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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Capplanco Seven Incorporated,

10 Plaintiff,

11 v.

12 KFC of America Incorporated, et al.,

13 Defendants.

No. CV-15-01727-PHX-DLR

ORDER

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16 At issue are Defendant KFC Corporation of Delaware's (KFCC) Motion for
17 Partial Judgment on the Pleadings, (Doc. 40), and Motion for Partial Summary Judgment,
18 (Doc. 44). The motions are fully briefed, and the Court heard oral argument on June 21,
19 2016. For the following reasons, KFCC's Motion for Partial Judgment on the Pleadings
20 is denied, and its Motion for Partial Summary Judgment is granted.

21 **BACKGROUND**

22 In 2001, KFCC leased real property (Property) from Plaintiff Capplanco Seven
23 Incorporated's (Capplanco) predecessor in interest for a 20-year term.¹ (Doc. 45, ¶¶ 1-4.)
24 KFCC ceased operations and vacated the Property in 2009, but continues to pay rent.
25 (*Id.*, ¶¶ 5-8.) KFCC does not expect to use the Property for the remainder of the lease
26 term, but alleges it will continue to timely pay rent until the lease expires or is terminated.

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28 ¹ KFC of America Incorporated merged with KFCC in 2002. (Doc. 12, ¶¶ 8-9;
Doc. 13, ¶¶ 8-9.) For ease, the Court will refer to Defendants only as KFCC.

1 (Id., ¶¶ 10-11.)

2 At issue is Section 10.11 of the lease, which states:

3 **Maintenance.** Throughout the entire term of the Lease, Tenant, at its sole
4 cost and expense, shall take good care of (a) the Tenant Improvements and
5 (b) pursuant to and in the manner required by the Center Declaration, the
6 Premises, and shall keep the same in good order and repair and in a neat,
7 sanitary and attractive condition, and make all necessary repairs and
8 replacements thereto, interior and exterior, structural and nonstructural,
with due diligence and in good faith. When used in this Section 10.11, the
term “repairs” shall include all necessary replacements, renewals and
alterations.

9 (Id., ¶ 16.) Pursuant to the Center Declaration:

10 In the event of any damage or destruction of Building(s) on a Parcel, the
11 Owner of such Parcel shall with reasonable diligence, and at its sole cost
12 and expense . . . repair, restore and rebuild the same in its condition existing
13 prior to such damage or destruction, subject to the provisions hereof, or
with such chances, alterations or additions as are not inconsistent with this
Declaration[.]

14 (Doc. 48-1 at 6.)

15 Capplanco brought this lawsuit against KFCC in August 2015 and filed its
16 amended complaint shortly thereafter. (Docs. 1, 12.) The amended complaint alleges
17 four claims against KFCC, three of which are at issue here. Count I alleges that KFCC
18 breached Section 10.11 of the lease by failing to maintain the Property and seeks
19 damages “in an amount to be proven at trial.” (Doc. 12, ¶¶ 23-30.) Count III alleges that
20 KFCC’s failure constitutes waste, for which Capplanco also seeks damages. (Id., ¶¶ 40-
21 45.) Finally, Count IV alleges that KFCC breached Section 10.11 of the lease and seeks
22 specific performance in the form of an order “[d]irecting KFC[C] to comply with its
23 maintenance obligations under Section 10.11 of the Lease.” (Doc. 45, ¶ 24; Doc. 12 at 6-
24 7.) KFCC has moved for judgment on the pleadings on Counts I and III, and for
25 summary judgment on Count IV. (Docs. 40, 44.)

1 **DISCUSSION**

2 **I. Motion for Partial Judgment on the Pleadings**

3 **A. Legal Standard**

4 A motion for judgment on the pleadings under Federal Rule of Civil Procedure
5 12(c) “is properly granted when, taking all the allegations in the non-moving party’s
6 pleadings as true, the moving party is entitled to judgment as a matter of law.” *Fajardo*
7 *v. Cty. of L.A.*, 179 F.3d 698, 699 (9th Cir. 1999). “Rule 12(c) is ‘functionally identical’
8 to Rule 12(b)(6) and . . . ‘the same standard of review’ applies to motions brought under
9 either rule.” *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011)
10 (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). Thus,
11 a motion for judgment on the pleadings should not be granted if the complaint contains
12 “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
13 face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation
14 omitted).

15 **B. Analysis**

16 Capplanco does not seek to terminate the lease. (Doc. 12, ¶ 22.) The issue is
17 whether Capplanco may bring damages claims based on KFCC’s alleged failure to
18 secure, maintain, and repair the Property without first terminating the lease. Notably,
19 Capplanco’s amended complaint does not specify how it intends to measure its damages.
20 Nonetheless, KFCC argues that no damages are permitted under the terms of the lease or
21 Arizona law. (Doc. 40 at 3-6.)

22 **i. Remedies Contemplated by the Lease**

23 Section 17(ii) enumerates three remedies available to Capplanco in the event of a
24 default by KFCC:

25 (a) *Declare the Term ended* and reenter the Premises and the
26 Tenant Improvements and take possession thereof and
27 remove all persons therefrom, and Tenant shall have no
28 further claim thereon or hereunder; or

(b) *Without declaring this Lease ended*, reenter the Premises

1 and the Tenant Improvements and occupy the whole or any
2 part thereof for and on account of Tenant and collect any
3 unpaid rentals and other charges, which have become
4 payable, or which may thereafter become payable; or

5 (c) Even though Landlord may have reentered the Premises
6 and the Tenant Improvements, *thereafter elect to terminate*
7 *this Lease* and all of the rights of Tenant in or to the Premises
8 and the Tenant Improvements[.]

9 (Doc. 12-1 at 19 (emphasis added).)

10 If Capplanco elects to terminate the lease pursuant to subsections (a) or (c),
11 Section 17(iv) lists the types of damages available, including “any amount necessary to
12 compensate Landlord for all the detriment proximately caused by Tenant’s failure to
13 perform its obligations under this Lease . . . including . . . maintaining or preserving the
14 Premises . . .” (*Id.* at 19-20.) Section 17(ii)(b) does not require Capplanco to terminate
15 the lease, but limits Capplanco to “collect[ing] any unpaid rentals and other charges.”
16 This type of language has been interpreted to mean “specific monetary obligations
17 imposed by the Lease on the lessee,” and not repair costs when the lessee has breached a
18 maintenance and repair covenant. *Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair*
19 *& Remodel, LLC*, 192 Cal. App. 4th 1183, 1200 (Cal. Ct. App. 2011). Thus, the
20 enumerated remedies make recovery of maintenance and repair damages contingent on
21 lease termination.

22 The lease, however, does not limit Capplanco to these enumerated remedies.
23 Section 17(ii) clearly states that the enumerated remedies are “in addition to any other
24 remedies available to it at law or in equity.” (Doc. 12-1 at 19.) Arizona law enforces
25 provisions that allow parties to seek legal remedies beyond those identified by the
26 contract itself. *See Roosen v. Schaffer*, 621 P.2d 33, 35 (Ariz. Ct. App. 1980). The
27 question, then, is whether Arizona law permits a landlord to recover maintenance and
28 repair damages without first terminating the lease.

1 **ii. Remedies Available at Law**

2 Arizona courts have not addressed whether a landlord may recover maintenance
3 and repair damages from a tenant during the lease term. In the absence of controlling
4 authority, “Arizona courts generally follow the Restatement of the Law on a particular
5 subject, provided its application is logical, furthers the interests of justice, is consistent
6 with Arizona law and policy, and has been generally acknowledged elsewhere.” *Cont’l*
7 *Lighting & Contracting, Inc. v. Premier Grading & Utilities, LLC*, 258 P.3d 200, 205
8 (Ariz. Ct. App. 2011) (internal quotations and citation omitted). When a “tenant fails to
9 perform a valid promise contained in the lease,” the Restatement (Second) of Property
10 provides the landlord with the option to “continue the lease and obtain appropriate
11 equitable and legal relief, including (a) recovery of damages, and (b) recovery of the
12 reasonable cost of performing the tenant’s promise.” Restatement (Second) of Property,
13 Land. & Ten. § 13.1 (1977).

14 Relying on *Avalon*, KFCC argues that the majority of jurisdictions do not follow
15 the Restatement, which allows a landlord to recover damages for maintenance and repair
16 failures during the lease term. (Doc. 40 at 5-6.) KFCC reads *Avalon* too broadly.
17 According to *Avalon*, “a lessor may sue to enforce maintenance and repair covenants
18 during the lease term; the issue is what remedy the lessor may receive—specific
19 performance, injury to the reversion interest, and/or cost of repair damages.” 192 Cal.
20 App. 4th at 1207. Confronted with a similar issue, and after surveying cases nationwide,
21 *Avalon* concluded that “[t]he vast majority . . . follows the rule that a lessor may not
22 recover cost of repair damages during the lease term for breach of maintenance and repair
23 covenants.” *Id.* at 1204-05.

24 The basic rationale for this rule is that it would not be fair to award the
25 lessor the cost of repairs in this situation because he or she is not bound to
26 expend the money on repairs, and because the allowance of the present cost
27 of such repairs would give him or her a windfall, since otherwise the lessor
28 would not rightfully come into possession of the demised premises until the
expiration of the lease term, after the value of repairs made during the term
has substantially declined It has also been observed in support of the
rule that the lessor’s entitlement to cost-of-repair damages during the lease
term is entirely speculative, because the lessee may make the necessary
repairs before the lease expires[.]

1 45 A.L.R. 5th 251, § 2(a). But where a landlord sues before the end of the lease term for
2 breach of a covenant to repair, the measure of damages typically “is the reduction in
3 value of the lessor’s reversion, that is, the difference in the value of the premises with and
4 without repairs.” *Ed Miller & Sons, Inc. v. Earl*, 502 N.W.2d 444, 451 (Neb. 1993).
5 Even then, special circumstances may sometimes justify deviation from this general rule.
6 45 A.L.R. 5th 251 § 2(a); *see Ed Miller & Sons*, 502 N.W.2d 444 (awarding cost of repair
7 damages because evidence showed the amount to be less than the reduction in value of
8 the reversion). These same principles apply to a waste claim, which “is by definition
9 injury to the lessor’s reversion interest.” *Avalon*, 192 Cal. App. 4th at 1220. Accordingly,
10 although the timing of Capplanco’s lawsuit might limit the type or measure of damages it
11 may recover, Arizona law would likely follow the Restatement, which would not bar
12 Capplanco’s claims entirely.

13 **II. Motion for Partial Summary Judgment**

14 **A. Legal Standard**

15 Summary judgment is appropriate if the evidence, viewed in the light most
16 favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to
17 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
18 P. 56(a). “[A] party seeking summary judgment always bears the initial responsibility of
19 informing the district court of the basis for its motion, and identifying those portions of
20 [the record] which it believes demonstrate the absence of a genuine issue of material
21 fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Substantive law determines
22 which facts are material and “[o]nly disputes over facts that might affect the outcome of
23 the suit under the governing law will properly preclude the entry of summary judgment.”
24 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact issue is genuine ‘if
25 the evidence is such that a reasonable jury could return a verdict for the nonmoving
26 party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)
27 (quoting *Anderson*, 477 U.S. at 248).

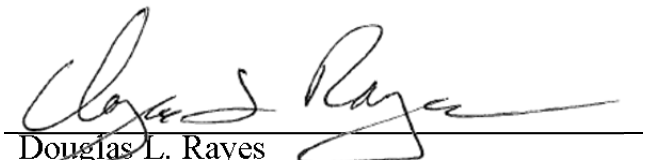
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1 Capplanco may pursue its claims, but will bear the burden of proving reversionary
2 damage at summary judgment or at trial. Specific performance, however, is not an
3 appropriate remedy for Capplanco's breach of contract claim. Accordingly,

4 **IT IS ORDERED** that KFCC's Motion for Partial Judgment on the Pleadings,
5 (Doc. 40), is **DENIED**, and its Motion for Partial Summary Judgment, (Doc. 44), is
6 **GRANTED** as explained herein.

7 Dated this 7th day of July, 2016.

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Douglas L. Rayes
United States District Judge