Robert B. Jetter, M.D., PLLC v 737 Park Ave. Acquisition LLC
2017 NY Slip Op 30797(U)
April 19, 2017
Supreme Court, New York County
Docket Number: 654159/2012
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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ROBERT B. JETTER, M.D., PLLC, ABBEY ROAD OFFICE BASED SURGERY PLLC,

Plaintiffs,

-against-

737 PARK AVENUE ACQUISITION LLC, MACKLOWE PROPERTIES, HAILEY DEVELOPMENT GROUP LLC

Defendants.

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DECISION/ORDER

Index No. 654159/2012
Motion Seq. No. 011

HON. SALIANN SCARPULLA, J.:

In this commercial landlord-tenant action, defendants 737 Park Avenue Acquisition LLC ("737 Park") and Macklowe Properties, Inc. and/or Macklowe Properties, LLC ("Macklowe") (collectively, "Defendants") move, pursuant to CPLR § 3212, for partial summary judgment granting judgment on 737 Park's fifth counterclaim for declaratory judgment and to dismiss all of plaintiffs' claims.

Plaintiffs Robert B. Jetter, M.D., PLLC ("Jetter") and Abbey Road Office Based Surgery PLLC ("Abbey Road") (collectively, "Plaintiffs") oppose Defendants' motion and cross-move, pursuant to CPLR § 3025 (b), for leave to file a second amended complaint.

Background

This action arises out of construction and renovation activity at the building located at 737 Park Avenue, New York, NY (the "Building"), where Jetter leases Unit 1B (the "Premises"), pursuant to a written lease agreement dated October 15, 2008 (the "Lease"), between Jetter and 737 Park, as landlord. Jetter and Abbey Road are professional limited liability companies that operate a medical office in the Premises. Robert B. Jetter, M.D., performs plastic surgery at the Premises.

Plaintiffs allege that 737 Park hired defendant Hailey Development Group LLC ("Hailey")[1] as a contractor and Macklowe, a party to this motion, as construction manager to complete certain renovations and construction in the Building, which commenced on or about January 2, 2012. The construction and renovation activity eventually created certain events and conditions in or around the Premises, prompting Jetter to withhold rent.

In early 2012, 737 Park commenced a nonpayment proceeding against Jetter in the Civil Court of the City of New York, alleging that Jetter breached the Lease by withholding rent, *737 Park Avenue Acquisition LLC v. Robert B. Jetter, M.D., PLLC,* Index No. L&T 71456/2012 (the "first proceeding"). Jetter asserted the following relevant defenses in the first proceeding: (1) partial actual eviction; (2) partial constructive eviction; (3) breach of contract; and (4) breach of the covenant of quiet enjoyment.

After a four-day non-jury trial, the Civil Court (James D'Auguste, J.) issued a decision in which it found that Jetter breached the Lease by failing to pay rent for a number of months. Judge D'Auguste also found that Jetter was entitled to a rent abatement of three weeks for partial constructive eviction based on three specific flooding incidents. Jetter's remaining affirmative defenses of breach of lease, actual and constructive eviction, and breach of the covenant of quiet enjoyment, including claims of noise and water interruptions, were dismissed or found insufficient. *Id.* The Appellate Term later affirmed Judge D'Auguste's decision and order in the first proceeding.

Plaintiffs commenced this action on November 30, 2012. In the amended complaint, Plaintiffs assert ten causes of action for: (1) diminution of value of the Premises against Defendants and Hailey; (2) loss of business income against Defendants and Hailey; (3) breach of the covenant

[1] Hailey is not a party to the motion for partial summary judgment, so reference to Defendants excludes Hailey for purposes of this motion.

of quiet enjoyment against Defendants; (4) damage to reputation and loss of goodwill against Defendants and Hailey; (5) partial actual eviction against Defendants; (6) partial constructive eviction against Defendants; (7) breach of the covenant of good faith and fair dealing against Defendants; (8) gross negligence against Hailey; (9) trespass against Hailey; and (10) private nuisance against Hailey. In the amended complaint, Plaintiffs once again allege various events and conditions previously considered in the first proceeding, and also allege various events and conditions that occurred subsequent to the first proceeding.

Many of the allegations occurring subsequent to the first proceeding are the same type of allegations that were litigated in the first proceeding and held insufficient, *e.g.*, noise and water interruption. Other allegations specifically detailed in the bill of particulars were not previously considered, including subsequent leaks, musty smells of mold, demolition work in the Premises, a partially collapsing ceiling, and falling debris and dust. Based on these subsequent events and conditions, the Department of Buildings issued a stop work order ("SWO") on March 6, 2014, which was later rescinded on June 25, 2014 and then again reissued on June 30, 2014. The reissued SWO remains in effect.

In 2013, 737 Park commenced a second nonpayment proceeding in the Civil Court of the City of New York against Jetter, after Jetter withheld rent accruing after the period adjudicated in the first proceeding, *737 Park Avenue Acquisition LLC v. Robert B. Jetter, M.D., PLLC,* Index No. L&T 76801/2013 (the "second proceeding").[2] Jetter once again asserted the following affirmative defenses in the second proceeding: (1) actual partial eviction; (2) partial constructive eviction; (3) breach of covenant of quiet enjoyment; and (4) breach of the covenant of good faith and fair dealing. 737 Park moved for summary judgment arguing *res judicata*, and the Civil Court (Frank

[2] Defendants assert that the motion for partial summary judgment is only based on the decision and order in the first proceeding.

Nervo, J.) issued a decision on December 2, 2013 concluding that the decision in the first proceeding precluded Jetter's assertion of the same affirmative defenses in the second proceeding. Jetter appealed, and the Appellate Term reversed the Civil Court in the second proceeding, finding that "the commercial tenant was not barred by res judicata or collateral estoppel from litigating its partial constructive eviction defense in this nonpayment proceeding. The facts supporting this defense relate to different conditions at the premises and covered a time period subsequent to that involved in the prior nonpayment proceeding between the parties." *737 Park Avenue Acquisition LLC v. Robert B. Jetter, M.D., PLLC*, No. 51153 (U) (N.Y. App. Term Aug. 7, 2015)

Defendants now move for partial summary judgment in this action, arguing that Plaintiffs are barred by the doctrine of *res judicata* from asserting the following claims: (1) diminution of value; (2) loss of business income; (3) breach of the covenant of quiet enjoyment; (4) damage to reputation and loss of goodwill; (5) partial actual eviction; (6) partial constructive eviction; (7) breach of the covenant of good faith and fair dealing. Plaintiffs cross-move to amend the complaint to include additional factual allegations and causes of action for vicarious liability against Defendants and for negligence against Hailey.[3]

I. Defendant's Motion for Partial Summary Judgment

"On a motion for summary judgment, the moving party [] has the burden to establish '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'" Voss *v Netherlands Ins. Co.,* 22 N.Y.3d

[3] During a discussion with defendants and Hailey on the record, Plaintiffs originally agreed to withdraw those claims on which defendants moved for partial summary judgment. However, after the Appellate Term narrowly reversed the second proceeding on Plaintiffs' partial constructive eviction defense, Plaintiffs retained those causes of action previously agreed as withdrawn in their cross-motion for leave to amend. Defendants now reassert their motion for partial summary judgment for determination here.

728, 734 (2014) (citation omitted) (italics added). Summary judgment is granted "then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action' " *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012) (citation omitted).

A. 737 Park's Fifth Counterclaim for Declaratory Judgment

737 Park moves for partial summary judgment on its fifth counterclaim, requesting that I declare that Jetter has no right to extend the term of the Lease. The lease provides Jetter with an option to renew the Lease for three years, pursuant to paragraph 68, "[p]rovided [that] Tenant . . . shall not have incurred late payment charges, more than three (3) times" among other conditions. 737 Park argues that based on the first proceeding's decision, in which the Civil Court found that 737 Park was entitled to "late fee additional rent . . . accrued each month during the period from March 2012 through February 20, 2013," Jetter incurred more than three separate late payment charges and should no longer be able to exercise the renewal option. Jetter does not dispute the merits of 737 Park's argument but instead opposes on the basis that a justiciable controversy does not exist until the notice period to exercise the renewal option occurs.

It is fundamental that to establish a cause of action for a declaratory judgment, a party must present a justiciable controversy. CPLR § 3001. "A request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." *40-56 Tenth Ave. LLC v 450 W. 14th St. Corp.*, 22 A.D.3d 416, 417 (1st Dep't 2005).

Here, the future event is within the parties' control as the Lease provides Jetter with the option to exercise the right to renew, and the time to exercise that right will eventually occur. In fact, "[a] declaratory judgment is intended 'to declare the respective legal rights of the parties based on a given set of facts . . . .' " *Touro Coll. v Novus Univ. Corp.*, 146 A.D.3d 679, 679 (1st Dep't 2017) (citation omitted). The crux of 737 Park's argument serves that very purpose – that by

wrongfully withholding rent for at least three months (as found by the court in the first proceeding), Jetter should be prohibited from attempting to exercise the future right to renew, because the time for the renewal option will occur, and the declaration now has a direct impact on how the parties proceed with the Lease's duration. *See Remsen Apartments, Inc. v. Nayman*, 454 N.Y.S.2d 456, 458 (2d Dep't 1982) ("Where the probability of occurrence of the contingent event is great or the declaratory judgment may have an immediate and direct impact on the parties' conduct, the declaratory relief should be granted").

Under the circumstances of this action, I find that a justiciable controversy exists regarding each party's rights and obligations under the Lease. In addition, because the court in the first proceeding found that Jetter wrongfully failed to pay rent for at least three months, under the plain terms of the renewal option, Jetter is no longer able to exercise the renewal option. Accordingly, I grant 737 Park's fifth counterclaim for declaratory judgment, and declare that Jetter is precluded from exercising the Lease's renewal option.

B. *Res Judicata* and Collateral Estoppel

Defendants move for partial summary judgment dismissing Plaintiffs' first cause of action for diminution of value; second cause of action for loss of business income; third cause of action for breach of the covenant of quiet enjoyment; fourth cause of action for damage to reputation and loss of goodwill; fifth cause of action for partial actual eviction; and seventh cause of action for breach of the covenant of good faith and fair dealing on the basis of *res judicata* and/or collateral estoppel. Plaintiffs oppose, arguing that the claims were asserted as affirmative defenses in the first proceeding, that the first proceeding was a summary proceeding inappropriate to fully adjudicate these claims for compensatory damages, and that subsequent events and conditions have occurred since the first proceeding.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (2005). "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." *In re Hunter*, 4 N.Y.3d 260, 269 (2005). On the other hand, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same" *Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343, 349 (1999) (citations omitted); *see also People v Evans*, 94 N.Y.2d 499, 502 (2000) (stating generally that "res judicata precludes a party from asserting a *claim* that was litigated in a prior action, while collateral estoppel precludes relitigating an *issue* decided in a prior action.") (citations omitted).

To the extent that Plaintiffs argue 1) that summary proceedings in the Civil Court have no preclusive effect on actions before me, and 2) that *res judicata* and/or collateral estoppel are inapplicable because the claims asserted in this action were previously asserted only as affirmative defenses, both arguments are unpersuasive. "The rule of *res judicata,* applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions, or in summary or special proceedings." *Brown v City of New York*, 66 N.Y. 385, 390 (1876); *see also Henry Modell and Co., Inc. v Minister, Elders and Deacons of Refm. Prot. Dutch Church of City of New York*, 68 N.Y.2d 456, 461 (1986). Plaintiffs fail to identify a certain remedy or form of relief they were unable to seek in the first proceeding to avoid this well-settled principle's application. Further, the determination of the affirmative defenses in the first proceeding implicates the principles of *res judicata* even though Plaintiffs now recast it here as claims for compensatory damages against Defendants. *See Henry Modell and Co., Inc.*, 68 N.Y.2d at 461–62 (finding that "the *claim*, which could have been raised as a *defense* in the first action [] and which now seeks to

destroy or impair the 'rights established by the first action', is barred.) (citations omitted) (emphasis added); *see also Serio v Town of Islip*, 87 A.D.3d 533, 533–34 (2d Dep't 2011) (stating that *res judicata* bars claims "even if based upon different theories or if seeking a different remedy").

Plaintiffs further contend that subsequent events and conditions have occurred since the adjudication of the first proceeding, which give rise to their ability to seek relief in this action for the same or substantially similar grounds. In response, Defendants argue that the first proceeding's preclusive effect applies to all ongoing conduct as a singular transaction and that none of Plaintiffs' allegations would alter the first proceeding's preclusive effect.

Plaintiffs' assertion of identical or substantially similar claims against Defendants does not automatically bar Plaintiffs' claims on the basis of *res judicata*. Rather, "[u]nder New York's transactional approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred" *Serio v Town of Islip*, 87 A.D.3d 533, 533–34 (2d Dep't 2011). "What constitutes a transaction or a series of transactions depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" *Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P.*, 78 A.D.3d 1010, 1013 (2d Dep't 2010) (citation and quotations omitted). The relevant inquiry is whether the claims here arise from the same transaction or series of transactions as in the first proceeding.

Here, Plaintiffs' allegations fall into two categories: (1) allegations concerning events and conditions underlying the first proceeding; and (2) those allegations concerning events and conditions occurring after the first proceeding. While *res judicata* bars claims encompassed by the first category, it does not automatically bar claims for different events and conditions subsequent to the first proceeding, even if the claims stem from the same construction activity. *See Storey v.*

Cello Holdings, L.L.C., 347 F.3d 370, 383 (2d Cir. 2003) ("Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action; accordingly, they are not barred by *res judicata* regardless of whether they are premised on facts representing a continuance of the same course of conduct.") (internal quotation marks omitted); *Rapid Elec. Co., Inc. v Rowe Holding Corp.*, 47 A.D.2d 615, 616 (1st Dep't 1975) (stating that "[p]laintiff could sue only for damages suffered to the time of the commencement of the action and is not barred from bringing repeated actions Seriatim for damages if the breach continues and damages result").[4] Therefore, to the extent a claim in this action occurred after the judgment in the first proceeding, the judgment would not necessarily have a preclusive effect.

In the fifth cause of action for partial actual eviction, Plaintiffs do not identify a single specific event and/or condition subsequent to the events and conditions underlying the dismissal of the partial actual eviction claim in the first proceeding. Rather, Plaintiffs broadly assert that because subsequent events and conditions allegedly occurred, *res judicata* has no preclusive effect. However, not one allegation in the bill of particulars, which provides the most detailed account of the alleged subsequent events and conditions, raises an issue regarding whether Defendants after the first proceeding wrongfully ousted Plaintiffs from the Premises. *See Sapp v Propeller Co. LLC*, 5 A.D.3d 181, 182 (1st Dep't 2004) (stating an "actual eviction occurs when a landlord wrongfully ousts a tenant"); *Scolamiero v Cincotta*, 128 A.D.2d 224, 226 (3d Dep't 1987) (stating that '[t]here must be a physical expulsion or exclusion [] where the tenant is so ousted from a portion of the demised premises the eviction is actual, if only partial").

[4] Defendants argue that Plaintiffs place too great an emphasis on the date and cites *Marinelli Associates v. Helmsley-Noyes Co., Inc.*, 265 A.D.2d 1 (1st Dep't 2000). *Marinelli*, however, is distinguishable because there, plaintiff "had no need to await [for a specific event] to bring its claim" unlike here, events and conditions after the first proceeding had to occur for Plaintiffs to seek additional relief. *Id.* at 6.

The most Plaintiffs can claim here is that the alleged subsequent events and conditions raise issues of fact for a new partial constructive eviction claim, but Defendants do not move to dismiss the new partial constructive eviction claim on the basis of *res judicata*. *Compare 737 Park Avenue Acquisition LLC v. Robert B. Jetter, M.D., PLLC*, No. 51153 (U) (N.Y. App. Term Aug. 7, 2015) (finding that Jetter was not barred by res judicata or collateral estoppel from litigating its partial constructive eviction defense in the second proceeding because of subsequent events and conditions), *with Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 A.D.3d 89, 98 (1st Dep't 2012) (stating that the "reinstatement of a portion of the first complaint did not retroactively render commencement of second action proper."). Accordingly, I dismiss Plaintiffs' fifth cause of action for partial actual eviction on the basis of *res judicata*.[5]

Plaintiffs' claims for (1) loss of business income and (2) damage to reputation and loss of goodwill are also dismissed under *res judicata* regardless of the alleged subsequent events and conditions. In the first proceeding, the court squarely determined that, under the Lease's exculpatory clause, Jetter is precluded from asserting a claim for loss of business. Thus, Justice D'Auguste stated that "[t]he exculpatory clause provides that '[t]here shall be . . . no liability on the part of Owner by reason of . . . injury to business,' which precludes Respondent's business interruption defense. This provision acts as an agreement by the parties to 'allocate the risk of liability between themselves to third parties through insurance.' " *737 Park Avenue Acquisition LLC v. Robert B. Jetter, M.D., PLLC,* Index No. L&T 71456/2012 at 2-3 (citation omitted).

[5] Plaintiffs' argument that defendants' motion for partial summary judgment is premature because discovery is not yet complete does not save this claim either, for Plaintiffs neither allege nor submit any evidence evincing physical ouster, a factual allegation that would be well within their knowledge.

The Civil Court's prior determination precludes Jetter's business interruption/loss of reputation claims here regardless of the alleged subsequent events and conditions. As the Civil Court held, any damages sustained based on injury to business and emanating from the Lease – whether plead as income, reputation, or goodwill – are barred under of section 4 of the Lease. *See Elias v Rothschild*, 29 A.D.3d 448, 448 (1st Dep't 2006) (noting "that claims can arise out of the same transaction or series of transactions even if . . . different relief is sought and even when several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief") (internal quotations and citations omitted).

Because the business interruption/loss of reputation claims were adjudicated in the first proceeding and any subsequent events would not change the plain terms of the Lease, as interpreted by the Civil Court, I grant Defendants' motion for summary judgment dismissing the second cause of action for loss of business income and the fourth cause of action for damage to reputation and loss of goodwill as against Defendants to the extent these claims are based on the Lease.

Regarding Plaintiffs' claim for breach of the covenant of quiet enjoyment, the Civil Court in the first proceeding determined that Jetter's defense ultimately failed because paragraph 23 of the "Lease provides that the landlord's covenant of quiet enjoyment is conditioned upon [Jetter's] payment of rent." Because Plaintiffs attest to only paying monthly rent since April 1, 2014, *res judicata* now bars this claim to the extent Plaintiffs seek recovery for events and conditions prior to April 1, 2014, and I grant Defendants' motion for summary judgment as to the third cause of action only to that extent. Accordingly, Plaintiffs may pursue a claim for breach of the covenant of quiet enjoyment for events and conditions after April 1, 2014.

Regarding Plaintiffs' seventh cause of action for breach of the covenant of good faith and fair dealing, Defendants argue that this cause of action is merely a reassertion of the first

proceeding's breach of contract defense. New York courts generally hold that a "cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained [when] it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract" *MBIA Ins. Corp. v Merrill Lynch*, 81 A.D.3d 419, 419–20 (1st Dep't 2011) (internal quotations and citation omitted). Here, the claim for breach of the covenant of good faith and fair dealing, as alleged in the amended complaint, is premised on the same conduct that underlies the first proceeding, i.e., water and noise interruptions, inadequate ingress and/or egress, and flooding incidents, which the Civil Court determined was insufficient or already awarded Jetter a rent abatement. In turn, I find that the breach of covenant of good faith and fair dealing claim is duplicative of the breach of contract claim in the first proceeding. In any event, giving proper effect to the Lease's exculpatory provisions, as affirmed by the Appellate Term in the first proceeding, permits the challenged conduct without 737 Park incurring liability.[6] Accordingly, *res judicata* has a preclusive effect on Plaintiffs' claim for breach of the covenant of good faith and fair dealing and collateral estoppel precludes re-litigating the sufficiency of the alleged incidents.

Lastly, Defendants argue that Plaintiffs' first cause of action for diminution of value is a measure of damages, not an independent claim for which Plaintiffs may recover. Diminution of

[6] First, paragraph 4 in relevant part broadly provides that "[t]here shall be no allowance to Tenant for diminution in rental value and no liability on the part of the Owner by reason of inconvenience, annoyance or injury to business arising from Owner or others making repairs, alterations, additions or improvements in or to any portion of the building or the demised premises . . . ." Second, paragraph 20 in relevant part further provides that "[o]wner shall have the right at any time . . . without incurring liability to Tenant therefore to change the arrangement and/or location of public entrances, passageways . . . or other public parts of the building." Third, paragraph 29(f) in relevant part specifically provides that "[o]wner reserves the right to stop services of the . . . plumbing . . . or other services, if any, when necessary by reason of accident, or for repairs, alterations, replacements or improvements necessary or desirable in the judgment of Owner, for as long as may be reasonably required by reason thereof."

value is, in fact, a measure of damages for various causes of action. *See Guzzardi v Perry's Boats, Inc.*, 92 A.D.2d 250, 254 (2d Dep't 1983) (stating that the *measure of damages* for private nuisance is the diminution of the market value of the property) (emphasis added); Rasch's Landlord and Tenant, 2 N.Y. Landlord & Tenant Incl. Summary Proc. § 18:32 (4th ed.) ("Ordinarily the general damages recoverable for a breach of a landlord's covenant to repair are measured by the diminution in the rental value of the leased premises resulting from the failure to repair").

Plaintiffs cite no case law or authority demonstrating diminution of value as an independent cause of action. To the contrary, Plaintiffs seek diminution in rental value as a measure of damages in the sixth cause of action for partial constructive eviction and the seventh cause of action for breach of the covenant of good faith and fair dealing. Accordingly, I dismiss the first cause of action for diminution of value because it is not an independent cause of action and also because it is duplicative of the damages Plaintiffs already seek in the sixth and seventh cause of action.

C. Election of Remedies

Defendants move for partial summary judgment dismissing Plaintiffs' sixth cause of action for partial constructive eviction, arguing that by withholding rent and then seeking a rent abatement as an affirmative defense in the first proceeding, Plaintiffs elected their remedy and may not now claim additional damages. Plaintiffs oppose, arguing that the damages Plaintiffs now seek are consistent with the previous award, which did not fully compensate Plaintiffs for Defendants' conduct because of events and conditions occurring after the first proceeding.

"[I]n cases of partial eviction[,] the tenant's refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages" *Bostany v Trump Org. LLC*, 88 A.D.3d 553, 554 (1st Dep't 2011). "[A] tenant who elects to remain in possession and pay the rent after a partial eviction may [then] claim damages from his lessor which include consequential damages." *Id.* at 554. Here, Plaintiffs have provided no evidence that the rent abatement previously awarded in the

first proceeding and later affirmed by the Appellate Term failed to fully compensate them for events and conditions underlying the first proceeding.

To the extent that Plaintiffs now seek damages from an alleged partial constructive eviction stemming from events and conditions occurring after the first proceeding, Plaintiffs attest only to rental payments since April 1, 2014. By withholding rent prior to April 1, 2014, Plaintiffs elected their remedy and have no claim for events and conditions occurring prior to April 1, 2014. Therefore, Plaintiffs' claim for partial constructive eviction is dismissed to the extent they seek damages for the period prior to April 1, 2014, and I grant Defendants' motion for summary judgment to dismiss the sixth cause of action for partial constructive eviction only to that extent. Accordingly, Plaintiffs may pursue a claim for partial constructive eviction for events and conditions after April 1, 2014. *See Phoenix Garden Rest., Inc. v Chu*, 245 A.D.2d 164, 165–66 (1st Dep't 1997) ("As to the merits of Defendants' motions, although plaintiff tenants allege a valid claim for breach of the covenant of quiet enjoyment for the period November 1991 through July 1992, during which they were either actively or constructively evicted and for which defendant landlords gave a rent abatement, there was no payment of rent or waiver thereafter and, therefore, Plaintiffs' claims should be dismissed to the extent they seek recovery for the period commencing after July 1992").

D. Dismissal of Plaintiff Abbey Road and Defendant Macklowe

Defendants move to dismiss all Lease based claims asserted by Abbey Road against Defendants and also move to dismiss all Lease based claims Plaintiffs assert against Macklowe, arguing that because neither Abbey Road nor Macklowe are parties to the Lease, both lack contractual privity. Plaintiffs do not dispute that neither Abbey Road nor Macklowe are parties to the Lease, but instead argue that the claims are based on negligence.

To the extent that Lease based causes of action remain, I dismiss Abbey Road and Macklowe, as non-parties to the Lease, from all causes of action based on the Lease for lack of contractual privity. *See Wright v Catcendix Corp.*, 248 A.D.2d 186, 186 (1st Dep't 1998) (dismissing plaintiff's claims against the building owner for constructive eviction, breach of the lease agreement, and breach of the covenant of quiet enjoyment because there was neither a contractual agreement nor landlord-tenant relationship); *Tefft v Apex Pawnbroking & Jewelry Co., Inc.*, 75 A.D.2d 891, 892 (2d Dep't 1980) (concluding that the landlord could not maintain an action against the defendant based upon a breach of the lease where there is no privity of contract between them). Accordingly, Abbey Road and Macklowe are dismissed from the first, second, third, fourth, fifth, sixth, and seventh causes of action to the extent those claims are based on the Lease.

II. Plaintiffs' Cross-Motion for Leave to Amend

Plaintiffs cross-move for leave to file a second amended complaint, pursuant to CPLR § 3025 (b), adding two new causes of action – one for negligence against Hailey, and another for vicarious liability against 737 Park and Macklowe. Defendants oppose on the grounds that Plaintiffs' delay in requesting leave to amend is inexcusable and prejudicial, and that the new vicarious liability claim lacks merit. Hailey also submits an affidavit opposing Plaintiffs' request for leave to amend, arguing delay.

Leave to amend a complaint is freely granted "upon such terms as may be just," requiring only that the plaintiff "set[] forth additional or subsequent transactions or occurrences" and that the motion be "accompanied by the proposed amended . . . pleading clearly showing the changes or additions to be made to the pleading." CPLR § 3025 (b). Lateness is a barrier to granting a motion to amend only when combined with significant prejudice to the other side. *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957, 959 (1983); *Norwood v City of New York*, 203 A.D.2d 147 (1st

Dep't 1994). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment[.]" *Valdes v Marbrose Realty, Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001) (citations omitted).

Plaintiffs filed the original complaint less than three years from this application, and the amended complaint approximately two-and-a-half ago. Such a delay is far less than circumstances where courts have previously granted leave to amend. While Defendants argue that the delay here requires Plaintiffs to provide a reasonable excuse, this requirement appears to apply in situations where there has been an extended delay. *See Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc., LLC*, 4 A.D.3d 290, 293 (1st Dep't 2004); *Jablonski v County of Erie*, 286 A.D.2d 927, 927 (4th Dep't 2001). Considering that depositions have not yet commenced and the Note of Issue has not been filed, I am reluctant to find an extended delay here. Even so, Plaintiffs have attested that the factual amendments relate to events and conditions that occurred after the complaint was first amended in April 2013. Accordingly, I find that the delay should not, alone, preclude an order granting leave to amend the complaint. Because this is Hailey's primary opposition, I grant Plaintiffs' application to add a negligence claim against Hailey.

Defendants have also failed to demonstrate that any delay here would cause them prejudice. Although Defendants argue that by permitting Plaintiffs to add tort based claims when Plaintiffs initially proceeded with primarily contract based claims, that Defendants would be prejudiced – I disagree. There can be no prejudice when Plaintiffs' new causes of action sounding in negligence are based on facts formerly alleged in the original/amended pleading, were addressed in previous motions, and which the bill of particulars now provides in more detail. *See Bamira v Greenberg*, 256 A.D.2d 237, 239 (1st Dep't 1998) ("In light of the fact that these causes of action were based

on allegations already pleaded or as to which defendant was fully on notice, we reject defendant's contention of prejudice.") To the extent that Plaintiffs seek to amend the pleading to include previously unalleged facts, which would also support Plaintiffs' new causes of action, those amendments relate to events and conditions that occurred subsequent to the filing of the original and amended pleading. Neither does the contention that amendment at this point will require the parties to expend additional time preparing for the case or force the parties to conduct further discovery constitute sufficient prejudice. *See Jacobson v Croman*, 107 A.D.3d 644, 645 (1st Dep't 2013) (finding such arguments insufficient to constitute prejudice). Therefore, I find that Defendants have not sufficiently shown prejudice to overcome my discretion to liberally grant leave to amend.

Defendants finally argue that Plaintiffs' new cause of action for vicarious liability against 737 Park and Macklowe is wholly without merit, and Plaintiffs should not be permitted to add this claim. However, "plaintiff[s] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) (citation omitted). Upon review, I find that the proposed amended complaint is not palpably insufficient or clearly devoid of merit.

For all these reasons, I grant Plaintiffs' cross-motion for leave to file a second amended complaint.

In accordance with the foregoing, it is

ORDERED that defendant 737 Park Avenue Acquisition LLC's motion for partial summary judgment on its fifth counterclaim for declaratory judgment is granted and that I will issue a formal declaration consistent with this decision at the conclusion of the action; and it is further

ORDERED that defendants 737 Park Avenue Acquisition LLC and Macklowe Properties, Inc. and/or Macklowe Properties, LLC's motion for partial summary judgment dismissing plaintiffs Robert B. Jetter, M.D., PLLC's and Abbey Road Office Based Surgery PLLC's first cause of action for diminution of value, fifth cause of action for partial actual eviction, and seventh cause of action for breach of the covenant of good faith and fair dealing is granted; it is further

ORDERED that defendants 737 Park Avenue Acquisition LLC and Macklowe Properties, Inc. and/or Macklowe Properties, LLC's motion for partial summary judgment dismissing plaintiffs Robert B. Jetter, M.D., PLLC's and Abbey Road Office Based Surgery PLLC's second cause of action for loss of business income and fourth cause of action for damage to reputation and loss of goodwill is granted only to the extent that such causes of action are based on the Lease, and otherwise denied; it is further

ORDERED that defendants 737 Park Avenue Acquisition LLC and Macklowe Properties, Inc. and/or Macklowe Properties, LLC's motion for partial summary judgment dismissing plaintiffs Robert B. Jetter, M.D., PLLC's and Abbey Road Office Based Surgery PLLC's third cause of action for breach of the covenant of quiet enjoyment and sixth cause of action for partial constructive eviction is granted only to the extent that the allegations occurring prior to April 1, 2014 may not form a basis for these claims, and otherwise denied; it is further

ORDERED that defendants 737 Park Avenue Acquisition LLC and Macklowe Properties, Inc. and/or Macklowe Properties, LLC's motion for partial summary judgment dismissing plaintiff Abbey Road Office Based Surgery PLLC and defendant Macklowe Properties, Inc. and/or

Macklowe Properties, LLC as parties from the first, second, third, fourth, fifth, sixth, and seventh causes of action is granted only to the extent that such causes of action are based on the Lease, and otherwise denied; it is further

ORDERED that the action shall continue as to the causes of action asserted against defendant Hailey Development Group LLC; and it is further

ORDERED that the cross-motion of plaintiffs Robert B. Jetter, M.D., PLLC and Abbey Road Office Based Surgery PLLC for leave to file a second amended complaint is granted; and it is further

ORDERED that plaintiffs Robert B. Jetter, M.D., PLLC and Abbey Road Office Based Surgery PLLC shall serve and file a second amended complaint consistent with this Decision and Order within 30 days as of the date of this Order; and it is further

ORDERED that defendants 737 Park Avenue Acquisition LLC, Macklowe Properties, and Hailey Development Group LLC shall serve an answer to the second amended complaint or otherwise respond thereto pursuant to the time limits set forth in the CPLR as of the date of service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on June 14, 2017, at 2:15 p.m.

This constitutes the decision and order of the Court.

DATE : 4/19/17

SALIANN SCARPULLA, JSC