ZH Control Co., LLC v Extra Stor. LLC
2017 NY Slip Op 32376(U)
November 9, 2017
Supreme Court, New York County
Docket Number: 153140/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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Z H CONTROL CO., LLC,

Plaintiff,

- against -

EXTRA STORAGE LLC, MARJORIE OTTER, AND XYZ CORP.,

Defendants.

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DECISION AND ORDER
Index No. 153140/2016

Mot. Seq. Nos.: 002 and 003

O. PETER SHERWOOD, J.:

MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION (003)

Because these are motions for partial summary judgment, the following facts are taken from the parties' 19-A statements (NYSCEF Docs. No. 95, 116, 117, 152, 156).[1]

A. Facts

Plaintiff ZH Control Co. LLC (ZH) is the owner of a commercial condominium unit (the Commercial Unit), which includes space at street level and in the cellar level at the Morton-Barrow Condominium, which is comprised of two adjacent buildings at 452-462 Hudson Street (The Barrow Building) and 438-450 Hudson Street (The Morton Building, and together, the Buildings). ZH is a successor entity to ZH Control Co, which owned the Buildings prior to their conversion. The cellar-level portion of the Commercial Unit includes five storage rooms (the Storage Rooms). Pursuant to a storage lease agreement dated January 2005 (the Lease), defendant Extra Storage took possession of the Storage Rooms.

Plaintiff claims it was not paid rent for the Storage Space. Defendants contend that defendant Marjorie Otter (Otter) was not a part of the lease and never had possession of the Storage Space, that plaintiff orally waived payments, and any other breach of the lease. Thus any attempt by the plaintiff to terminate the lease is a nullity.

[1] Defendants object to plaintiff's 19-A statement because that statement cites to the affidavit of counsel, rather than that of a fact witness. The statement cites to the affidavit of Edward Antoian, a partner at the asset manager for plaintiff, and the documentary exhibits attached thereto (*see* NYSCEF Doc. No. 95).

B. Additional Facts from Defendants' Cross-Motion

Florence Zager and her children Eric Zager and Robin Zager are members of ZH, in addition to an entity, which is the largest shareholder. Otter was hired by Daniel Zager, late husband of Florence. Otter maintains that she performed some tasks for ZH, as well as for various members of the Zager family, over time. Defendants assert that Florence signed the Lease.

In or around 2013, the Zagers asked Otter to give any files regarding their assets to their new asset manager, Michael Sass of ABS Partners Real Estate, LLC. Otter turned over documents but it is disputed how complete the files were, and how much effort and care was taken. Otter resigned as executor of Florence's will. It is disputed whether this was her idea, or requested of her. It is also disputed whether Otter is owed money for her services.

In October 2015, plaintiff, by counsel, asked Otter for documentation of Extra Storage's right to possess the Storage Rooms. The Lease was provided, although Otter maintains it is incomplete because it lacks a diagram of the lease space. In November 2015, plaintiff attempted to terminate defendant's rights to the Storage Rooms by issuing a notice to quit for each room. After receiving the Lease plaintiff provided a notice to cure and thereafter a notice of termination to defendant.

It is disputed whether plaintiff demanded accountings pursuant to the Lease or whether plaintiff, as with the rent, orally waived its right thereto. It is undisputed that Extra Storage receives rent from Building residents for use of the Storage Units. Otter is the managing member of Extra Storage.

In this action plaintiff brings claims for:

1. Ejectment of all defendants
2. Use and Occupancy of $10,000 per month against all defendants
3. Breach of Contract against Extra Storage
4. Attorney's Fees against Extra Storage
5. An Accounting against Extra Storage and Otter
6. Constructive Trust against Extra Storage and Otter
7. Breach of Fiduciary Duty against Otter.

In this motion, plaintiff moves for summary judgment on the first claim, for ejectment only, and asks that it be severed and a judgment granted. Plaintiff also moves for summary judgment dismissing defendants' first, second, and third affirmative defenses, and seeks an order requiring defendants to turn over all current leases, occupancy agreements, and pre-paid rents and unearned security deposits for rented space within the Storage Rooms.

In its cross-motion, defendants move to dismiss all claims against Otter and the fifth and sixth claims against Extra Storage.

C. Arguments

1. Plaintiff's Motion for Partial Summary Judgment

Plaintiff which owns the Storage Rooms, issued termination notices for defendants' tenancy pursuant to the Lease. Nevertheless, defendants continue in possession of those spaces. Plaintiff asserts that on these facts summary judgment on the first claim, for ejectment, should be granted.

Additionally, the following affirmative defenses fail against this claim:

1) Lack of personal jurisdiction, due to the manner of service;
2) Lack of jurisdiction, related to the service of notices to quit;
3) Improper service of the Notice to Cure and the Notice of Termination (Memo at 10);

2. Defendants' Opposition and Cross-Motion

Defendants argue that all of the claims against Otter and the equitable and quasi-contract causes of action against Extra Storage should be dismissed with prejudice. Having decided to enforce the Lease, plaintiff cannot also argue that the Lease is invalid, as having been procured improperly by Otter (Opp at 2). These claims are no longer available in the alternative, as there is no longer a dispute about the validity of the Lease (*id.* at 4). Therefore, the breach of fiduciary duty claim, which implies the Lease is invalid, should be dismissed (*id.* at 5). As far as plaintiff makes arguments about Florence Zager and whether she provided plaintiff with knowledge of the Lease, there is a "heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties" and to overcome the presumption, "evidence of a very high order is required" (Opp at 6, quoting *George Backer Mgt. Corp. v Acme Quilting Co., Inc.*, 46 NY2d 211, 219 [1978]). The constructive trust and equitable accounting claims should fail, as the plaintiff has acknowledged the valid Lease (*id.* at 8).

Additionally, the claims for ejectment, use and occupancy, and an accounting should be dismissed against Otter, because she is not a party to the Lease. The equitable claims against Otter should be dismissed because she was never personally in possession of the Storage Rooms (*id.* and 8-9).

As to the plaintiff's motion for summary judgment on the ejectment claim, defendants argue that the affidavit of plaintiff's asset manager, Edward Antoin, is insufficient to make a prima facie case, as he lacks personal knowledge of any events prior to his retention in August of 2013

(*id.* at 11). Nor can the lack of proof be cured on reply (*id.* at 12, *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] ["a deficiency of proof in moving papers cannot be cured by submitting evidentiary material in reply"]). Defendants also argue that plaintiff has demanded defendants "proprietary business documents and valuable fixtures" which is prohibited by the Lease and that plaintiff has thwarted discovery in this action by refusing to produce documents (*id.*)

Defendants claim plaintiff has misrepresented material facts. For example, plaintiff seeks an order requiring Extra Storage to turn over its fixtures and ongoing business to plaintiff, but the fixtures belong to Extra Storage, and plaintiff is not entitled to them, under the Lease (Opp at 12). Defendants also argue that plaintiff's failure to cooperate with discovery, including its refusal to appear for depositions, preclude the award of summary judgment (*id.* at 13). Defendants argue that plaintiff has refused to provide documents concerning debts owed to Otter or Extra Storage, which would go to the waiver defense, or any documents related to Otter's alleged fiduciary relationship with plaintiff at the time the Lease was entered into (Opp at 14). As plaintiff has not yet completed a thorough search for documents, is late responding to discovery demands, and as no depositions have been taken, the motion is premature. Further, defendants argue that plaintiff has failed to describe the Storage Rooms with sufficient precision to allow a Marshal or Sherriff to perform an eviction, requiring summary judgment be denied (Opp at 15).

Substantively, defendants claim that Florence waived plaintiff's right to payment under the Lease, as payment for services which plaintiff and the Zager family had received, including Florence's estate planning, her personal care, and overseeing family accountants' handling of the family's personal expenses (*id.* at 15, citing Otter aff, NYSCEF Doc. No. 114, at ¶¶ 24-26, and e-mails attached as Exhibit 7 to Otter Aff, NYSCEF Doc. No. 124 [showing services provided], e-mails attached as Exhibit 8 to Otter Aff, NYSCEF Doc. No. 125 [acknowledging Otter was owed money in 2012]). The emails show that Otter provided services and expected compensation, not that the rent was waived. Defendants also argue there is a question of fact as to whether plaintiff issued the notice of termination in good faith, as rent and information about the rental was demanded after 7 years and outside the statute of limitations, and that the claims are barred by laches, as plaintiff waited 7 years after waiving the right to payment and over a decade after the start of the Lease (Opp at 16).

3. Plaintiff's Reply and Opp to Cross-Motion

Regarding the ejectment claim, plaintiff points out that the breaches in the Lease that were the cause for termination of the Lease were a failure to provide contractually required accountings, and failure to pay rent (Reply at 5). Defendants do not argue they provided either accountings or paid rent. No *Yellowstone* injunction was sought, and plaintiff subsequently filed a notice of termination (Reply at 5). Nor is there any dispute that the Lease was properly terminated. Regarding the Antoian affidavit, Antoian swears that he is familiar with the Building and the Lease, has all available records of the plaintiff, and has had personal dealings with Otter (Antoian Aff, NYSCEF Doc. No. 94, at ¶¶ 1, 15-18; Antoian Reply Aff, NYSCEF Doc. No. 110, at ¶¶ 3-7). This is sufficient (Reply at 7, citing *First Interstate Credit All., Inc. v Sokol*, 179 AD2d 583, 584 [1st Dept 1992] ["affidavit submitted based upon documentary evidence was sufficient to comply with the requirement that a motion for summary judgment be supported by an affidavit from a person having personal knowledge"]). Antoian's testimony in his affidavit is limited to his knowledge based on the documents and his personal knowledge (see Reply at 7). Documents supporting plaintiff's claims, including the Lease, were attached to his affidavit and are not disputed by defendants (Reply at 6-7).

As far as defendants object to plaintiff's demand for the fixtures in the Storage Rooms, plaintiff merely wishes to limit disruption to the tenants using the space, and is willing to pay a proper value for the fixtures, with the value to be determined (*id.* at 8). As far as defendants argue there is a need for additional disclosure, there is no need for disclosure with respect to the notices to cure and of termination. It is also undisputed that Extra Storage, and possibly Otter, remain in possession of the Storage Rooms (*id.*).

Regarding defendants' oral modification argument, plaintiff notes that the Lease requires a writing to modify its terms (Lease, ¶ 26 ["This Lease . . . may not be modified except in writing signed by both parties"]). According to General Obligations Law, it cannot be modified without a writing (General Obligations Law § 15-301[1]). Such clauses are regularly enforced (Reply at 11-14 [collecting cases]). Nor is defendants' non-payment of rent evidence of the waiver, as that is equally possibly evidence of breach of the Lease (*id.* at 14).

Plaintiff also contends that it has not made an election of remedies, that its claims are based either on the Lease or on Otter's common law fiduciary responsibilities. Its claims are not brought in the alternative, and so the defendants' motion to dismiss its fifth, sixth, and seventh claims should be denied (Reply at 15). The fifth cause of action, for an accounting, is not a common law claim, but one pursuant to the Lease (*id.* at 15-20). Otter is a proper defendant to this claim because a letter from her counsel indicated she was a tenant of the Storage Rooms pursuant to the Lease (*id.* at 17, citing Rosen letter to Estis dated December 29, 2015, attached as Exhibit H to plaintiff's moving papers, NYSCEF Doc. No. 103). However, the letter references and encloses the Lease which shows clearly that Extra Storage is the tenant (see NYSCEF Doc. No. 84). In any event, Otter is both Extra Storage's principal and plaintif's former fiduciary, and so may be required to make an accounting (Reply at 18)

The sixth claim, for a constructive trust, is based on the defendants' obligations under the Lease to collect rents and pay a portion to the plaintiff (Reply at 17, 21-22). Plaintiff explains that the claim against Otter is distinct, as she was acting in a fiduciary capacity at the time of the Lease.

The seventh claim, for breach of fiduciary duty, against Otter, asserts a claim against her for her actions as plaintiff's fiduciary in administering the Lease (Reply at 23-24).

4. Defendants' Reply in Support of their Cross-Motion

Defendants reiterate that all claims premised on the Lease being unenforceable must be dismissed, and that plaintiff has failed to bring evidence to overcome the presumption it was aware of the Lease (Cross-Reply at 2-3). Nor has plaintiff provided evidence to rebut defendants' assertion of waiver. Waiver is distinct from the modification of a contract, and can be addressed at trial, even with a written-modification-only restriction (Reply at 5, citing *Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 6 [1st Dept 2006], *affd.* 8 NY3d 59 [2006]). Defendants also repeat their arguments about the election of remedies, that, in deciding to rely on the Lease and admit its enforceability, plaintiff is estopped from also pursuing equitable or quasi contract claims against the defendants. Defendants also note that Otter is not a tenant pursuant to the Lease and so cannot be held to that contract. Further, defendants take issue with the evidence presented by the plaintiff, as the Complaint in this action is verified by the plaintiff's attorney (NYSCEF Doc. No. 1), and the plaintiff's motion is supported only by attorney

affirmations and the affidavit of plaintiff's asset manager, Antoian, who lacks personal knowledge of events before 2013 (Cross-Reply at 12).

Defendants also raise issues regarding plaintiff's failure to provide documents about Florence's will and her competence, as plaintiff has argued Florence was not competent to enter into the Lease.

DISCUSSION

1. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

2. Plaintiff's Claim for Ejectment

"In order to maintain a cause of action to recover possession of real property, [a] plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009], quoting *Jannace v Nelson, L.P.*, 256 AD2d 385, 385 [2d Dept 1998]).

In their statements of undisputed facts, the parties agree that plaintiff is the owner of the Commercial Unit at the Buildings, which includes the Storage Rooms (NYSCEF Docs. No. 95, 117, ¶1); that plaintiff leased the Storage Rooms to Extra Storage pursuant to the Lease; that the Lease provides for Extra Storage to pay rent to plaintiff and that Extra Storage did not pay it. Plaintiff established that it sent Extra Storage a 20 day notice to cure on or about February 11, 2016 (Notice to Cure, NYSCEF Doc. No. 104); that defendants neither paid rent nor provided the required documentation after that and that plaintiff terminated the Lease. Accordingly, plaintiff has made a prima facie case for ejectment.

Defendants assert the affirmative defense that plaintiff, by its principal, Florence, orally waived payment under the Lease as compensation for defendant Otter's work for her and her family. Defendants bear the burden of proving waiver (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984] ["A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved"]). As evidence, defendants provide only Otter's self-serving affidavit (Otter Aff, NYSCEF Doc. No. 114, ¶ 17 ["Plaintiff, through Florence Zager, expressly waived any right to collect those rents before they came due based upon the receipt and acceptance of valuable services"]). Although defendants provide evidence of Otter's legitimate claim for compensation for services provided to The Zagers, they have offered no defense to the claim of non-payment of the rent.

The no-oral-modification clause in the Lease does not prohibit waiver. "[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement. Such waiver may be evinced by words or conduct, including partial performance. . . . Waiver is unilateral and, not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform" (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 6 [1st Dept 2006], *affd*, 8 NY3d 59 [2006] internal citations and quotations omitted]). Here the only evidence of waiver is the self-serving statement of Otter who assumes there was a waiver. Accepting for purpose of discussion that a waiver was given, the Notices to Cure provided defendants with notice that plaintiff wished to withdraw the waiver and gave defendants an opportunity to perform before termination of the Lease (*see Rossrock Fund II, L.P. v Osborne*, 82 AD3d 737, 737 [2d Dept 2011] ["correspondence . . . operated to provide the appellant with notice of the plaintiff's intention to foreclose, and also provided the appellant with two opportunities to reinstate the loans. Accordingly, to the extent that the right to foreclose was validly orally waived, the waiver was thereafter validly withdrawn"]). It is undisputed that defendants failed to pay rent pursuant to the Lease even after receipt of the Notices to Cure. Accordingly, plaintiff is entitled to ejectment, and summary judgment shall be granted to the plaintiff on the first cause of action.

As far as plaintiff seeks an order requiring defendant to turn over all current leases or occupancy agreements for any rented space within the Storage Rooms, together with prepaid rents and unearned security deposits, such relief shall be awarded along with the grant of ejectment. As to the fixtures in the Storage Rooms, the Lease provides that those are removed by the tenant within 90 days after the end of the Lease (Lease, ¶ 9, NYSCEF Doc. No. 63). The Lease was terminated effective March 15, 2016 but Extra Storage failed to remove the fixtures. Accordingly, Extra Storage has abandoned its right to the fixtures.

3. Plaintiff's Motion to Dismiss Affirmative Defenses

Plaintiff moves to dismiss defendants' first, second, and third affirmative defenses. On a motion to dismiss affirmative defenses, "the plaintiff bears the burden of demonstrating that [such] defenses are without merit as a matter of law. In deciding a motion to dismiss a defense, the

defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-42 [1st Dept 2011] [internal citations omitted]). A defense should not be stricken where there are questions of fact requiring a trial (*see id.*; *see also Atlas Feather Corp. v Pine Top Ins. Co.*, 128 AD2d 578, 579 [1st Dept 1987].

The first affirmative defense, for lack of personal jurisdiction because of a failure of service on Otter and Extra Storage, was raised as a motion to dismiss. The court found that proper service was made (Transcript of Oral Argument on Feb. 14, 2017, NYSCEF Doc. No. 74, at 33-34). Accordingly, this affirmative defense is dismissed.

Similarly, the third affirmative defense, that the Notice to Cure and the Notice of Termination are defective, was also dismissed with the court holding adequate notice was given (*id.* at 34).

The second affirmative defense, for lack of personal jurisdiction because the ten day Notice to Quit, the predicate for this litigation, is defective and a nullity, is moot. Parties agree that the Lease is valid and enforceable. They also agree that the Notice to Quit is moot. At this point, plaintiff's claims are based on the Notice to Cure and Notice of Termination. Accordingly, third affirmative defense is dismissed.

4. Defendants' Motion to Dismiss Claims against Otter

Defendants argue that, as Otter is not a party to the Lease, and the action is brought pursuant to the Lease, she should not be a party to this action. However, while not described in so many words, this claim against Otter is being advanced under a veil-piercing theory. New York law disfavors disregard of the corporate form. "Generally, . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKL Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts also reject veil-piercing allegations that are

"unaccompanied by allegations of consequent wrongs" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]).

Otter signed the Lease as a Member of Extra Storage, and she is the managing member. Defendants argue that plaintiff waived its right to payment by Extra Storage under the Lease as a way to pay a debt owed to Otter, indicating Otter's domination of Extra Storage. It is also debated whether Otter used Extra Storage to take advantage of plaintiff. Accordingly, it is premature to dismiss the claims against Otter, where they stand against Extra Storage.

5. Cross- Motion to Dismiss Certain Claims Against Extra Storage

Defendants seek to dismiss the equitable and quasi-contract claims against Extra Storage, and thus Otter, on the ground that the Lease is binding, making the extracontractual claims moot. Those claims are addressed below.

a. Accounting

This claim is not extra-contractual. It is effectively a claim for specific performance of an obligations under the Lease (*see* Lease, ¶ 3(c) and Complaint, ¶¶ 75-76). Accordingly, plaintiff's claim for an accounting will not be dismissed.

b. Constructive Trust

The elements of a constructive trust claim are: a confidential or fiduciary relationship; an express or implied promise; a transfer made in reliance on the promise; and unjust enrichment (*see Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980] [citations omitted]). The elements need not be rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]["Although the. . . factors are useful in many cases[,] constructive trust doctrine is not rigidly limited"]; *Robinson v Day*, 103 AD3d 584, 587 [1st Dept 2013]). "Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009])

Here, defendants are correct that, as there is a Lease governing the parties' rights and obligations, there can be no unjust enrichment claim. The motion to dismiss the claim for a constructive trust will be granted.

c. Breach of Fiduciary Duty

In order to establish a breach of fiduciary duty, plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584 [2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]).

Defendants argue that any breach of fiduciary duty related to the inception of the Lease is barred by the statute of limitations, and that a breach of fiduciary duty would render the Lease void, a position disclaimed by plaintiff. Neither of these arguments apply to the plaintiff's allegation that Otter breached her duty to plaintiff by failing to inform it of the Lease. While Otter argues Florence's signature on the Lease creates a presumption plaintiff knew about the Lease, there is a dispute about Florence's capability. That is an issue of fact. Accordingly, this claim survives.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is GRANTED as to the First Cause of Action; that plaintiff ZH Control Co., LLC may regain possession of the storage units along with all applicable occupancy agreements and security deposits from defendant, Extra Storage LLC and that the First Cause of Action shall be severed with judgment entered with respect thereto and all remaining causes of actions continued; and it is further

ORDERED that defendants' cross-motion for summary judgment to dismiss the Fifth (accounting), Sixth (constructive trust) and Seventh Causes of Action (breach of fiduciary duty) is GRANTED as to the Sixth Cause of Action only and is otherwise DENIED; and it is further

ORDERED that the First, Second and Third Affirmative Defenses are DISMISSED; and it is further

ORDERED that plaintiff shall settle judgment on five (5) days notice.

ORDERED that the rents collected prior to surrender of possession shall continue to be held in escrow pending resolution the remaining claims and defenses; and it is further

ORDERED that counsel appear for a status Conference on December 12, 2017, Part 49, Room 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: November 9, 2017

ENTER,

O. PETER SHERWOOD J.S.C.