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SHORT FORM ORDER

PUBLISH

INDEX NO.: 22962-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 4-8-11; 6-30-11
SUBMITTED: 6-30-11
MOTION NO.: 002-MOT D
003-XMD

GRANFELD II, LLC,

Plaintiff,

-against-

KOHL'S DEPARTMENT STORES, INC. and KOHL'S ILLINOIS, INC.,

Defendants.

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Upon the following papers numbered 1-62 read on this motion and cross-motion for summary judgment ; Notice of Motion and supporting papers 1-18 ; Notice of Cross Motion and supporting papers 19-57 ; Answering Affidavits and supporting papers 58-61 ; Replying Affidavits and supporting papers 62 ; it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted to the extent of dismissing the second through fifth causes of action; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the cross-motion by the plaintiff for summary judgment in its favor is denied.

This is an action to recover damages for the purported anticipatory repudiation of a commercial lease. On October 17, 2003, the plaintiff's predecessor in interest, Feldland Management, LLC ("Feldland"), entered into a ground lease with the defendant Kohl's Department Stores, Inc. ("KDS") for a parcel of land in the Town of Brookhaven on which Kohl's was to construct a department store. The parcel bordered on Horseblock Road to the north and the

Long Island Expressway to the south. The lease was contingent upon Feldland obtaining all necessary zoning approvals within 24 months and KDS obtaining all other governmental approvals within six months after Fedland's receipt of the zoning approvals. Feldland and KDS subsequently assigned their rights under the lease to the plaintiff and the defendant Kohl's Illinois, Inc. ("Kohl's"), respectively.

The plaintiff obtained zoning approval from the Town of Brookhaven on May 23, 2008, and Kohl's had six months from that date, or until November 23, 2008, to obtain the other governmental approvals. In order to obtain a building permit, the Town of Brookhaven required, inter alia, a road-opening permit from the New York State Department of Transportation (the "NYSDOT") for a curb cut on the north service road of the Long Island Expressway. When it appeared to Kohl's that the road-opening permit was not likely to be obtained by November 23, 2008, Kohl's sought to obtain a no-objection letter from the NYSDOT. On July 11, 2008, the NYSDOT issued such a letter, which provided, in pertinent part, as follows:

> Inasmuch as we are in conceptual agreement with the mitigation measures proposed and believe that all involved are working diligently towards a resolution that will not compromise public safety on the State highway, we have no objection to the Town of Brookhaven issuing a Building Permit for this site.
>
> In order to insure that all public safety concerns relating to traffic have been addressed in the final site plans we request, by copy of this letter that the Town of Brookhaven contact us prior to the issuance of a Certificate of Occupancy.

The letter went on to list the items that needed to be address prior to approval and issuance of a highway work permit by the NYSDOT.

Following NYSDOT's issuance of the aforementioned no-objection letter, Kohl's obtained all of the other approvals needed to obtain a building permit. On October 24, 2008, the Town of Brookhaven issued a building permit for the project, but Kohl's did not begin construction. By a letter dated January 21, 2009, Kohl's advised the plaintiff that it was terminating the lease in accordance with section 3.3 thereof because it had not obtained all of the governmental approvals necessary for the construction and operation of the building, including the applicable permit and approval from the NYSDOT. Section 3.3 of the lease provides, in pertinent part, as follows:

> Notwithstanding anything contained in this Lease to the contrary, the obligations of Landlord and Tenant under this Lease shall be contingent upon Tenant having obtained the Governmental Approvals. Tenant shall apply for the Governmental Approvals within thirty (30) days after Landlord has obtained the Zoning Approval. If Tenant has not obtained the Governmental Approvals

> with six (6) months after the date on which Landlord obtains the Zoning Approval, then either party may terminate this Lease by giving written notice to the other party to that effect prior to the date on which the Governmental Approvals have been obtained, whereupon neither party shall have any further liability or obligation to the other hereunder.

By a letter dated February 12, 2009, the plaintiff advised Kohl's that it was rejecting Kohl's notice of termination of the lease and deeming Kohl's to be in default unless it cured its default within 30 days. Kohl's did not cure its purported default within the 30-day period. By a letter dated April 29, 2009, the plaintiff advised Kohl's that it was terminating the lease, and this action ensued. The gravamen of the complaint is that, by deferring NYSDOT approval until the issuance of a certificate of occupancy, Kohl's waived its right to terminate the lease under section 3.3 due to its failure to obtain NYSDOT approval within six months after the zoning approvals were obtained. The complaint contains five causes of action for anticipatory repudiation of the lease, attorney's fees, breach of the implied covenant of good faith and fair dealing, equitable estoppel, and a declaratory judgment. Both sides move for summary judgment.

The plaintiff has adopted a familiar strategy of stating a cause of action for breach of contract in numerous guises, presumably in the hope that the court will find merit to at least one of its disparate theories of relief (*see*, **SAA-A, Inc. v Morgan Stanley Dean Witter & Co.**, 281 AD2d 201, 202). Unfortunately for the plaintiff, the second through fifth causes of action are duplicative of the first cause of action for anticipatory repudiation of the lease.

The second cause of action for attorney's fees is merely an element of the damages recoverable on the first cause of action (*see*, **Horton Medical, P.C. v New York Central Mutual Fire Ins. Co.**, 20 Misc 3d 142[A] at *2). Accordingly, the defendants are entitled to summary judgment dismissing the second cause of action, and the complaint is deemed amended so as to demand attorney's fees as part of the damages sought in connection with the first cause of action (**Id.**).

The third cause of action alleges that, in purporting to terminate the lease, Kohl's breached the implied covenant of good faith and fair dealing. It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance, which embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract (**Villcorta v Saks Inc.**, 32 Misc 3d 1203[A] at *12 [and cases cited therein]). A breach-of-the-implied-covenant-of-good-faith-and-fair-dealing claim that is duplicative of a breach-of-contract claim must be dismissed (**New York Univ. v Continental Ins. Co.**, 87 NY2d 308, 319-320). Such a claim is duplicative if it merely alleges, as the plaintiff in this case does, that the defendant did not act in good faith in performing its contractual obligations (**Villcorta v Saks Inc.**, *supra* at *13, *citing* **Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce**, 70 AD3d 423, 426). Accordingly, the defendants are entitled to summary judgment dismissing the third cause of action.

The fourth cause of action alleges that the defendants are equitably estopped from

terminating the lease due to their failure to obtain NYSDOT approval. Equitable estoppel does not apply when the alleged misrepresentation or act of concealment underlying the estoppel claim is the same misrepresentation or act that forms the basis of the underlying substantive cause of action (*see*, **Pautienis v Legacy Capital Corp.**, 36 AD3d 462; **Frommer v Frommer**, 17 Misc 3d 1106[A] at *5 [and cases cited therein]). Claims for equitable estoppel that are duplicative of breach-of-contract claims are properly dismissed (**Kopelowitz & Co., Inc. v Mann**, 23 Misc 3d 1112[A] at *11, *affd as mod* 83 AD3d 793). Moreover, equitable estoppel is not a basis to recover damages (**Id**. at 798). The fourth cause of action for equitable estoppel is based on the same purported misrepresentation or act of concealment as the first cause of action for anticipatory repudiation of the lease and seeks to recover the same measure of damages. Accordingly, the defendants are entitled to summary judgment dismissing the fourth cause of action.

The fifth cause of action seeks a judgment declaring that the defendants waived or are equitably estopped from terminating the lease on the ground that they failed to obtain NYSDOT approval. It is well-established that a cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has a adequate alternative remedy in another form of action such as breach of contract (**Main Evaluations, Inc. v State of New York**, 296 AD2d 852, 853, *citing* **Apple Records v Capitol Records**, 137 AD2d 50, 54). Here, the plaintiff has an adequate alternative remedy in its first cause of action for anticipatory breach of the lease. Accordingly, the defendants are entitled to summary judgment dismissing the fourth cause of action.

The court finds that triable issues of fact preclude an award of summary judgment to either party on the remaining cause of action for anticipatory repudiation of the lease. Accordingly, summary judgment is denied as to that cause of action, and the parties are directed to proceed to trial thereon.

Dated: October 26, 2011

J.S.C.

HON. ELIZABETH HAZLITT EMERSON