540 Madison Partners LLC v Global Tech. Invs. LLC
2014 NY Slip Op 32161(U)
July 30, 2014
Supreme Court, New York County
Docket Number: 653174/12
Judge: Nancy M. Bannon

[* 1]

seq 005 + seq 006

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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540 MADISON PARTNERS LLC,

Plaintiff,

Index No. 653174/12

-against-

GLOBAL TECHNOLOGY INVESTMENTS LLC, a/k/a GTI GROUP, LLC, MICHAEL P. SCHULHOF,

Defendants.

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Nancy M. Bannon, J.:

In this commercial landlord/tenant conflict, defendants Global Technology Investments LLC, formally known as GTI Group, LLC (GTI) and Michael P. Schulof (Schulof) move, pursuant to CPLR 3212, for partial summary judgment dismissing the complaint as to Schulhof on a personal guarantee, and for an in limine order precluding plaintiff 540 Madison Partners LLC (plaintiff) from providing evidence at any potential hearing of certain aspects of the damages which plaintiff seeks (mot. seq. no. 005). Plaintiff cross-moves for partial summary judgment on its second cause of action. Plaintiff also moves, pursuant to CPLR 3025 (b), for an order amending its complaint to add two new causes of action and numerous defendants (mot. seq. no. 006). Motions (005) and (006) are hereby consolidated for disposition.

I. Background

In April 2007, GTI entered into a written 10-year lease (Lease) (Notice of Motion, exhibit B), with plaintiff's predecessor, the then-owner of a building located at 540 Madison Avenue, New York, New York, to rent commercial space in the building (premises). At the same time, Schulhof signed a limited "Good Guy" guaranty (guaranty) (*id.*, exhibit A), in which he agreed to be personally liable for payment of rent until such time as four conditions were met: (1) that the tenant vacates the premises; (2) pays all rents and additional charges due for the period prior to the vacature; (3) leaves the premises in "broom clean" condition and free of all liens and encumbrances; and (4) returns the keys.

Schulhof maintains that he informed plaintiff in June 2010 that GTI would be leaving the premises prior to the end of the lease term. Defendants claim that it was always the intention of the GTI and plaintiff's predecessor, at the time that the Lease was executed, that GTI would be able to "walk away" from the space at any time, with no personal liability on Schulhof's part, if all rents and charges were current. Schulhof aff, at 6. Schulhof claims that, after that date, plaintiff made efforts to show the premises to at least 10 to 12 prospective tenants.

In a letter dated August 3, 2011, GTI notified Boston Properties, plaintiff's parent company, that GTI would be ceasing

operations, and would, therefore, vacate the premises on or before August 31, 2011.

On August 26, 2011, GTI vacated the premises, and dropped off the security passes used to enter and exit the building with the building's property manager. GTI acquired the signature of the property manager on a statement saying that he had received the "ID security passes." Notice of Motion, exhibit H. Schulhof states that there "never where any 'keys'" to the interior of the premises, so there was nothing else to return. Schulhof aff, at 8.[1]

Article 22 of the Lease requires that:

> "upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to the Owner the demised premises, 'broom clean,' in good order and condition, ordinary wear and damages which Tenant is not required to repair as provided elsewhere in this lease excepted, and Tenant shall remove all its property."

Article 44 (i) further requires that, upon termination of the Lease, "Tenant shall, at Owner's option and Tenant's expense, remove all of Tenant's wiring and cables from the demised premises and all conduits, risers, telecommunication closets and other portions of the Building."

Defendants claim to have hired "extra cleaning personnel,"

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[1]At his deposition, Schulof also stated that "I gave Mr. Lewis the only keys that we had for the space and for the building." Affirmation of Bernstein in support of motion to amend, exhibit B, at 55.

in addition to the movers and GTI staff, to clean the premises before GTI left. Schulhof aff, at 8. GTI offers photographs for the purpose of establishing that there were no significant debris or damages to the premises when it left. *Id.*, exhibit I. GTI also left some "valuable wiring and cabling in place in anticipation for use by a future tenant." *Id.* at 10. GTI apparently left some unidentified fixtures behind. Defendants maintain that, while the GTI left the premises with "minor carpet stains and dirt," as well as some "wall anchors" and "small nail and picture hook holes" (*id.*), GTI still left the premises in "far better than 'broom clean'" condition. *Id.* at 9.

Plaintiff sent GTI two documents dated September 15, 2001. The first is a "Fifteen (15) Day Notice of Cure" (Notice) (Notice of Cross Motion, exhibit G), rejecting GTI's surrender of the Lease, and notifying GTI that it was in breach of the Lease by failing to pay rents due for the remaining period of the Lease. The Notice also stated that GTI had violated provisions of the Lease in that, "upon removal of trade fixtures, moveable office furniture and equipment from the Premises, [GTI] has failed to repair and restore the Premises to the condition existing prior to any such installation . . . ." Notice, at 2. The Notice also accused GTI of failing to pay "base rent, additional rent, and other charges" as required by the Lease. *Id.* The Notice did not mention any failure to return the keys. GTI was given 15 days to

cure, before October 3, 2011.

The Notice was accompanied by a letter of the same date (September 15 Letter) (Schulhof aff, exhibit D), making the same statements and demands, and informing GTI that plaintiff would hold both GTI and Schulhof, as guarantor, "for any and all sums due for the remainder of the term of the Lease and Guaranty." *Id.* at 1. GTI was faulted for failing to pay rents, failure to deliver the keys to the premises, and failing to leave the premises broom clean. Plaintiff stated that GTI had left the premises in "substantial disrepair." *Id.* GTI was again given 15 days to "remove all fixtures and paneling, partitions, railings and like installations, as well as all wiring, cabling, conduits, risers and telecommunications closets" from the premises. *Id.* at 2.

In a letter dated September 22, 2011 (Schulhof aff, exhibit E) (September 22 Letter), GTI offered to remove all of its "installations" and return the premises to its "raw condition" before the expiration of plaintiff's Notice (*id.* at 3), but that, unless plaintiff provided a Notice specified in Article 3 of the Lease by September 30, 2011, GTI "will deem that Landlord has waived any rights, pursuant to Article 3 of the Lease, to demand removal of the fixtures." *Id.* Under Article 3, all fixtures remaining in the premises upon GTI's vacatur were to become plaintiff's property, unless plaintiff affirmatively relinquished

ownership of such fixtures in a notice to GTI, and then asked for their removal. Defendants took the position that, pursuant to Article 3, GTI would have been liable if it took its fixtures upon vacating the premises, because those fixtures became plaintiff's property at that time. Since the Notice and September 15 Letter did not specifically and affirmatively relinquish possession of the fixtures, GTI maintains that it could ignore the deadline given in the allegedly inadequate Notice, and subject plaintiff to GTI's own terms for removal of the fixtures, including the waiver language quoted above.

In a letter dated September 28, 2011 (September 28 Letter), defendants' counsel denied that plaintiff had accepted GTI's surrender of the premises when GTI handed the security passes to plaintiff's property manager. Plaintiff complained that GTI had failed to render any keys to any interior locks.

In the September 28 Letter, plaintiff reiterated its claims that the premises were left with "significant damage" (*id.* at 2), rather confusingly saying that the damage to the walls and carpeting was caused by the removal of GTI's fixtures, not by their remaining on the premises. It nevertheless also demanded removal of unidentified fixtures. Plaintiff argues that its relinquishment of the fixtures was implicit in the Notice, and that no further notice was required to find GTI in default, since the Lease had allegedly not yet been terminated.

Before GTI vacated the premises, plaintiff commenced an action in this court against defendants and approximately 20 "John Does," in which plaintiff sought to compel GTI to remain on the premises, and sought an attachment in excess of $4 million of defendants' assets, as well as against the assets of all John Doe entities. Plaintiff's application was based on GTI's alleged anticipatory breach of the Lease.

In a decision dated August 25, 2011, rendered by Justice Doris Ling-Cohan (Schulhof aff, exhibit G), the court stated that plaintiff had "inexplicably" brought the application even though GTI was current as to all rent obligations, and that GTI, in its letter informing plaintiff of its plans to leave, had indicated that it would abide by all Lease terms. The court denied the application for an attachment as wholly lacking in merit, and commented that plaintiff's attempt to bring in the John Doe entities as defendants' "alter egos" was "patently frivolous." *Id.* at 3. In the decision, Justice Ling Cohan stated that "the court must stress that *there has yet to be a breach* by the tenant of the parties' lease and that it appears that the tenant is in compliance with its financial obligations pursuant to the terms of the lease." *Id.* at 4. Plaintiff voluntarily discontinued that action, and commenced the within action, on September 11, 2011.

Plaintiff relet the premises to FTV Management Company LLC

(FTV) in a lease dated January 31, 2012. Notice of Motion, exhibit T. There is no evidence that it did anything at all to the premises prior to the commencement of the FTV lease, and there is no claim that plaintiff did any more to restore or repair the premises after the commencement of the FTV lease, other than to paint the walls and replace the carpeting. The copy of the FTV lease states that FTV "accept[s] the New Premises in their existing condition 'as is' on the date hereof and in broom clean condition. Tenant agrees that Landlord has no obligation to perform any work to prepare the Premises for Tenant's occupancy."[2] *Id.* at 3.

In the complaint, plaintiff seeks accelerated rent and charges through October 2017.[3] It seeks damages for alleged breaches of the Lease, including the alleged failure to restore the premises to its original condition, and to leave it broom clean. The complaint further seeks to hold Schulhof to his guaranty for all GTI's alleged breaches. Lastly, plaintiff seeks attorneys' fees. Defendants respond with an answer containing 14 affirmative defenses, reiterating that GTI fulfilled all of its obligations under the Lease with regard to its vacatur of the

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[2]This language also appears in a proposal from plaintiff to FTV, dated December 6, 2011. Notice of Motion, exhibit R.

[3]Defendants maintain that plaintiff has since conceded, in previous motion papers, that its claim does not extend beyond December 1, 2012.

premises.

Defendants move for summary judgment dismissing the second cause of action, which is based on the guaranty, on the ground that defendants fulfilled all of the requirements of the guaranty. At oral argument of this motion, it was established that there where only two elements of the guaranty which were now in dispute: the requirement to deliver the premises "broom clean," and the obligation to return the keys.

Defendants also seek to limit the elements of damages which plaintiff may seek in a motion in limine, barring plaintiff from offering evidence at a hearing on damages that it expended certain monies to relet the premises. In this regard, defendants essentially seek to dismiss from this action certain areas of damages.

Defendants also request, without benefit of motion, that this court sanction plaintiff, under 22 NYCRR 130-1.1, for "frivolous conduct," in failing to produce photographs and a video[4] of the premises, showing how GTI left the premises, until after the deposition of plaintiff's witness, nearly one year after defendants made discovery demands upon plaintiff which should have uncovered this evidence. Defendants assert that they have been prejudiced, as they would have obtained summary dismissal of the second cause of action much sooner had the

[4]The video is not before the court on this motion.

photographs been produced when requested.

On plaintiff's cross motion, plaintiff seeks partial summary judgment on its second cause of action against Schulhof, based on the guaranty, and asks for a hearing on the reletting costs. Plaintiff bases its cross motion on its own set of photographs of the premises, allegedly showing "significant damage" to the premises, as stated in its September 28, 2011 letter. Notice of Motion, exhibit F. Plaintiff also maintains that it has evidence that the interior offices had locks, so that GTI did not fulfill its obligation to return the keys.

In a separate motion, plaintiff seeks to amend its complaint to add many entities which bear the name GTI, and which are related in some manner to defendants, on a theory that all are alter egos of defendants. Upon the claim that Schulhof did business as many entities out of the premises, plaintiff argues that, somehow, there were more tenants using the premises than where allowed by the Lease. Based on this theory, plaintiff seeks to recover under two new causes of action, for use and occupancy and unjust enrichment.

II. Discussion

A. Summary Judgment

Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he 'proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

As explained, the only issues which need be determined on the dueling motions for summary judgment are whether GTI left the premises "broom clean," "ordinary wear and damages" excepted, and whether GTI returned the necessary keys.

Both sides to the argument claim that all of the photographs provided in discovery establish their own arguments. Plaintiff claims that the photographs show substantial or significant damage in the form of large holes in the walls, and cabling left on the premises, some of which came through holes in the carpets. Defendants maintain that the holes were small, and

that the cabling not only was not evidence of significant damage, but was actually an improvement on the premises, as it would be useful to any new tenant.

The parties both raise the case of *Akron Meats v 1418 Kitchens* (160 AD2d 242 [1st Dept 1990]) to support their opposing claims as to the condition of the premises upon GTI's departure. *Akron Meats* is a case in which the tenant failed to leave the rental premises "broom clean, in good order and condition, ordinary wear and tear excepted," including removal of all of its property (*id.* at 242), when it left the premises with "sizeable holes" from "drain units" in the floor, and exposed wiring where large refrigeration units had been removed. *Id.* at 243. The *Akron Meats* Court found that the premises had been left "in a completely stripped condition and in a general state of disrepair." *Id.*

Plaintiff claims that *Akron Meats* applies because GTI left the premises in exactly the same condition as in *Akron Meats*, with extremely large holes and exposed cables. However, it does not take a jury to see that the holes left in the walls are not large, but are small, and obviously of so little import that plaintiff could arrange for the premises to be painted after the commencement of FTV's lease without any special efforts to cover the holes. Likewise, the holes in the carpeting containing cables for computers and other telecommunications are small, and

were also repaired by the provision of new carpeting after the FTV lease commenced. Wear and tear to walls and carpets which can be repaired by new paint and new carpets is not significant or substantial damage, but is only "ordinary wear and damages," which, under the Lease, need not be remedied by the tenant upon departure from the premises. It is perfectly ordinary for a landlord to replace carpeting and to paint the walls upon the rental of a premises to a new tenant.

All of the photographs show a swept and clean floor, with absolutely no debris, garbage or pieces of furniture left on the floors, and walls with nothing but small holes and picture anchors, of which plaintiff has not complained. This renders this case unlike that of *1029 Sixth v Riniv Corp.* (9 AD3d 142 [1st Dept 2004]), in which the tenant left the premises in less "severe a state of disrepair" than in *Akron Meats* (*id.* at 147), but still not broom clean, because the tenant "left behind garbage bags, refuse and shelving" which "concededly [would have] cost thousands of dollars and required hours of labor to clear away . . . ." *Id.* at 147. The Court in that case found that "broom clean" might be found if there were only "a trash bag or two needing to be brought to the curb." *Id.* Although plaintiff complains of fixtures remaining on the premise, it never mentions what these fixtures were, and only complains of damage resulting from the removal of fixtures.

Plaintiff rented the premises to FTV "as is" and "broom clean" as a provision of the lease therein. All repairs were made after the lease commenced, but apparently before FTV moved in. No fixtures were ever removed. Plaintiff painted and put in new carpeting, seemingly as a concession to FTV, as it is not required by its lease. There is no evidence of any damage or debris left by GTI on the premises which would render the premise less than "broom clean" at the time of GTI's departure. Therefore, this court finds that GTI met this requirement of the Lease, and that Schulhof's guaranty is satisfied as to this requirement.

This court also finds that the evidence establishes as a matter of law that GTI returned the only "keys" to the premises, in the form of the security ID passes. Plaintiff harps on the claim that there were interior locks to the doors on the premises, and even attempts to convince this court by means of a very inconclusive photograph. Defendants' Reply, exhibit 1. However, noticeably, plaintiff never claims that these locks were in use, or that anyone had keys to them at the time of the Lease. Plaintiff never claims that it had any difficulty accessing the premises; or that it ever gave keys to interior locks to FTV. Plaintiff has failed to rebut defendants' claim that the security ID passes were the only relevant keys which were to be returned to plaintiff at the termination of GTI's occupancy. As a result,

the second prong of Schulhof's guaranty has been met. Schulhof is entitled to summary judgment dismissing him from this action.

Although plaintiff's delay in producing its photographs is unexplained, this court does not see plaintiff's actions as sanctionable.

B. Motion In Limine

Defendants seek an order in limine to "limit the issues at any potential hearing" concerning several items of plaintiff's damages. Defendants' memorandum of law, at 19. This is not a proper use of a motion in limine, which is brought to make an evidentiary ruling whether there is "anticipated inadmissible, immaterial, or prejudicial evidence . . . ." *State of New York v Metz*, 241 AD2d 192, 198 (1st Dept 1998); *see Matter of PCK Dev. Co., LLC v Assessor of Town of Ulster*, 43 AD3d 539, 540 (3d Dept 2007)("excluding the introduction of anticipated inadmissible evidence" is a "classic motion in limine"). The present motion is not seeking an evidentiary ruling on the admissibility of any item, but seeks to limit claims which plaintiff can pursue. As the arguments made by defendants are essentially ones applicable to summary judgment, and plaintiff has responded as such, this court will address defendants' application as one for partial summary judgment.

The claims defendants would have this court dismiss relate to certain reletting costs sustained by plaintiff. They are (1)

three months of free rent plaintiff gave to FTV; (2) leasing commissions paid to Boston Properties; and (3) the cost of "tenant improvements" made by plaintiff for FTV after FTV's lease commenced. Defendants concede that certain damages are due to plaintiff (the question of brokers' fees and rent differential), but claim that these items can be easily calculated without the need for a hearing.

Defendants argue that plaintiff's right to recover $163,203.42 in three months' free rent accorded to FTV (who was relocating from another floor in the building) has already been decided at oral argument by Justice Scarpulla, and is now law of the case. At oral argument, defendants' attorney argued to the court that FTV's lease ran from January 2012, although FTV did not relocate until months later, and that plaintiff "gave them free rent. That can't be charged against us." Notice of Motion, exhibit L, at 18). Justice Scarpulla said "I agree." Plaintiff's attorney then responded "[t]here is a free rent period. The lease expressly says, the GTI lease says they are liable for rent concessions." *Id.* at 18-19. Justice Scarpulla concluded "[t]hat is the issue though. I agree with your argument about liability, but I don't think that's fair to have a trial on damages without some discovery." *Id.* at 19.

This court finds this conversation ambiguous, and that Justice Scarpulla did not make a final ruling on the matter of

the free rent period, so as to engage the rule of law of the case.

The Lease provides that:

> Owner may re-let the demised premises or any part thereof, either in the name of the Owner or otherwise for a term or terms, which may at Owner's option be less than or exceed the period which would otherwise have constituted the balance of the term of the lease, and may grant concessions of free rent or charge a higher rental than in this lease.

A grant of free rent to FTV for the period prior to its occupation of the premises is not part of FTV's lease, and there is no evidence that FTV bargained for this concession as a requirement to lease the premises. Therefore, there is no evidence that free rent to FTV was a reletting cost, rather than a gratuitous concession by plaintiff. This court finds that defendants are not liable for plaintiff's provision of free rent to FTV after the FTV lease was already signed. Therefore, the matter may not be pursued at any anticipated hearing.

Defendants concede that the matter of two of the three leasing broker fees for which plaintiff seeks recovery is one requiring calculation, but denies that it owes recompense to plaintiff for the $53,170.20 brokerage fee it allegedly paid to its parent corporation, Boston Properties, under a management contract between plaintiff and Boston Properties. Defendants point out that GTI had no contract with Boston Properties.

It is not possible on the record before the court to

determine plaintiff's obligation to pay this disputed brokerage fee. Whether or not plaintiff has a right to this fee as a cost of reletting the premises can be determined on the damages hearing.

Plaintiff seeks damages for costs it claims it sustained in order to repair damage allegedly caused by GTI when it vacated the premises. The damage was resolved by painting the walls, recarpeting the floors, and taking GTI's name off of the door, an item that cost plaintiff $395. All of these so-called repairs were made after the FTV lease was entered into, and not made to prepare the premises for reletting. As previously noted, plaintiff leased the premises to FTV "as is" and "broom clean." That plaintiff later accommodated FTV by providing it with new paint and carpeting were not reletting costs. Nor does the replacement of GTI's name on the door constitute reletting costs attributable to GTI. Plaintiff's request for these damages is dismissed, and no evidence regarding these charges will be brought forth at any future hearing.

B. Motion to Amend

It is a given that leave to amend pleadings "'shall be freely given' absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Assoc., Inc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983), quoting CPLR 3025 (b); *see also Eighth Ave. Garage Corp. v H.K.L. Realty*

Corp., 60 AD3d 404 (1st Dept 2009). "[A] court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face." *Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 559 (2d Dept 2011); *see also MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499 (1st Dept 2010).

Plaintiff seeks to add causes of action for (1) piercing the corporate veil to include 14 new defendants; (2) use and occupancy; and (3) unjust enrichment. Once again plaintiff seeks to embroil entities with which with Schulhof is related, bearing the name GTI, or a similar name, into this dispute. Plaintiff claims that Schulhof has identified GTI as a "pass through" company, created to pay rent on the Lease. Dep. of Schulhof, Bernstein aff, Exhibit A, at 13. This connection allegedly allows for the application of a theory of alter ego as to the 14 new defendants, and a theory of piercing the corporate veil to implicate Schulhof, as GTI's principal.

Incorporation to limit personal liability is a "legitimate purpose." *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 (2d Dept 2013). In order to pierce the corporate veil to reach Schulman or the GTI entities, plaintiff would have to show that these parties dominated GTI "and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *Sheridan Broadcasting Corp. v Small*,

19 AD3d 331, 332 (1st Dept 2005). "'[E]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.'" *Id.*, quoting *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998). Significantly, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d at 947.

Plaintiff has failed to plead with particularity that Schulman or the GTI entities so controlled GTI so as to commit a fraud or other wrongful action against plaintiff. *See Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 (1st Dept 2007)(a claim to pierce the corporate veil must allege "particularized facts"). Plaintiff's attempt to plead any relationship whatsoever between GTI and any of the GTI entities is as conclusory and speculative now as it was on plaintiff's prior attempt to bring in these parties as John Does. Amendment will not be granted to bring in these entities, nor to make Schulman personally liable beyond his guaranty.

Nor will amendment be granted to bring in plaintiff's proposed causes of action for use and occupancy and unjust enrichment. These claims are based on the fact that Schulhof carried out business for his other companies from the leased premises. Plaintiff determines that these parties must be unidentified tenants to the Lease, who were somehow obligated to

pay more rent to plaintiff than plaintiff received from GTI under the Lease. Plaintiff's claim for unjust enrichment appears to seek to multiply the rent it was allowed to charge under the Lease by the amount of entities whose business was done from the premises. This is meritless on its face.

The Lease never states what GTI business can emanate from the premises, and defendants were not unjustly enriched by the fact that GTI paid its rent as provided for in the Lease. There is no evidence pled to support a theory that any GTI entity was FTV's "subtenant." *See Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419, 419 (1st Dept 2013). There is no claim for unjust enrichment. Also, as is well known, a claim for unjust enrichment will not lie where there is a valid contract covering the subject matter of the claim. *See IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 (2009). Here, the Lease is that valid contract.

Nor is plaintiff entitled to "use and occupancy," the amount a landlord can attribute to a holdover tenant until the tenant vacates the premises. *See 501 E. 87th St. Realty Co. v Ole Pa Enters Inc.*, 304 AD2d 310, 311 (1st Dept 2003)(court awards use and occupancy "from the expiration of the last lease through the time the apartment was finally vacated"); *1133 Bldg. Corp. v Ketchum Communications*, 224 AD2d 336, 336 (1st Dept 1996) (use and occupancy available during "the holdover period"). The facts

do not comport with this rule. Consequently, plaintiff's motion to amend is denied.

III. Conclusion

As a result of the foregoing, the second cause of action against Schulhof is dismissed. Plaintiff's claims for the cost of free rent to FTV, and the costs of alterations to the premises in order to suit FTV, will be dismissed, and no evidence will be permitted about these items at any future hearing. Plaintiff can, however, attempt to prove its rights to recover all its leasing brokers' fees, as well as the amount of such fees, if proven recoverable. Defendants' informal application for sanctions against plaintiff is denied. Plaintiff's motion to amend is denied.

Accordingly, it is

ORDERED that the part of defendants Global Technology Investments LLC, and Michael P. Schulof's motion as seeks partial summary judgment dismissing the second cause of action is granted; and it is further

ORDERED that the second cause of action is dismissed as to defendant Michael P. Schulman, with costs and disbursements to this defendant as charged by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the part of defendants Global Technology Investments LLC, and Michael P. Schulof's motion as seeks a motion in limine is converted to a motion for partial summary judgment dismissing certain claims, and is granted in part, and denied in part, as determined above; and it is further

ORDERED that the plaintiff 540 Madison Partners LLC's cross motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff 540 Madison Partners LLC's motion to amend the complaint is denied.

Dated: 7/30/14

ENTER:

J.S.C.
HON. NANCY M. BANNON