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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. PART 48

Justice

Index Number : 115261/2009
PARAGON IMAGING GROUP
vs
SCANDIA REALTY LIMITED
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn is decided in accordance w/ the accompanying memorandum decision/order of this Court.

FILED

DEC 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/16/13

JEFFREY K. OING J.S.C., J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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PARAGON IMAGING GROUP LTD.,

Plaintiff,

-against-

SCANDIA REALTY LIMITED PARTNERSHIP,

Defendant.

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Index No.: 115261/09

Mtn Seq. No. 002

JEFFREY K. OING, J.:

Plaintiff, Paragon Imaging Group Ltd. ("Paragon"), moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing defendant, Scandia Realty Limited Partnership's ("Scandia"), first counterclaim for breach of lease, and to vacate or reform certain stipulations entered into by the parties and so ordered by this Court.

Scandia cross-moves for summary judgment dismissing the complaint and for summary judgment on its counterclaims.

Background

On June 28, 1993, Paragon leased a retail space and part of the basement at 7-9 West 18th Street from Scandia to operate a print shop. The lease was set to expire in 2003, but the parties extended it to May 31, 2013.

As is relevant to this dispute, the lease provides that Paragon may only make alterations to the premises with Scandia's prior written consent and must obtain all necessary government

"permits, approvals and certificates" at its own expense (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 3). Any alterations or repairs to the premises by Paragon must comply with all "laws, orders, regulations, rules of governmental authorities ... and all rules and regulations of insurance underwriters" (Id. at ¶ 56[a]). Paragon must provide plans and specifications to Scandia before starting work, and all work must be finished within six months of commencement (Id. at ¶¶ 56[a], 56[b]). Further, Paragon must comply with all other "laws, orders, and regulations" applicable to the premises (Id. at ¶ 6), and shall not "use or occupy the demised premises" in a way that violates the certificate of occupancy, the lease prohibition against pornographic uses, or is in anyway not the specified use in the lease (Id. at ¶ 15). Finally, Paragon must acquire and maintain any government licenses or permits necessary for its business (Id. at ¶ 71).

At the time the parties entered into the lease, the certificate of occupancy provided that the premises could be used as a "billiard parlor" (Notice of Cross-Motion, Ex. 1). According to the NYC Department of Buildings ("DOB"), on September 1, 1993, three months after executing the lease, Paragon filed plans and obtained a permit for work to amend the certificate of occupancy (Koutsomitis Aff., 10/9/12, ¶ 4).

Paragon did not finish the work and never obtained an amended certificate of occupancy (Id. at ¶¶ 4-6).

In the fall of 1998, Scandia sought financing from Huntoon Hastings Capital Corp. ("Huntoon") (Tenant Estoppel Certificate, Jones Reply Aff., 1/8/13, Ex. 1). As part of Scandia's application, Paragon executed a tenant estoppel certificate concerning the lease on the property (Id.). Specifically, Paragon represented that, inter alia, neither it nor Scandia were currently in default of their obligations under the lease (Id. at ¶ 5). Bardwell Jones, Scandia's general partner, signed the estoppel certificate, but Scandia itself made no representations (Jones Aff., 11/9/12, ¶ 46). Ultimately, Scandia never obtained financing from Huntoon (Id. at ¶ 44).

Sometime prior to 2008, Paragon added two air conditioners to the basement (Id. at ¶ 29). In 2006, Paragon installed an air conditioner and connecting ventilation ductwork on the first floor (Id.). Paragon apparently failed to submit plans or obtain permits and sign-offs from the DOB or the Landmarks Preservation Commission ("Landmarks Commission") before installing any of the air conditioners (Id. at ¶¶ 29, 31). As a result, the HVAC system for the premises is allegedly not in compliance with the New York City Construction Code (Id. at ¶ 31). Further, the system purportedly discharges "noxious, offensive and foul odors" into the building (Id. at ¶ 30).

On February 20, 2009, Scandia sent Paragon a letter outlining various problems: the certificate of occupancy needed to be amended, Paragon's outdoor sign applications from 1994 and 1997 required proper permits, an electrical work application filed on December 16, 1993 needed a DOB sign-off, and the air conditioning system needed various repairs and alterations (2/20/09 Letter to Paragon, Kozek Affirm., 8/21/12, Ex. D).

Paragon hired Weatherwise Conditioning Corp. ("Weatherwise"), an HVAC consultant, and Beitin Associates, an engineering firm, to implement the required work (Pourkay Aff., 8/21/12, ¶ 9). In May 2009, Paragon sent Scandia proposed plans and specifications. In October 2009, Paragon sent Scandia revised plans due to changes in the building code. In between that time period, around August 2009, Paragon withdrew its 1994 sign application (10/23/09 Letter to DOB, Kozek Affirm., 8/21/12, Ex. M). Scandia demanded that DOB investigate the withdrawal because they had not signed off on it (Id.).

On September 3, 2009, Scandia sent Paragon a notice of default under the lease regarding the certificate of occupancy, the signs, and the air conditioner repairs (9/3/09 Notice of Default, Kozek Affirm., 8/21/12, Ex. G). On October 19, 2009, Scandia sent a second notice because Paragon had not accepted Weatherwise's quotation for the work on one of the air conditioners (10/19/09 Notice of Default, Kozek Affirm., 8/21/12,

Ex. I). On October 26, 2009, Scandia sent a third and final notice of default because Paragon allegedly failed to comply with the building's emergency action plan (10/26/09 Notice of Default, Kozek Affirm., 8/21/12, Ex. K).

The Present Action

Paragon commenced this action by summons and complaint dated October 29, 2009, and immediately brought an order to show cause seeking a Yellowstone injunction tolling Paragon's time to cure the alleged defaults and preventing Scandia from terminating the lease. On January 14, 2010, the Court (Justice Marilyn G. Diamond) issued an order granting Paragon the requested relief.

On February 16, 2010, Scandia informed Paragon that Scandia would cure the defaults set out in the September 3, 2009 notice, and would exercise its right under Article 19 of the lease to seek reimbursement of the costs from Paragon (2/16/10 Gellis Email to Berger, Kozek Affirm., 8/21/12, Ex. R). Despite Paragon's objections, on March 5, 2010, Scandia unilaterally withdrew all three notices of default (3/5/10 Gellis Email to Berger, Kozek Affirm., 8/21/12, Ex. S). Scandia's counsel asserted that the defaults in the October 19 and October 26 notices had been cured, and again stated Scandia's intent to cure the defaults itself and seek reimbursement (Id.). Paragon took the position that these actions were in derogation of its right to remedy the damages itself and control the repair costs, as

well as a violation of the Yellowstone injunction (3/8/10 Berger Email to Gellis, Kozek Affirm., 8/21/12, Ex. T). Scandia then began working on the premises. The issue regarding the sign was no longer ripe because it fell off the building during a storm. On January 6, 2011, Scandia obtained an amended certificate of occupancy for the premises (Amended Certificate of Occupancy, Kozek Affirm., 8/21/12, Ex. U).

On August 26, 2011, Scandia submitted its verified bill of particulars, which set forth the total cost of remedying the defaults at $122,284.17 (Scandia's Bill of Particulars, Kozek Affirm., 8/21/12, Ex. V). On December 15, 2011, Paragon offered to liquidate Scandia's damages pursuant to CPLR 3220 (Offer to Liquidate Damages, Kozek Affirm., 8/21/12, Ex. X). As part of the ensuing negotiations, on January 12, 2012, the parties entered into a stipulation wherein Paragon agreed to complete the remaining HVAC work, and provide new plans to Scandia, the last remaining default listed in the September 3, 2009 notice (1/12/12 So-Ordered Stipulation, Kozek Affirm., 8/21/12, Ex. Z).

Scandia, however, required that Paragon's new plans conform to comments made by Scandia's engineer, Anthony Rini. At the time, Paragon believed that the only remaining work related to the air conditioners. Rini had previously told Bardwell Jones that besides work related to Paragon's air conditioners Paragon needed to install a new "make-up air system" to provide "fresh

air and exhaust make-up" relating to a "chiller" Paragon used to cool its primary printing press (6/25/10 Rini Letter to Jones, Kozek Affirm., 8/21/12, Ex. BB). Paragon provided a copy of Rini's letter to its engineer, Karl Beitin. Beitin, assuming that the work laid out in the comments was mandatory, included the work related to the chiller in the revised plans.

On March 21, 2012, the parties entered into another stipulation, finalized on April 2, 2012, which provided deadlines for submissions of the HVAC plans to the Landmarks Commission and the DOB, bidding on the project, approval by both entities, and the date to begin work (4/2/12 Amended So-Ordered Stipulation, Kozek Affirm., 8/21/12, Ex. AA). Pursuant to the stipulation, Paragon submitted plans to Scandia, Landmarks Commission, and DOB that it did not realize contained the chiller work items (Pourkay Aff., 8/21/12, ¶¶ 24-25). After working with the Landmarks Commission to resolve some issues with respect to the new HVAC plans (Landmarks Commission Materials Checklist, Kozek Affirm., 8/21/12, Ex. GG) and providing Scandia with insurance certificates and the DOB proof of filing, Paragon allegedly learned in June 2012 that Rini had insisted on including the "chiller" work and other unnecessary items into the HVAC plans, at an added cost to Paragon of $100,000 (Pourkay Aff., 8/21/12, ¶¶ 24-25). The work included ductwork Scandia removed while

obtaining the amended certificate of occupancy, and now had to be reinstalled (Id. at ¶ 25).

On June 15, 2012, Paragon filed an amended complaint alleging five causes of action: 1) a permanent injunction preventing Scandia from terminating the lease based on the alleged defaults; 2) a judgment tolling Paragon's time to cure if found to be in default; 3) breach of the covenant of good faith and fair dealing; 4) breach of the covenant of quiet enjoyment; and 5) a declaratory judgment that Paragon is not in default under the lease.

On June 29, 2012, Scandia answered and asserted two counterclaims: breach of the lease, and breach of the March 21 stipulation, as amended on April 2, 2012.

On May 21, 2013, Paragon informed the Court that it would be vacating the premises on May 31, 2013, the expiration date under the lease, and taking the "chiller" unit with it.

Discussion

Initially, that branch of Scandia's cross-motion for summary judgment dismissing the first cause of action for a permanent injunction preventing Scandia from terminating the lease, and the second cause of action for a judgment tolling Paragon's time to cure is granted, and those claims are dismissed. As Paragon has vacated the premises, injunctive relief is no longer warranted.

Further, that branch of Paragon's motion for partial summary judgment dismissing Scandia's first counterclaim seeking pre-litigation attorney's fees is granted, and that portion of the counterclaim is dismissed. Scandia concedes it is not entitled to recover such attorney's fees (Scandia Memorandum of Law, p. 29).

Paragon's motion for summary judgment

I. Breach of the Lease

Paragon argues that Scandia's first counterclaim for breach of the lease must be dismissed because of (i) the estoppel certificate, (ii) the statute of limitations, and (iii) because Paragon has not defaulted pursuant to the terms of the lease.

i. Estoppel Certificate

Paragon's reliance on the estoppel certificate is unavailing. The lease provides that any estoppel certificate requested by Scandia will include a representation from Paragon that Scandia is not in default, but does not require that Scandia represent anything with respect to Paragon's compliance with the lease (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶¶ 38, 46). The estoppel certificate itself clearly states that Paragon is the only party making representations (Tenant Estoppel Certificate, Jones Reply Aff., 1/8/13, Ex. 1, p. 1). Paragon represented that as far as it knew it was not in default under the lease (Id. at ¶ 5). Further, Paragon specified that it was

providing the estoppel certificate to Huntoon as part of Scandia's application for financing, not to Scandia itself (Id. at p. 1). Indeed, Jones, Scandia's general partner, stated that Scandia had only signed off on the estoppel certificate without making its own representations (Jones Reply Aff., 1/18/13, ¶ 3). While Scandia agreed to be bound by the estoppel certificate by signing off on it, it made no representations. Stated differently, the estoppel certificate does not provide Paragon with anything to rely on with respect to Scandia, and Paragon's reliance on JRK Franklin, LLC v. 164 87th St. LLC, 27 AD3d 392 [1st Dept 2006], is inapposite. There, unlike here, both the landlord and the tenant had made representations in the estoppel certificate (Id. at 392-393).

ii. Statute of Limitations

The statute of limitations for breach of contract actions is six years (CPLR 213[2]). Scandia served its answer and counterclaims on November 17, 2009. Thus, the counterclaim is timely if accruing on or after November 17, 2003.

In 1993, when Paragon moved in the certificate of occupancy was for a billiard parlor. The lease provides that Paragon "will not at any time use or occupy the demised premises in violation of ... the certificate of occupancy" (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 15), and that Paragon must "not do or permit any act or thing to be done in or to the demised premises which

is contrary to law" (Id. at ¶ 6). In a case involving identical language, the First Department held that the tenant was responsible for obtaining the amended certificate of occupancy after he used the premises in a way that differed from the current certificate (Rivera v. JRJ Land Property Corp., 27 AD3d 361, 363-64 [1st Dept 2008]).

Paragon does not dispute that its use of the premises violates these provisions of the lease and the certificate of occupancy. Indeed, Paragon commenced work to amend the certificate of occupancy shortly after it moved in, but never finished the work and never obtained an amended certificate (Koutsomitis Aff., 10/9/12, ¶¶ 4-6).

Paragon argues, however, that Scandia cannot recover any damages regarding the amended certificate of occupancy because Scandia failed to correct the default within six years of Paragon's failure to complete the work in a timely fashion (Store Lease, Kozek Affirm., Ex. A, 8/21/12, ¶ 56[a]). The argument is unavailing.

The lease's "No Waiver" clause provides:

> The failure of Owner to seek redress for violation of, or insist upon the strict performance of any covenant or condition of this lease or of any of the Rules or Regulations set forth or hereafter adopted by Owner, shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation. The receipt by owner of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of

> such breach and no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by the owner

(Id. at ¶ 24). Thus, contrary to Paragon's argument, Scandia has not waived its right to seek enforcement of the lease. Paragon's contention that the estoppel certificate constitutes a written waiver acceptable under paragraph 24 of the lease is misplaced given that the estoppel certificate does not contain any representations by Scandia.

In any event, Scandia's counterclaim is predicated on Paragon's failure to comply with applicable regulations, laws, and other rules, not just the failure to obtain the necessary sign-offs, permits, and authorizations for its work and failing to complete said work in a timely fashion (Amended Answer ¶¶ 24-26). In other words, with respect to the certificate of occupancy, Paragon's continued use of the premises without amending the certificate of occupancy constituted a continuing violation of paragraph 15 of the lease and the N.Y.C. Administrative Code § 28-118.3.1 ("No building ... shall be occupied or used unless and until the commissioner has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed"). This violation goes beyond failing to complete the work timely so as to amend the certificate of occupancy. As the First Department has held, the cause of action renews daily where "it is alleged that the

complained-of conduct constituted not merely a violation of the lease, but a lease violation consisting of illegal conduct" (1050 Tenants Corp. v. Lapidus, 289 AD2d 145, 146 [1st Dept 2001]). Based on the forgoing, the statute of limitations began to run, at the earliest, in 2011 when Scandia successfully obtained an amended certificate of occupancy, well within the six year statute of limitations.

With respect to the renovations to the HVAC system, the record reflects that Paragon installed one of the air conditioners necessitating the work on the HVAC system in 2006, and the others at some time prior to 2008 (Jones Aff., 11/9/12, ¶ 29). Pourkay, Paragon's President, asserts that the air conditioning issue predates the September 3, 2009 notice to cure by at least 10 years (Pourkay Aff., 8/21/12, ¶ 10). The record does not reflect when exactly the basement air conditioners were installed, arguably creating an issue of fact as to whether Scandia's claims with respect to the HVAC system are timely. At minimum however, the HVAC system was out of compliance with the law, and Paragon failed to obtain permits and sign-offs upon the installation of the first floor air conditioner in 2006, making that portion of Scandia's first counterclaim for breach of the lease timely.

Alternatively, the cause of action for a violation of the lease which causes ongoing damage to another also renews each day

as the violation continues (1050 Tenants Corp. v. Lapidus, 289 AD2d at 146). Here, the alleged defects in the HVAC system caused it to discharge "noxious, offensive, and foul odors" into the premises and Scandia's office in the basement (Jones Aff., 11/9/12, ¶ 30).

Accordingly, that branch of the cross-motion for summary judgment dismissing Scandia's first counterclaim as barred by the statute of limitations is denied.

iii. Defaults under the Lease

The lease provides two separate remedies for Scandia in the event of Paragon's default. Scandia may serve Paragon with a five day notice to cure, and if Paragon fails to begin curing the noticed defaults within five days Scandia may serve a three day termination notice and terminate the lease (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 17).

Alternatively, Scandia may also perform Paragon's obligations under the lease and recover any fees and expenses incurred as additional rent, or as damages if the expenses were incurred after the lease expires (Id. at ¶ 19). If Scandia chooses to fix the default itself, it may do so without any waiting period or any notice to Paragon (Id.).

Paragon asserts that, when read together, both potential remedies require Scandia to first serve Paragon with a notice to cure. Accordingly, it argues that Scandia's decision to withdraw

all three of its notices to cure prevents Scandia from suing Paragon for breach of the lease without serving a new notice. To begin, this assertion ignores the plain language of section 19, which allows Scandia to commence repairs without notice to Paragon and then seek reimbursement (Id.). In any event, Paragon's reliance on Waldbaum, Inc. v. Fifth Ave. of Long Island Realty Assocs., 85 NY2d 600 (1995) to support its argument is misplaced. There, the Court of Appeals dealt with a lease which explicitly defined an event of default as the failure to cure a noticed breach within 30 days.

Here, by contrast, the lease does not define "default" as it is used in either paragraph. Both paragraphs, however, frame Scandia's remedy as taking place after the default. Further, paragraph 17 contemplates that the notice required to terminate the lease will include the default giving rise to the remedy. Thus, the default is the breach of the lease itself, rather than Paragon's failure to cure the breach. Accordingly, Scandia's first counterclaim is ripe even though it withdrew the notices.

Paragon points out that Scandia may only recover its repair expenses as damages if the lease term has expired at the time Scandia incurs those expenses (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 19). Therefore, Paragon argues that Scandia must still go through the notice and termination process to collect damages rather than additional rent.

The critical fact that Paragon overlooks in making this observation is that the lease has since expired. Due to the parties' disputes over the scope and cost of the work, Paragon has not started the renovations to the HVAC system, or even fully planned them. Paragon may be liable for those future expenses if the trier of fact finds that it violated the requirements of the lease for making alterations to the HVAC system (Id. at ¶¶ 3, 56). Given the lease expiration and Paragon's vacatur, there is no avenue to recover those expenses as additional rent.

Next, Paragon asserts that Scandia's efforts to repair the alleged deficiencies in the HVAC system is a breach of the Yellowstone injunction. It argues that the injunction gives it the right to control the costs of the repairs by tolling the time to cure, and that by withdrawing the notice of default and conducting repairs Scandia has breached the injunction by "abrogat[ing] or interfer[ing]" with Paragon's rights under the lease (Order Granting Yellowstone Injunction, Kozek Affirm., 8/21/12, Ex. Q, pg. 4).

The Yellowstone injunction's purpose was to prevent Scandia from terminating the lease, commencing a summary proceeding and evicting Paragon, or otherwise violating Paragon's rights under the lease. The lease does not give Paragon the right to control the cost of repairs, nor does Paragon cite to any provision of the lease that supports its argument. In fact, paragraph 19

specifically contemplates that Scandia may control the cost of repairs by making repairs itself (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 19).

Accordingly, that branch of motion seeking summary judgment dismissing the first counterclaim on the ground that Paragon did not default under the terms of the lease is denied.

II. Vacating or Reforming The So-Ordered Stipulations

Paragon seeks to reform or vacate the so-ordered stipulations, dated January 12, 2012 and March 21, 2012, as amended on April 2, 2012 and April 25, 2012, between the parties governing the HVAC system. Those stipulations provide that within certain deadlines, Paragon would draw up and submit new HVAC plans to Scandia, and afterwards to the DOB and the Landmarks Commission. As part of this process, Rini and Beitin, Scandia's and Paragon's engineers, respectively, consulted on what was necessary to have the HVAC system come into compliance with the building code. Paragon now claims that Beitin, at Rini's insistence, included certain items of work unrelated to the two air conditioners (Karl Beitin Aff., 8/21/12, ¶¶ 4-5). Pourkay contends that he only realized that the extra work was included after Scandia had counter-signed the plans and Paragon submitted them to the DOB and the Landmarks Commission (Pourkay Aff., 8/21/12, ¶¶ 24-25).

Specifically, Paragon objects to the inclusion of two items of work: work related to the chiller unit and the reinstallation of ductwork that Scandia removed while renovating the premises to amend the certificate of occupancy. As stated above, on May 21, 2013, Paragon informed this Court that it would vacate the premises on the expiration of the lease on May 31, 2013, and take the chiller unit with it. Paragon's counsel concedes that this renders that aspect of Paragon's motion to remove the chiller work from the stipulations moot. Therefore, the only remaining item of work in dispute is the reinstallation of the ductwork.

A so-ordered stipulation signed in writing by the parties is treated as an independent contract and subject to the usual rules of contract interpretation (McCoy v. Feinman, 99 NY2d 295, 302 [2002]). A court must find good cause before disturbing a stipulation, such as unconscionablility, fraud, collusion, mistake, duress, public policy violation, or ambiguity to the point of not representing the parties' intent (Id.). Paragon argues that the Court should vacate or reform the stipulations based on mistake or fraud.

Paragon states that Scandia removed the ductwork as part of the renovations necessary to amend the certificate of occupancy, the reinstallation of which will cost Paragon an additional $40,000 (Pourkay Aff., 8/21/12, ¶¶ 24-25). William Butler, who "rendered services" to Scandia as part of the renovation to amend

the certificate of occupancy, stated that while making the first floor bathroom handicapped accessible he removed an "unused trunk line of ductwork" ((Butler Aff., 10/25/12, ¶¶ 1, 3). He inspected the ductwork before removing it, and found that it was abandoned and served no purpose (Id.). The removed ductwork connected the ground floor and the basement, and connecting with the ductwork that carried air to other parts of the basement from the air conditioners (Id. at ¶ 4). Butler did not, however, remove any of the air conditioning ductwork when he pulled out the unused ducts (Id. at ¶ 5).

Paragon claims that Pourkay's and Butler's testimony demonstrates a mutual mistake requiring vacatur of the stipulations. Paragon asserts that the parties did not intend for Paragon to pay to redo work that had already been done. In order to demonstrate mutual mistake by the parties on this point, Paragon must show that the mistake was substantial and existed at the time the parties entered into the stipulation (Weissman v. Bondy & Schloss, 230 AD2d 465, 468 [1st Dept 1997]). In other words, the mistake must "go to the foundation of the agreement" (Scotts Co., LLC v Ace Indem. Ins. Co., 51 AD3d 445, 446 [1st Dept 2008]).

Here, the record is unclear as to whether Paragon even knew the ductwork had been removed until May 2012. Scandia knew that the ductwork was gone, but thought it was unused, and in addition

needed to remove it to make room for the expanded bathroom. In that sense, mutual mistake may have existed. Beitin states that this ductwork is necessary to legalize the HVAC system with respect to the two air conditioners and the chiller; indeed, the plans he drew up in consultation with Rini contemplated new ductwork throughout the basement (Beitin Aff., 8/21/12, ¶ 5). Nonetheless, this purported mutual mistake amounts to an issue of apportionment of costs of reinstalling ductwork, which does not frustrate the parties' agreement compelling vacatur.

Next, Paragon argues that the stipulations should be reformed so that Scandia bears the cost of reinstalling the ductwork. Although mutual mistake is also ground for reformation of a stipulation (Rotter v. Ripka, 110 AD3d 603, 603 [1st Dept 2013]), a factual issue exists as to whether the ductwork is still necessary now that the chiller is gone, and who should be liable if the ductwork needs to be reinstalled. Indeed, the record is unclear as to whether the ductwork can even be reinstalled. Given that it was removed to make way for a new bathroom, which was itself necessary to amend the certificate of occupancy, it may be necessary to install entirely new ductwork. As such, reformation of the stipulations cannot be had at this juncture.

Accordingly, that branch of Paragon's motion to vacate or reform the January 12, 2012 stipulation as amended on March 21, 2012, April 2, 2012, and April 25, 2012 is denied.

Scandia's cross-motion for summary judgment

I. Breach of the Lease

Scandia cross-moves for summary judgment on its first counterclaim, citing Paragon's failure to obtain an amended certificate of occupancy and failing to obtain permits and sign-offs for the HVAC system modifications, as well as the alleged continuing non-compliance of the HVAC system.

With respect to the certificate of occupancy, Scandia relies on paragraphs 6 and 15 of the lease, which taken together require Paragon to amend the certificate of occupancy. Paragon's reliance on N.Y.C. Administrative Code § 28-114.4.1 and Dinicu v. Groff Studios Corp., 257 AD2d 218, 222-223 [1st Dept 1999] to the contrary is misplaced; neither authority definitively assigns responsibility for amending a certificate of occupancy.

Accordingly, that branch of Scandia's cross-motion for summary judgment as to Paragon's liability for the work necessary to amend the certificate of occupancy is granted. Given that the record does not contain sufficient facts establishing the amount and basis of Scandia's damages in this regard (Scandia's Verified Bill of Particulars, Kozek Affirm., 8/21/12, Ex. V, pg. 3), that issue is to be resolved at trial.

With respect to the HVAC system modifications, Scandia relies on an affidavit by Rini, its engineer, as proof that the HVAC system is out of compliance. Rini, who is a licensed engineer and familiar with the N.Y.C. Building Code, asserts that altering the HVAC system requires a permit from the DOB and the failure to obtain one is a violation (Rini Aff., 10/26/12, ¶ 5; see N.Y.C. Admin. Code § BC 105.2). Further, Rini states that the continued use of the air conditioners requires an equipment use permit, which is also provided for in the Building Code (see N.Y.C. Admin. Code § 27-778). Nicholas Koutsomitis, Scandia's architect, explains that the DOB has levied a $24,330.60 fine to legalize the previously illegal HVAC system (Koutsomitis Aff., 10/9/12, ¶ 12; see also Koutsomitis Aff., 10/9/12, Ex. 3, p. 1).

The DOB reports, however, paint a confusing picture. Two reports are for an illegally installed air conditioner on the first floor, and the third is for a change in the air conditioner in the basement (DOB Reports, Pourkay Reply Aff., 12/28/12, Ex. A). Despite both parties agreeing that there are air conditioners in the basement, the third report claims that no such unit exists (Id. at p. 3). The first two reports were eventually disposed of as "unsubstantiated based on department records" (Id. at pp. 1-2). Notably, the reports do not indicate that anyone actually entered the premises and inspected the HVAC

system. Because of the conflicting DOB reports and records, a factual issue exists as to whether Paragon operated its HVAC system in a way that breached the lease.

Accordingly, that branch of Scandia's cross-motion for summary judgment on the first counterclaim for breach of the lease is granted in part and denied in part. For these same reasons, and the reasons stated above regarding Paragon's motion, that branch of Scandia's cross-motion for summary judgment on Paragon's fifth cause of action for declaratory judgment seeking a declaration that Paragon is in default of the lease is denied.

II. Breach of the So-Ordered Stipulations

A party must make the same prima facie case for breach of a stipulation as for a contract (McCoy v. Feinman, 99 NY2d at 302). Here, Scandia has established the existence of the stipulations, and its own performance under them. Specifically, Scandia provided all the required sign-offs on Paragon's plans before Paragon submitted them to the DOB and the Landmarks Commission. The record reflects that Paragon, for its part, complied with its obligations under the stipulation up until it discovered the work it thought was inappropriately added to the plans.

Presently, the Landmarks Commission will not approve the plans until Paragon completes the Landmarks Commission's materials checklist (Materials Checklist, Kozek Affirm., Ex. GG). Sandy Chung, a Landmarks Preservationist with the Landmarks

Commission, states that she spoke with a woman named Olga who works for Beitin Associates on May 30, 2012 regarding the checklist (Sandy Chung Aff., 8/20/12, ¶ 6). Since then, there has been no further action on the application, and she cannot approve it until the materials checklist is satisfied (Id. at ¶¶ 7-8). Further, the DOB will not approve the plans until Paragon pays the fee for legalizing the previously non-compliant HVAC system (DOB Application Details, Kozek Affirm., Ex. HH).

The record further reflects that Paragon reached out to Scandia to resolve this issue. Paragon's counsel wrote to Scandia in June 2012 and argued that the plans needed to be redrawn to remove the work related to the chiller (6/14/12 Letter to Gellis, Kozek Affirm., Ex. KK, pp. 1-2). He also stated that Scandia must bear the cost of reinstalling the ductwork (Id. at p. 2). Shortly thereafter, Paragon filed an amended complaint seeking to vacate or reform the stipulations.

Scandia now asks this Court for summary judgment for the costs of legalizing the HVAC system. To begin, that remedy clearly goes beyond the stipulations themselves. Further, Scandia claims it will eventually be damaged in the amount of the renovations to the HVAC system and other related expenses. Scandia, however, has not made out a prima facie case regarding its damages for Paragon's alleged breach. In fact, Scandia's papers do not contain any non-conclusory factual allegations with

regard to damages. The record reflects that the repair process has been at a standstill since Paragon disputed the appropriate scope of the work.

Because of the foregoing factual issues, that branch of Scandia's cross-motion for summary judgment on the second counterclaim for breach of the so-ordered stipulations is denied.

III. Breach of the Covenant of Good Faith and Fair Dealing

Implicit in every contract is a covenant of good faith and fair dealing (Dalton v. Educational Testing Serv., 87 NY2d 384, 389 [1995]). "This covenant 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" (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002] [internal citations omitted]). Accordingly, to make out a prima facie case for breach of the implied covenant, the injured party must actually have been denied its benefit under the contract by virtue of the other side's bad faith conduct (One Step Up, Ltd. v Webster Bus. Credit Corp., 87 AD3d 1, 13-14 [1st Dept 2011] ["The claim for breach of the covenant of good faith and fair dealing is not viable because defendant did not deprive plaintiff of the benefits of any contract to which plaintiff was a party"]). Further, the implied covenant exists only "in aid and furtherance of other terms of the agreement of the parties," and does not create additional

obligations beyond the express terms of the contract (Murphy v Am. Home Products Corp., 58 NY2d 293, 304 [1983]).

In asserting this claim, Paragon returns to its belief that under the lease it is entitled to control the cost of remedying any defects under the lease (Pourkay Reply Aff., 12/28/12, ¶ 20). Specifically, Paragon argues that Scandia interfered with its efforts to cure the defaults in the three default notices by delaying sign-offs and demanding a DOB investigation into an application Scandia asked Paragon to withdraw. Further, Scandia refused to give Paragon further time to cure the defaults causing Paragon to commence this action to obtain a Yellowstone injunction (Id. at ¶ 19). Indeed, Paragon asserts that the default notices are themselves evidence of bad faith as they are "frivolous" and based on "trivial, at best, issues under the lease" (Id.). Finally, Scandia withdrew the default notices after Paragon had spent considerable time and money remedying the claimed defaults forcing Paragon to pay double for the same work at Scandia's allegedly inflated prices (Id.).

As to the default notices themselves, the First Department recently held that a lessor who serves multiple notices of default does not breach the implied covenant where the notices are justified (Gettinger Assoc., L.P. v Abraham Kamber Co. LLC, 83 AD3d 412, 414 [1st Dept 2011]). In Gettinger Assoc., the defendant sublessor served multiple notices of default, at least

some of which existed at the time the notices were served. The First Department held that as long as some justification existed for the issuance of the default notice the fact that certain defaults were sharply disputed and some had been cured at the time the notice was served did not render the notices improper (Id. at 414 ["Even if incorrectly cited, those alleged defective conditions still could not render the notice of default unjustified or issued in bad faith given that some basis existed for the issuance"]).

Here, Paragon has never contested that they failed to obtain the proper sign-offs, construction and use permits, or an amended certificate of occupancy which are the basis for the September 3, 2009. Instead, they raise several arguments regarding the timing of the notice and the lack of violations in the DOB database, all of which, as stated above, are unavailing. Further, Paragon does not dispute the defaults in the October 19 and October 26, 2009 notices, stating that it resolved those issues with Scandia (Pourkay Aff., 8/21/12, ¶ 12). Accordingly, whatever issues remain in dispute regarding the notices of default, Scandia did not breach the implied covenant by serving them.

With respect to Paragon's other claims, there is at least a triable issue of fact as to Scandia's alleged breach of the implied covenant. The lease provides that once Scandia serves a notice of default Paragon has time to at least begin curing the

defaults before Scandia terminates the lease (Store Lease, Kozek Aff., 8/21/12, Ex. A, ¶ 17). Scandia noticed two extensive defaults, namely, the problems with the HVAC system and the certificate of occupancy, and ultimately gave Paragon only two months to resolve them. The short turnaround forced Paragon to seek a Yellowstone injunction when Scandia refused to give them more time. Further, by Paragon's reckoning, Scandia delayed in signing off on the proposed plans for the HVAC system (Email Correspondence Between Gellis and Berger, Kozek Affirm., 8/21/12, Ex. L), and made a complaint to the DOB regarding a sign application that Scandia asked Paragon to withdraw (10/23/09 Gellis Letter to DOB, Kozek Affirm., 8/21/12, Ex. M). While the lease does not forbid any of these actions, if done in bad faith they deny Paragon of the "fruits of the contract", namely, its right to attempt a cure under the lease (Jennifer Realty Co., 98 NY2d at 153). Given that the parties vigorously dispute the propriety of these actions, this issue cannot be summarily resolved.

Further, there is an issue of fact as to whether Scandia's voluntary withdrawal of the notices impacts this claim. Up until that point, Paragon had continually worked to remedy the noticed defaults, expending time and resources by hiring various contractors and consultants to draft plans for the renovations (Pourkay Aff., 8/21/12, ¶¶ 9, 18). When Scandia withdrew the

notices, its counsel stated that Scandia would be seeking reimbursement for the cost of the renovations (2/16/10 Gellis Email to Berger, Kozek Affirm., 8/21/12, Ex. R). Paragon's former counsel refused to pay for anything that duplicated Paragon's prior work (2/16/10 Berger Email to Gellis, Kozek Affirm., 8/21/12, Ex. R), and the record does not reflect whether there was any further correspondence regarding the scope of Scandia's potential reimbursement claim.

Although Scandia correctly posits that the lease allows it to cure defaults under the lease and recover its costs from Paragon for doing so (Store Lease, Kozek Affirm., 8/21/12, Ex. A, ¶ 19), the lease is silent on whether this includes work that duplicates what Paragon has already done. In this context, giving Paragon time to cure the defaults, stepping in when Paragon had already spent time and money on the problem, and then seeking duplicate costs for the work raises factual issues concerning Scandia's alleged breach of the implied covenant.

Accordingly, that branch of Scandia's motion for summary judgment dismissing the third cause of action for breach of the implied covenant of good faith and fair dealing is denied.

IV. Breach of the Covenant of Quiet Enjoyment

To prove a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction from the premises (Jacobs v. 200 East 36th Owners Corp., 281 AD2d 281

[1st Dept 2001]). The principle is well settled that a tenant must abandon the premises and show that "the landlord's wrongful acts substantially and materially deprive[d] the tenant of the beneficial use and enjoyment of the premises" to prove a constructive eviction (Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 83 [1970]).

The complaint does not allege that Scandia ousted Paragon from the premises, or that Paragon left on its own. Indeed, Paragon remained in the space until the expiration of the lease. Pourkay, Paragon's President, testified that Paragon was never prevented from using any portion of the store or basement during the repairs (Pourkay 11/3/11 EBT at pg. 48). Further, the lease provides that Scandia may enter the premises to conduct necessary repairs, including bringing in materials and equipment "without the same constituting an eviction nor shall the tenant be entitled to any abatement of rent while such work is in progress nor to any damages by reason of loss or interruption of business or otherwise" (Store Lease, Kozek Affirm., Ex. A, 8/21/12, ¶ 13). Paragon has not shown that Scandia came to the premises for some reason other than making repairs. Thus, Scandia's presence, standing alone, cannot form the basis for a constructive eviction (Winston Churchill Owners Corp. v. Churchill Operating Corp., 193 AD2d 396, 396-97 [1st Dept 1993]).

Nonetheless, Pourkay stated that Paragon was actually prevented from using several portions of the premises for hours at a time during the repairs to amend the certificate of occupancy (Pourkay Reply Aff., 12/28/12, ¶ 21). The affidavit is in direct contradiction to his earlier deposition testimony. An affidavit meant to rectify harmful deposition testimony has no evidentiary value (Addo v. Melnick, 61 AD3d 453, 454 [1st Dept 2009]).

Accordingly, that branch of Scandia's cross-motion for summary judgment dismissing the fourth cause of action for breach of the covenant of quiet enjoyment is granted, and that claim is dismissed.

It is therefore,

ORDERED that Paragon's motion for summary judgment dismissing Scandia's first counterclaim for breach of the lease is denied; and it is further

ORDERED that branch of Paragon's motion for partial summary judgment dismissing Scandia's first counterclaim seeking pre-litigation attorney's fees is granted, and that portion of the counterclaim is dismissed; and it is further

ORDERED that Paragon's motion to vacate or reform the January 12, 2012 and March 21, 2012 stipulations, as amended on April 2, 2012, and April 25, 2012 is denied; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment dismissing the first cause of action for a permanent injunction preventing Scandia from terminating the lease and the second cause of action for a judgment tolling Paragon's time to cure is granted, and those claims are dismissed; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment dismissing the third cause of action for breach of the covenant of good faith and fair dealing is denied; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment dismissing the fourth cause of action for breach of the covenant of quiet enjoyment is granted, and that claim is dismissed; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment on the fifth cause of action for declaratory judgment seeking a judgment declaring Paragon in default under the lease is denied; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment on its first counterclaim for breach of the lease is granted in part and denied in part; and it is further

ORDERED that branch of Scandia's cross-motion for summary judgment on its second counterclaim for breach of the January 12,

2012 and March 21, 2012 stipulations, as amended on April 2, 2012, and April 25, 2012 is denied; and it is further

ORDERED that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/16/13

HON. JEFFREY K. OING, J.S.C.