Kentshire Madison LLC v KLG N.Y. LLC
2015 NY Slip Op 31614(U)
August 26, 2015
Supreme Court, New York County
Docket Number: 152759/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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KENTSHIRE MADISON LLC,

Plaintiff,

- vs -

KLG NEW YORK LLC,

Defendant.

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Index No. 152759/2015

Motion Seq. 001

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action seeking, *inter alia*, declaratory relief and monetary damages arising from a commercial subtenancy, defendant KLG New York LLC (the "Overtenant") moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint of Kentshire Madison LLC (the "Subtenant").

The motion is granted in part and denied in part.

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88,

614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] (CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Such a motion may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Mill*

Financial, LLC v Gillett, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *see also, Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]).

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based")). To constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431, 992 NYS2d 2 [1st Dept 2014] *citing* Siegel, Practice Commentaries, supra, at 2)).

Where a written agreement unambiguously contradicts the allegations of a breach of contract cause of action, the contract itself constitutes documentary evidence warranting dismissal of the complaint, pursuant to CPLR 3211(a)(1), regardless of any extrinsic evidence or self-serving allegations offered by the plaintiff (*Prichard v 164 Ludlow Corp.*, 14 Misc 3d 1202, 831 NYS2d 362 [Sup Ct, New York Cty 2006] *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]). "As Professor Siegel recognizes, 'even correspondence' may, under appropriate circumstances, qualify as documentary evidence. In our electronic age, emails can qualify as documentary evidence if they meet the 'essentially undeniable' test" (*Amsterdam*

Hospitality Group, LLC v Marshall-Alan Associates, Inc., 120 AD3d 431, 992 NYS2d 2 [1st Dept 2014] *citing Art and Fashion Group Corp. v Cyclops Prod.*, Inc., 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]; *see also Langer v Dadabhoy*, 44 AD3d 425, 843 NYS2d 262 [1st Dept 2007], *lv denied* 10 N.Y.3d 712 [2008]; *Baystone Equities, Inc. v Gerel Corp.*, 305 AD2d 260, 759 NYS2d 78 [1st Dept 2003] (contracts, rationally construed, are inconsistent with plaintiff's contention that the five-day notice to cure contractually required of the seller as a condition of contract termination in certain circumstances was applicable where termination was predicated on nonpayment of the deposit. Finally, the documentary evidence renders untenable plaintiff's claim that the parties entered into a net lease agreement after the original contracts were terminated)).

Plaintiff's first cause of action seeks a declaration that defendant's failure to maintain a certain easement[1] *or* to provide a second means of egress, deprived it of its beneficial use and enjoyment of the premises and created a fire safety hazard, and as such, constitutes a constructive eviction of plaintiff so as to suspend plaintiff's obligation to pay rent and additional rent.

The first cause of action is dismissed. A constructive eviction claim may only be asserted in defense to a claim for non payment (*Elkman v Southgate Owners Corp.*, 233 AD2d 104, 649 NYS2d 138 [1st Dept 1996] ("The third cause of action for partial constructive eviction was duplicative of the first cause of action and, moreover, may only be asserted defensively")). To the degree plaintiff claims that it has been placed in a defensive posture as a result of defendant's

[1] The easement ("Easement") was granted pursuant a "Conditional, Limited, Revocable, Non-Exclusive Easement Agreement" between the former adjacent property owner, Bank of New York ("Grantor"), and 700 Madison Partners LLC (the "Overlandlord").

draw down of the letter of credit (previously tendered by plaintiff as its form of security deposit), such draw down does not rise to the level of a nonpayment proceeding to which a claim of constructive eviction may apply.

Furthermore, said cause of action is duplicative of plaintiff's second cause of action for breach of the covenant of quiet enjoyment (*see Phoenix Garden Rest. v Chu* ,245 AD2d 164, 667 NYS2d 20 [1st Dept 1997] (finding causes of action for "constructive eviction" are dismissible as duplicative of those for breach of the covenant of quiet enjoyment)).[2]

Plaintiff, in opposition, also asserts that its first cause of action also seeks money damages for improperly drawing down on the letter of credit. However, the first cause of action does not expressly claim that the money damages sought therein arise from the letter of credit. In any event, while caselaw indicates that a claim for money damages may arise from an alleged trespass and/or negligence claim upon a finding on constructive eviction (*P.W.B. Enters. v Moklam Enters.*, 221 AD2d 184, 633 NYS2d 159) [1st Dept 1995] (finding of a partial constructive eviction renders defendant liable in damages for trespass and negligence)), no such claim for trespass or negligence is asserted in the first cause of action.

And, to the degree the first cause of action rests upon the alleged failure to maintain the Easement (as opposed to the more general claim of failure to provide a secondary means of egress), the documentary evidence, including the Overlease, Easement, and Sublease, conclusively establishes a defense to the "Easement" allegation. Such documents show that defendant had no legal duty to maintain the Easement for the benefit of plaintiff. Pursuant to the

[2] The Court does not address defendant's contention, raised for the first time in reply, that the first cause of action should be dismissed on the ground that its fails to assert a justiciable controversy.

Overlease, Section 1.7, defendant agreed that such Overlease was subject to the Easement and agreed to assume all responsibilities of the Overlandlord under the Easement. However, *plaintiff's Sublease*, Section 3.2, expressly "deemed deleted for the purposes of incorporation by reference in this Sublease: . . .1.7 [of the Overlease] . . . ." Thus, the rights and duties concerning the Easement as expressed in 1.7 of the Overlease *did not apply* to plaintiff. Moreover, pursuant to paragraph 12 of the Easement Agreement, the "Grantor may at its sole discretion elect to cancel and terminate this Agreement by giving [1 year prior] written notice of such election to Grantee [Overlandlord]." Thus, even assuming defendant assumed any of the Overlandlord's obligations to maintain the Easement, the Grantor (*i.e.*, successor to Bank of New York) retained the right to cancel the Easement in its sole discretion. Such documentation conclusively establishes that defendant had no obligation to maintain the Easement in favor of plaintiff, and that the cancellation of the Easement Agreement by the Grantor's successor (allegedly due to defendant's improper refusal to cede to the Grantor's successor's demand for additional fees) does not obviate the Grantor's right to exercise its unilateral right to cancel the Easement at its sole discretion.

Therefore, the first cause of action is dismissed.

The second cause of action for breach of the covenant of quiet enjoyment based on allegations incorporated in the first cause of action concerning defendant's purported failure to provide a second means of egress withstands dismissal. "To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 806 NYS2d 495

[1st Dept 2005] *citing Barash v Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 82–83, 308 NYS2d 649, 256 N.E.2d 707 [1970]). "There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant (*Jackson v Westminster House Owners Inc.*).

Assuming the allegations in the amended complaint as true, plaintiff adequately states a claim for breach of the covenant of quiet enjoyment. According to plaintiff, the New York City Building Code (the "Building Code") in effect in 2003 required a second means of egress for the subject premises, and plans were filed with the New York City Department of Buildings to provide for a second means of egress for the subject premises. Instead of creating a second means of egress, the Overlandlord procured the Easement. The Grantor terminated the Easement, and thus, the absence of a secondary means of egress created a "serious fire issue," contrary to the Building Code. Defendant knew that the failure to extend the Easement would ensure that plaintiff would not be able to occupy the space legally or safely.

In the second cause of action, plaintiff alleges that defendant "breached the covenant of quiet enjoyment because [1] it was unwilling to pay the required fees . . . for a continuation of the Easement" (¶68), and that [2] defendant "knew that depriving Plaintiff of a secondary means of egress would render the Plaintiff's occupancy illegal and unsafe." (¶69).

As to the former, the Court finds such allegation insufficient, based on the reasons noted above.

As to the latter, plaintiff's amended complaint states that defendant failed to inform plaintiff that the Easement "had been canceled" on January 7, 2013, and did not notify plaintiff of

same until "mid-August, 2014," "for the very first time." Coupled with the allegation that plaintiff surrendered the cellar and first floor in July 2014 "in reliance upon Defendant's agreement to accept partial surrender" (¶38), the amended complaint indicates that the absence of the secondary means of egress was not the basis of plaintiff's vacatur. In other words, plaintiff was not aware of the absence of any secondary means of egress at the time it vacated the cellar and first floor in July 2014.

Yet, plaintiff's amended complaint and opposition papers indicate that plaintiff vacated the second and fourth floors as well, in December 2014, after defendant refused to consent to plaintiff's renewed sublet request because the building lacked a secondary means of egress (see letters attached as Exhibit J and K). Based on the alleged absence of a secondary means of egress, plaintiff was compelled to vacate the second and fourth floors, as such absence created a fire and safety hazard. Therefore, as plaintiff's submissions indicate that plaintiff's "constructive eviction," at least with respect to the second and fourth floors, was caused by the absence of a secondary means of egress, dismissal of the second cause of action is unwarranted, at this juncture.

As to the third cause of action for promissory estoppel, such cause of action is dismissed. The elements of a claim for promissory estoppel are "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance thereon" (*Braddock v Braddock*, 60 AD3d 84, 871 NYS2d 68 [1st Dept 2009] *citing Williams v Eason*, 49 AD3d 866, 868, 854 NYS2d 477 [2008]).

Here, plaintiff alleges the parties had a meeting in June 2014, wherein plaintiff expressed

its desire to sublet the cellar and first floor. (¶33). In response, defendant agreed to exercise its right to "recapture" pursuant to Article 17 of the Sublease, "in exchange for valuable consideration." (¶¶35-36). By email dated July 8, 2014, defendant confirmed its intent "to proceed" on the partial recapture (¶37). Thus, "in reliance upon the Defendant's representations and promises that it would accept Plaintiff's surrender of the first and second floor of the Subject Premises as of August 1, 2014, the Plaintiff surrendered the first floor and cellar to the Defendant in July, 2014" (¶71). Thereafter, defendant advised that it would no longer recapture the first and cellar levels.

However, it is uncontested that Article 17 of the Sublease provides that "This Sublease cannot be changed or terminated orally or in any manner other than by a written agreement executed by both parties hereto." Such clause precludes oral modifications to the Sublease such as the one asserted by plaintiff[3] (*Tenber Associates v Bloomberg L.P.*, 51 AD3d 573, 859 NYS2d 61 [1st Dept 2008] ("Where, as here, a lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is generally precluded" *(StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 957 NYS2d 93 [1st Dept 2012] ("Where a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises to proceed with the transaction in the absence of that further written agreement")). The very email upon which plaintiff relies states that defendant:

"*wish[ed] to proceed on the partial recapture, subject to finalization of a brokerage*

[3] The same holds true as to plaintiff's assertion, in opposition, concerning plaintiff's meeting with defendant in December 2014 concerning plaintiff's request to sublet a portion of the subject premises.

agreement with Massey Knakal and finalization of the terms of Kentshire's occupancy of the 4th floor, and I believe we are very close on both. We hope to have an agreement with Massey Knakal in final form in the next couple of days, and to have agreement with Kentshire on the terms to be incorporated in an amendment of the Kentshire sub-sublease in that same time frame, so we can move forward on all fronts . . .our client intends to proceed as discussed. . . ."

This email was followed by other emails on July 17, July 23, and July 28, 2014, wherein plaintiff's counsel acknowledged that the "memorializing [of] the agreement" was yet pending, and expressing his availability to "both draft the partial termination and sublease amendment and/or negotiate same . . ." (see email dated July 28, 2014).

Such undisputed documentation conclusively establishes that any reliance by plaintiff upon an alleged oral representation to accept surrender of the cellar and first floor was unreasonable (*see Prestige Foods v Whale Sec. Co.*, 243 AD2d 281, 663 NYS2d 14 [1st Dept 1997] (dismissing promissory estoppel claim where plaintiffs' claim of reasonable reliance was "flatly contradicted" by the letters stating that neither party had any legal obligations until both had executed an underwriting agreement)).

And, plaintiff failed to adequately allege facts indicating that its partial performance in surrendering portions of the subject premises is unequivocally referable to the oral surrender agreement, in light of emails, including but not limited to one dated July 31, 2014. Plaintiff's own email indicated that two days prior, plaintiff was told that defendant was "working through some issue with the [Over]landord" and consequently defendant "wouldn't be in a position to send the Amendment until those issues are resolved and (b) the surrender date wouldn't be as of tomorrow," (August 1st). The email continues, "we need to know (a) when we will be receiving the Amendment and (b) the Amendment will properly reflect that the surrender is effective as of

midnight tonight." Based on such undisputed email, plaintiff's partial surrender of the subject premises in the absence of a written agreement, which plaintiff acknowledges was required by defendant, cannot be considered unequivocally referable to any oral surrender agreement.

Thus, the third cause of action is dismissed, without prejudice.

As to the fourth cause of action for breach of implied covenant of good faith and fair dealing, such cause of action also withstands dismissal. "A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties" (*Duration Mun. Fund, L.P. v J.P. Morgan Securities, Inc.*, 77 AD3d 474, 908 NYS2d 684 [1st Dept 2010]). Plaintiff alleges that defendant "knew that the Premises required a secondary means of egress and was obligated to provide the same" and that "Defendant was unable to obtain a continuation of the Easement because it refused to pay the required monies to the owner . . . ." To the degree the fourth cause of action is premised upon an alleged breach by defendant of an obligation to provide the Easement, and no such obligation exists in favor of the plaintiff, no breach of a covenant of good faith and fair dealing may arise from such obligation. However, plaintiff adequately states a claim for breach of the covenant of quiet enjoyment, which right is found in Article 17 of the Overlease and incorporated by reference by the Sublease. Nor is the fourth cause of action duplicative of the sixth cause of action for breach of contract, which alleges a breach based on defendant's failure to consent to plaintiff's sublet request (*cf. Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 972 NYS2d 33 [1st Dept 2013] ("Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, however, should be dismissed as duplicative of its contract claims, since both claims " arise from the same facts and seek the identical damages for each alleged breach")).

Therefore, dismissal of the fourth cause of action is unwarranted.

As to the fifth cause of action for a declaration that the Sublease was terminated and plaintiff has no further obligation to pay rent or additional rent based on the frustration of purpose doctrine is dismissed. "For a party to a contract to invoke frustration of purpose as a defense for nonperformance, 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense'" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD3d 506, 924 NYS2d 391 [1st Dept 2011] *citing Crown IT Servs., Inc. v Koval–Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [2004] and Restatement [Second] of Contracts § 265). "The doctrine applies "'when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract'" (*PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, *supra, citing* Restatement [Second] of Contracts § 265, Comment a)).

Plaintiff alleges that the purpose of the Sublease was to allow plaintiff to lawfully use and occupy the subject premises for its intended use, and that upon termination of the Easement, plaintiff could no longer safely and/or legally occupy the premises. Also, the absence of a secondary means of egress made it impossible for plaintiff to obtain the appropriate insurance coverage and frustrated plaintiff's use of the premises. Thus, the absence of the Easement frustrated plaintiff's use and occupancy of the premises.

As noted above, documentation conclusively establishes that defendant had no obligation to maintain the Easement in favor of plaintiff, and the absence of the secondary means of egress was not the basis of plaintiff's vacatur. Further, the Sublease contained an express reference to

the Easement in that it excluded section 1.7 of the Overlease from the Sublease. The amended complaint indicates that the plaintiff was unaware of the absence of a secondary means of egress and absence of the Easement at the time it chose to surrender possession. Therefore, the facts, as alleged, fail to indicate that plaintiff's use and occupancy was frustrated by defendant's alleged failure to maintain a secondary means of egress and/or Easement.

Plaintiff's reliance on *Goddard v Ishikawajima-Harima Heavy Indus. Co.* (24 N.Y.2d 842, 300 NYS2d 851 [1969]) in support of its fifth cause of action is unavailing, as such case involved a contract for the sale of boats destroyed by a fire. Here, the subject of the Sublease, *i.e.*, the premises, was not so destroyed or wholly incapable of being used and occupied by plaintiff, as plaintiff alleges that (1) its vacatur occurred August 1, 2014 before it knew of any absence of a secondary means of egress, and (2) it attempted to sublease the premises in December 2014 to another entity (10 months after "a Termination of Easement Agreement was duly recorded, *see* Amended Complaint, ¶30).

Thus, the complaint fails to allege sufficient facts indicating any entitlement to "the very 'narrow' protections afforded by the frustration-of-purpose doctrine" (*Baker v 16 Sutton Place Apartment Corp.*, 110 AD3d 479, 973 NYS2d 6 [1st Dept 2013] ("The absence of a roof garden, and the inability of defendant to subsequently install one, was clearly not "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense") *citing Crown IT Servs., Inc. v Koval–Olsen*, 11 AD3d 263, 265, 782 NYS2d 708 [1st Dept 2004]).

Thus, the fifth cause of action is dismissed, without prejudice.

As to the sixth cause of action for breach of contract for failure to consider plaintiff's sublet request and/or exercise defendant's right of recapture, such claim sufficiently states a breach of contract claim.

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426, 913 NYS2d 161 [1st Dept 2010]; *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 850 NYS2d 6 [1st Dept 2007]; *Renaissance Equity Holding, LLC v Al-An Elevator Maintenance Corp.*, 36 Misc 3d 1209(A), 954 NYS2d 761 (Table) [Supreme Court, New York County 2012]).

Here, plaintiff alleges that defendant breached Article 17 of the Sublease by refusing to consent to a sublet request plaintiff made in December 2014 or terminate the Sublease, causing damages in the amount of one million dollars. Such allegations are sufficient to state a claim for breach of contract. In further support of this claim, plaintiff alleges that defendant refused to consider plaintiff's sublet request because the building lacked a required second means of egress. Thus, to the degree defendant contends that it had no obligation to provide a second means of egress, dismissal of this claim based on documentary evidence and for failure to state a cause of action, is unwarranted.

It is noted that defendant's contentions in support of dismissal, such as the complaint's failure to plead that a formal request was made or that plaintiff did not submit documents as required by the Sublease in connection with a sublet, and that plaintiff was in default of the Sublease, are arguments suited for summary judgment, and do not serve as adequate bases for

dismissal pursuant to CPLR 3211(a)(7) or (a)(1).

It is also noted that Article 14 of the Sublease expressly limits damages based on an alleged failure of defendant to give consent to "injunction, declaratory judgment, specific performance or arbitration." In opposition, plaintiff adds that the damages sought are based on defendant's alleged improper draw down on the letter of credit. Thus, to the extent plaintiff seeks relief limited to the draw down on the letter of credit, dismissal of the sixth cause of action is unwarranted, at this juncture.

As to the seventh cause of action, plaintiff seeks a declaration that, pursuant to Section 227 of the Real Property Law, no further rent or additional rent is due as the premises are "unfit for occupancy" because of a lack of a secondary means of egress.

Section 227, entitled "When tenant may surrender premises," provides as follows:

> Where any building, which is leased or occupied, is destroyed or so injured by the elements, *or any other cause as to be untenantable, and unfit for occupancy*, and no express agreement to the contrary has been made in writing, *the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises*, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender.
>
> (Emphasis added).

The amended complaint and plaintiff's opposition papers assert that defendant refused to consider a sublet in December 2014 because the building lacked a secondary means of egress (see also, letters attached as Exhibit J and K), and that tenant vacated the second and fourth floors due the absence of a secondary means of egress. Further, defendant does not establish that plaintiff's vacatur of the first and cellar portions of the premises prior to its knowledge of the

absence of a secondary means of egress is fatal to this claim. All the statute appears to require is that the premises be "untenantable, and unfit for occupancy," and that the "injury occurred without his or her fault or neglect." Thus, to the degree that plaintiff alleges that the demised premises became untenantable *without plaintiff's fault or neglect*, due to the cancellation of the Easement, dismissal of this cause of action is unwarranted, at this juncture.

Defendant failed to cite any authority for the proposition that a finding by a municipal authority that the demised premises are unfit for occupancy is required to state a claim under section 227. Further, defendant's reliance on *Schwartz, Karlan & Gutstein v 271 Venture* (172 AD2d 226, 568 NYS2d 72 [1st Dept 1991]) and *Dance Magic, Inc. v Pike Realty, Inc.* (85 AD3d 1083, 926 NYS2d 588 [2d Dept 2011]) for the proposition that plaintiff expressly waived its rights under Real Property Law section 227, by virtue of Section 12.7 of the Lease, is unavailing. Section 12.7 of the Lease, which is incorporated by reference in the Sublease, provides that the

> "Lease shall not terminate, be forfeited or otherwise affected in any manner, and there shall be no reduction or abatement of the Rental payable hereunder, by reason or damage to or total, substantial or partial destruction of the Improvements to the Demised Premises, the Demised Premises or any part thereof, or by reason of untenantability of the Demised Premises or any part thereof, for or due to any reason or cause whatsoever, and Tenant, except as otherwise specifically provided in the Lease, waives any and all rights to quit or surrender the Improvements to the Demised Premises, the Demised Premises or any part[] thereof by reason of any damage or destruction of Improvement to the Demised Premises. . . .

In *Schwartz, Karlan & Gutstein v 271 Venture* (*supra*), at issue was Section 9 of the standard form lease, which provided that in the event of fire damage, "'this lease shall continue in full force and effect' "except that the landlord shall repair the damage at its own expense and the tenant shall be entitled to a reduction in rent proportionate to the usability of the premises;

and, in case of total unusability, the landlord, at its sole option, may elect not to restore the premises and to terminate the lease." The Court then noted that the "tenant [was] not only not afforded a corresponding right to terminate, it expressly waive[d] that option, otherwise available under Real Property Law § 227, and agree[d] that the afore-cited provisions of section 9 of the lease 'shall govern and control in lieu thereof.'" (*see also, Dance Magic, Inc. v Pike Realty, Inc., supra* (stating "In article 9 of the subject lease, the plaintiffs expressly waived their right to surrender possession pursuant to Real Property Law § 227 and agreed that the lease provisions would govern in the event that the demised premises were damaged or rendered partially or wholly unusable.")). No such express reference to section 227 exists herein.

Thus, dismissal of the seventh cause of action is unwarranted.

As to the eighth cause of action, seeking to enjoin defendant from drawing down on the letter of credit and directing defendant to deposit into Court $900,000 representing the proceeds of the letter of credit and corresponding cross-motion for the same relief,[4] such cause of action is dismissed. The elements of a claim for injunctive relief are: "(1) a likelihood of success on the merits; (2) the prospect of irreparable harm if the preliminary injunction is withheld; and (3) a balance of equities tipping in its favor, and, accordingly, is not entitled to a preliminary injunction" (*Credit Index, L.L.C. v Riskwise Intern. L.L.C.*, 282 AD2d 246, 722 NYS2d 862 [1st Dept 2001]). Although plaintiff sufficiently alleges causes of action against defendant, there are no allegations indicating that "damages are not compensable in money and capable of calculation and, thus, that it will suffer irreparable harm absent the requested injunction" (*id.*).

[4] Plaintiff's cross-motion seeks to enjoin defendant from drawing down on the letter of credit and directing defendant to deposit into Court any and all monies it improperly obtained from the letter of credit.

Further, the record indicates that the letter of credit has nearly been depleted. Thus, dismissal of the eighth cause of action is warranted.

Consequently, the cross-motion for injunctive relief is denied.

And, the Court does not address defendant's argument in support of dismissal of the ninth cause of action. Plaintiff's amended complaint was filed after defendant initially moved for dismissal, and in reply, defendant contends that its motion should be apply to the amended complaint as well. However, plaintiff was not provided an opportunity to address the arguments raised by defendant in reply. Thus, dismissal of the ninth cause of action is denied, without prejudice.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant KLG New York LLC to dismiss the complaint and amended complaint of Kentshire Madison LLC pursuant to CPLR 3211(a)(1) and (a)(7) is granted solely as to the first, third, fifth and eighth causes of action, and denied as to the second, fourth, sixth, seventh, and ninth causes of action; and it is further

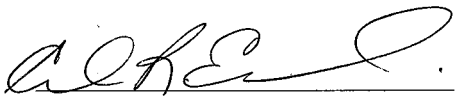
ORDERED that the first, third, fifth and eighth causes of action are hereby severed and dismissed; and it is further

ORDERED that defendant shall serve its answer to the remaining causes of action within 20 days of notice of entry of this order; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 26, 2015



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD