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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C.
Justice

PART 2

Index Number : 110361/2011
FRIEDMAN, DANIEL
VS.
16 MADISON SQUARE HOUSING
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
JUN 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/11/12

LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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DANIEL FRIEDMAN AND SALLY FRIEDMAN
AS TRUSTEES OF DORIS H.FRIEDMAN TRUST,

Plaintiffs,

Index No 110361/2011

-against-

16 MADISON SQUARE HOUSING CORP.,

Defendants,

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YORK, J.:

Defendant 16 Madison Square Housing Corp. ("16 Madison Square" or "Defendant") moves to dismiss the present complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. For reasons stated below the motion is granted.

BACKGROUND

Plaintiffs Daniel and Sally Friedman as trustees of Doris H.Friedman trust (""Plaintiffs") rented out the ground floor and portion of the basement at 16 East 23 Street, New York City ("Premises" or "Building") from 16 Madison Square under a lease dated December 30, 1980. From June 2002 till October 2005 Pope 23rd, Inc. ("Pope') was their subtenant. In October 2005 Pope, which is in the restaurant business, installed a vent and flue on the roof of the building connected to the cooking facilities on the premises. Plaintiffs allege that Pope had oral and written agreements with Madison Square authorizing the installation of the vent and flue, and

that plaintiffs were not aware of such agreements and did not consent to this work on the premises.

In June 2007 defendant sent a notice to plaintiffs stating that plaintiffs had illegally installed a flue on the roof, that the flue had fallen and destroyed a chimney to which it was attached, and that a second flue had been illegally added. Defendant demanded that plaintiffs repair the roof.

Plaintiffs allege that defendant has wrongfully and unlawfully demanded that plaintiffs make all the repairs to the roof before permitting repairs of the flue and vent, and failed to make a claim for damages with its insurance company, as allegedly obligated under the contract of lease.

Since January 25, 2008 FEA 23rd, Inc. ("FEA") became a subtenant of plaintiffs. Plaintiffs further allege that FEA has been unable to properly operate its cooking facilities without a flue and vent, and refuses to pay the rent due to plaintiffs. In plaintiffs' estimate, the resulting damages consist of the loss of rent for the life of the sub-lease in the amount of $1,000,000.00 and request a judgment in the amount in excess of $2,500,000.00 with costs and disbursements.

16 Madison Square submitted an answer with thirteen affirmative defenses and three counterclaims. The affirmative defenses state, in essence, that defendant had no contractual obligation to plaintiffs to repair the roof, there was no privity of contract between defendant and plaintiffs' subtenants, and that the damages alleged in the complaint arise out of a dispute between plaintiff and its subtenants. It also informed the court that another action is pending between the same parties concerning the same incident. In its counterclaims defendant asserts that it was damaged by the improper, unauthorized and illegal acts of plaintiff, that plaintiffs owe

it reimbursement for water charges, increased insurance costs and Business Improvement District assessments and requests legal fees incurred in prosecuting the present action.

Now defendant moves to dismiss the complaint for failure to state a cause of action.

DISCUSSION

CPLR 3211(a)(4) allows the court to dismiss an action when "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." There exists a mirror action in the New York Supreme Court, started by 16 Madison Square on July 27, 2009 (Index No 111064/09) against plaintiffs and other parties and arising out of the same events. This is one ground to dismiss the present proceedings.

The additional ground to grant defendant's motion is deficiency in plaintiffs' pleadings. Plaintiffs allege that 16 Madison Square had contractual obligations under the lease to make repairs to the roof and seek insurance compensation before making any claim against the tenant for casualty losses, breached these obligations, and that damages resulted. To assess the extent of defendant's obligations, it is sufficient to read the plain text of the lease. "When parties set down their agreement in a clear, complete document, their writing should … be enforced according to its terms. This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where…the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length. It is also important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases." S. Rd. Assoc., LLC v Intern. Bus. Machines Corp., 4 NY3d 272, 277; 793 N.Y.S.2d 835 [2005] (internal citations omitted).

Paragraph three of the lease provides that "Tenant shall have the right, at its own cost and expense, at any time during the term hereof, to install any ducts or flues to any height required either in the buildings, walls, yards or courts, up to and above the roof and over the roof so long as the same do not cross any balcony or window, and provided the same are erected in full compliance with all laws, orders and ordinances and regulations of the federal, state, county and municipal authorities having jurisdiction thereof..." Paragraph four adds: "Landlord shall maintain and repair the public portions of the building, both exterior and interior... Notwithstanding the foregoing, all damage or injury to the demised premises or to any other part of the building, or to its fixtures, equipment and appurtenances, whether requiring structural or nonstructural repairs, caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, its servants, employees, invitees, or licensees, shall be repaired promptly by Tenant at its sole cost and expense, to the satisfaction of Landlord reasonably exercised." It is undisputed that damage to the roof was inflicted while subtenant Pope was in possession of the premises, and by the terms of the lease, the tenant is liable to the landlord for any negligence involved.

Concerning an obligation of each party to look first for any insurance in its favor before making any claim against the other (paragraph 8(e) of the lease), plaintiff fails to precisely cite the relevant language. This obligation is limited to "any claim against the other party for recovery for loss or damage resulting from fire or other casualty" and, in the context of other provisions of the paragraph, does not extend to allegedly negligent acts of a tenant or subtenant in installing the flue.

Plaintiff failed to state a cause of action for breach of contract or properly allege any other cognizable claim.

Defendant's first counterclaim is identical to its claim in an action pending in another court, and for this reason is dismissed pursuant to CPLR 3211(a)(4).

CONCLUSION

For the foregoing reasons, it is

ORDERED that defendant's motion to dismiss the complaint is granted; and it is further

ORDERED that the action will proceed as to counter-claims to the extend not precluded by the pending action between the parties.

Dated: 6/11/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.