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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

WINDSOR WEST VENTURES, LLC,	)	3:14-cv-00539-HDM-VPC
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
NEVADA URBAN INDIANS, INC.,	)	
	)	
Defendant.	)	
_____	)	

Before the court is the plaintiff Windsor West Ventures, LLC's ("plaintiff") motion for summary judgment and two supplements thereto. (#17, #23 & #36). Defendant Nevada Urban Indians, Inc. ("defendant") has opposed (#20), and plaintiff has replied (#22).

On June 27, 2013, defendant as tenant and plaintiff as landlord entered into a commercial lease agreement. The lease term was to commence September 1, 2013, or as soon as improvements requested by the defendant were completed, and run through August 31, 2020. Defendant began occupying the leased premises in January 2014. Shortly thereafter, plaintiff asserts, defendant began complaining about the condition of the property and expressed an intent to vacate. In response, plaintiff filed this suit for

1 anticipatory breach of contract and declaratory relief. Defendant  
2 answered and counterclaimed for breach of the lease. Plaintiff now  
3 moves for entry of summary judgment on its claims, both on  
4 liability and damages, as well as defendant's counterclaims.<sup>1</sup>

5 Summary judgment shall be granted "if the movant shows that  
6 there is no genuine issue as to any material fact and the movant is  
7 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
8 The burden of demonstrating the absence of a genuine issue of  
9 material fact lies with the moving party, and for this purpose, the  
10 material lodged by the moving party must be viewed in the light  
11 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
12 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
13 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
14 that affects the outcome of the litigation and requires a trial to  
15 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
16 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
17 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

18 Once the moving party presents evidence that would call for  
19 judgment as a matter of law at trial if left uncontroverted, the  
20 respondent must show by specific facts the existence of a genuine  
21 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
22 250 (1986). "[T]here is no issue for trial unless there is  
23 sufficient evidence favoring the nonmoving party for a jury to  
24 return a verdict for that party. If the evidence is merely  
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26 <sup>1</sup> Subsequent to the plaintiff's filing of its motion, defendant gave  
27 notice that it intended to vacate by September 30, 2015. Plaintiff asserts  
28 that the defendant stopped paying rent on September 30, 2015. At a hearing  
on that date before this court, defendant represented that it had paid rent  
through October. Plaintiff did not contest defendant's representation.

1 colorable, or is not significantly probative, summary judgment may  
2 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
3 of evidence will not do, for a jury is permitted to draw only those  
4 inferences of which the evidence is reasonably susceptible; it may  
5 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585  
6 F.2d 946, 952 (9th Cir. 1978).

7 Plaintiff seeks judgment on its breach of contract claim.  
8 However, as defendant has vacated the property, Nevada Revised  
9 Statutes § 118.175 requires plaintiff to take reasonable steps to  
10 mitigate its damages. Whether plaintiff has taken sufficient steps  
11 to satisfy this obligation is a question of fact that must be  
12 resolved at trial.

13 Further, plaintiff seeks judgment on its claim for declaratory  
14 relief, which seeks a declaration that defendant has not been  
15 constructively evicted. To prove constructive eviction, the  
16 defendant must prove that: (1) plaintiff either acted or failed to  
17 act; (2) plaintiff's action or inaction rendered "the whole or a  
18 substantial part of the premises ... unfit for occupancy for the  
19 purpose for which it was leased"; (3) defendant vacated the  
20 premises within a reasonable time; and (4) defendant provided  
21 plaintiff notice of and a reasonable opportunity to cure the  
22 defect. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*,  
23 335 P.3d 211, 214-15 (Nev. 2014). Although the evidence is quite  
24 thin, there is evidence of circumstances that, taken together,  
25 could have rendered the premises unfit for the purpose for which it  
26 was leased, including but not limited to: failure to complete one  
27 of the exam rooms as agreed, multiple nonfunctioning electrical  
28 outlets, holes in the wall, damage to items in the office

1 overnight, as well as doors left unlocked after hours, and a public  
2 bathroom - which defendant's clients used - kept in an unsanitary  
3 or unusable condition. (See Pl. Mot. Ex. 2 (Reeves Dep. at 22-23,  
4 28-30, 35, 40, 48-49, 52, 53-57 ,66 & 69)). Whether defendant  
5 vacated the premises in a reasonable period of time and gave  
6 plaintiff sufficient notice as required by the law are also  
7 questions of fact for the trier of fact. Accordingly, genuine  
8 issues of material fact preclude summary judgment on the  
9 constructive eviction claim.

10 For similar reasons, triable issues of fact exist as to the  
11 defendant's counterclaim for breach of the lease agreement. Most  
12 particularly, the lease required plaintiff to "install sinks with  
13 lower cabinets in two (2) exam rooms. . . ." (Mot. Summ. J. Ex.  
14 1)). Reeves testified that one of the exam rooms had not been  
15 completed and specifically did not contain a sink in accordance  
16 with the lease agreement. *Id.* Ex. 2 (Reeves Dep. at 22-23, 28-30,  
17 35 & 69)). There is therefore a genuine issue of material fact on  
18 the defendant's counterclaim, as well.

19 Because of the nature of the alleged breaches, the court is  
20 not persuaded by plaintiff's argument that an expert witness is  
21 required to a prove that it breached its duties or the lease.

22 Accordingly, the plaintiff's motion for summary judgment (#17,  
23 #23, #36) is hereby **DENIED**.

24 **IT IS SO ORDERED.**

25 DATED: This 4th day of February, 2016.

26 

27 UNITED STATES DISTRICT JUDGE

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