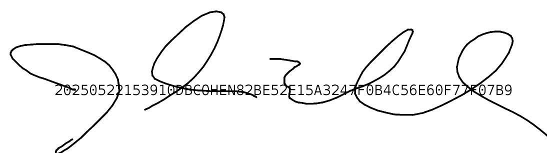
ORDERED that defendant's motion seeking summary judgment, dismissing plaintiff's second amended complaint, is granted with respect to plaintiff's First, Second, Third, Fourth, and Seventh causes of action, and these causes of action are severed and dismissed, and the motion is otherwise denied; and it is further;

ORDERED that plaintiff's cross-motion seeking partial summary judgment on its First, Second, Third, Fourth, and Seventh causes of action is denied; and it is further

ORDERED that defendant's motion for summary judgment on its three counterclaims against plaintiff is denied as moot; and it is further

ORDERED that defendant's motion for summary judgment on its affirmative defenses against plaintiff is denied; and it is further

ORDERED that defendant's motion seeking dismissal of plaintiff's affirmative defenses to its counterclaims is denied as moot.



5/22/2025			DAVID B. COHEN, J.S.C.		
DATE					
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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