SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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FIFTH AVE. CENTER, LLC,

Index No. 652724/2015

Plaintiff,

-against-

DECISION/ORDER

DRYLAND PROPERTIES LLC ,

Defendant.

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

MEMORANDUM DECISION

In this action arising out of a commercial lease, defendant Dryland Properties LLC ("defendant") moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the first, seventh, eighth, ninth, tenth and eleventh causes of action.

Factual Background

Plaintiff, Fifth Ave. Center, LLC ("plaintiff") alleges that it was the tenant of condominium units 11 and 12, and a portion of unit 10 in the Lower Level 2 (sub-cellar) of the building located at 420 Fifth Avenue (the "Building"). Plaintiff's tenancy was governed by an assigned, 15-year lease dated October 24, 2011 between defendant (as the owner of the units) and Manhattan Medical Development, LLC ("MMD") (the "Lease").[1] The Lease acknowledges plaintiff's use of the demised premises as a "medical office" for "out-patient care incorporating" Radiation Oncology and Therapeutic and Diagnostic Radiology (Sections 1.2 and 22.1(a)).

The Declaration of Condominium, pursuant to which the condominium was formed, provides that each unit owner shall not use its unit to be used for any "offensive or unlawful purpose," "nuisance," "manner which is not customary in a first class office building (with retail)

[1] The Lease was assigned to plaintiff, with defendant's consent, on October 31, 2013.

in midtown Manhattan and which will be a source of annoyance or in any way interferes with the peaceful possession, enjoyment and proper use of other Units . . . ." (Section 18.2).

The Bylaws, pursuant to the which the condominium units are governed, provides:

> "Each unit and all portions of the Limited Common Elements shall be kept in first-class condition . . . by the Unit Owner thereof and such Unit Owner shall promptly make or perform, or cause to be made or performed, all maintenance work, repairs, and replacements necessary in connection therewith." (Section 9.10.3)

Plaintiff claims that in January 2012, three months after the Lease was entered into with MMD, defendant entered into a lease with RhinoCo Fitness, LLC, a exercise gym known as "CrossFit," within commercial space in a portion of the cellar level directly above the subject leased space. The CrossFit exercise gym involves the repeated dropping of free weights and weighted equipment as part of individual and group classes, where participants are encouraged to fling heavy free weights into the air and letting them hit the floor (Complaint, ¶¶18-19). These activities allegedly created excessive vibrations, massive booms, and adversely affected the hangars and supporting pipes and conduits, and the structural integrity of the Building. The activities also impacted the pre-development planning and development stages of constructing the subject space to a medical treatment center. Complaints were allegedly made to defendant beginning in 2012, and defendant explored solutions to address the concerns, including vibration and noise level tests. In May 2013, defendant sent CrossFit a 30-day notice to cure. A June 18, 2013 sound and vibration study revealed that it would take at least nine months to install a complete new floor system, as there was no "off the shelf" floor system in place to resolve the issue. T. Steel Construction LLC contracted with CrossFit to perform the work, commencing January 27, 2014. During construction, defendant's engineer exchanged emails concerning the

hangars that secure the sprinkler "failing" "due to the dropping of the weights." Plaintiff alleges that defendant commenced an action against CrossFit alleging that CrossFit's failure to complete installation of the new flooring system to abate the noise and vibrations about which commercial tenants in the building, including the plaintiff herein, have complained.

Plaintiff further alleges an overcharge claim, asserting that the Lease defines the Tenant's proportionate share of real estate taxes escalations and operating expense allocations as 17.32%. However, this percentage greatly exceeds the true proportionate share based on the actual square footage of the leased space in relation to the building. Defendant intentionally miscalculated the escalations in order to inflate the additional rent due. Also, the base year rent for such items should have been updated to reflect the delay in the fixed rent commencement date, which did not occur until mid-year 2013.

Plaintiff also alleges that the Lease is an illegal contract in that the leased premises is not located within any "commercial" condominium units of the building as expressed in the Lease, but constitute portions of "office" condominium units. The Declaration of Condominium does not designate any "commercial" condominium units. The type of condominium is central in determining the rights and obligations that an owner has in the building as to its unit.

Further, defendant has improperly controlled and restricted plaintiff's access to the premises in breach of Section 20.2 of the Lease by requiring the Tenant to obtain defendant's permission to enter the premises as to time and date, and by implementing noise and vibration testing and entering the premises to perform remediation, without notice to plaintiff.

As a result, plaintiff asserts causes of action for nuisance, breach of lease, constructive eviction, overcharge, rescission, breach of implied covenant of good faith, and the return of

security deposit.

Discussion

Pursuant to CPLR 3211 [a] [l], 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." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]; *Mill Financial, LLC v Gillett*, *supra, citing Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]).

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]).

Dismissal of the nuisance claim (first cause of action) on the ground that the complaint fails to allege any intentional action by defendant, which interfered with the rights of plaintiff, is denied.

The elements of a claim for private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*61 West 62 Owners Corp. v CGMEMP LLC*, 77 AD3d 330, 334, 906 NYS2d 549, 553 [1st Dept 2010] (citations omitted)).

Defendant correctly points out that a "cause of action for nuisance does not lie against a landlord who 'did not create the nuisance' and who has 'surrendered control of the premises' to a

tenant" (*Clarke v 6485 & 6495 Broadway Apartment Inc.*, 122 AD3d 494997 NYS2d 49 [1st Dept 2014] *citing Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d 543, 581 NYS2d 46 [1st Dept1992]). However, contrary to defendant's contention, caselaw also holds that if "the landlord covenants to repair, or reserves the right to enter upon the premises to make such necessary repairs as he may deem advisable, then the landlord will be held thereby to have retained the power to perform this duty (to properly maintain the premises), and the reason for the suspension of his duty on the demise or conveyance of the entire premises falls" *(Zamzok v 650 Park Ave. Corp.*, 80 Misc 2d 573, 363 NYS2d 868 [Supreme Court, New York County 1974] *citing* Rasch, Landlord & Tenant, 2nd ed. s 610; *Appel v Muller*, 262 NY 278, 186 NE 785) (where lease between the landlord and the garage operator causing alleged nuisance showed that landlord "reserved the right to re-enter upon the premises for the purposes of making repairs (Sections 7.02 and 8.01)," such "retention of control prevents the [landlord] from disclaiming responsibility for the maintenance of the alleged nuisance")). Thus, a cause of action for private nuisance may lie for a landlord's alleged failure to take action to prevent the conduct of a tenant, to whom the landlord has leased possession of certain premises, where the landlord retains the right to reenter and make repairs. The allegations of the complaint indicate that defendant did not knowingly create the nuisance. However, the complaint does not allege that defendant surrendered exclusive control of the premises to CrossFit.

Although plaintiff does not allege that defendant created the alleged nuisance, the complaint sufficiently alleges that "it was within Defendant's control" to abate the noise and vibrations caused by CrossFit, and that CrossFit failed to complete installation of the new flooring system, which "will cost Dryland approximately 1 million to abate the noise and

vibration" caused by CrossFit (Complaint ¶¶13, 40). In opposition, plaintiff submits CrossFit's lease, indicating that in the event CrossFit failed to cure a non-monetary default, defendant "may, at its option" cure such default reserved the right to cure such default, which allegedly consists of installing new flooring to abate the complained of noise and vibrations.

Defendant's contention that it did not have a "remedy" to cure the conduct of the members of CrossFit is insufficient to warrant dismissal. The complaint (and documents submitted in opposition) indicate, arguably, defendant's ability to cure the vibrations and noise caused by such members by installation of a new floor. The cases cited by defendant are not controlling, in that they do not address whether a landlord who retains a right in a lease to cure a tenant's breach may be held liable for nuisance (*cf. George v Bd. of Directors of One West 64th Street, Inc.*, 2011 N.Y. Slip Op. 32325(U) [Supreme Court, New York County 2011] (fact that a cooperative allowed a nuisance to continue unabated, without more, is not grounds for imposing liability for private nuisance")).

As to plaintiffs' overcharge claim (seventh cause of action), plaintiff cites to sections 6.1 and 7.3 of the lease, and alleges that the lease defines "both real estate tax escalations and operating expense escalations" as "17.32%." (¶111). Plaintiff alleges that "this percentage . . . greatly exceeds the true proportionate share based upon the actual square footage of the subcellar space leased by Plaintiff in relation to the size of the Building . . . ." (¶112). Plaintiff then alleges that defendant "knowingly and intentionally miscalculated the real estate and operating escalations so as to inflate the additional rent imposed upon the Tenant under Articles 6 and 7 of the Lease" (¶113).

Based on the the plain and unambiguous language of the Lease, the seventh cause of action is dismissed.

The claim that 17.32% is greater than plaintiff's true proportionate share of the building when compared with the actual square footage of the leased space is barred by Article 1.3 of the Lease, which provides that:

> The Tenant does hereby acknowledge that no representations have been made the Landlord . . . as to the amount of square footage in the Demised Premises. The Tenant has had the opportunity to inspect the Demised Premises with experts of its own choosing and relies upon its own judgment in computing the square footage.

Paragraph 3 of the Assignment of the Lease to plaintiff expressly provides:

> 3. Disclaimer. The Lease is assigned by Assignor [MMD] to and accepted by Assignee [plaintiff] AS IS, WHERE IS, without any representations or warranties of whatsoever nature, express or implied.

A "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Beinstein v Navani*, 131 AD3d 401, 14 NYS3d 362 [1st Dept 2015]). "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562780 NE2d 166 [2002]). Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*see Gessin Elec. Contractors, Inc. v 95 Wall Associates*, LLC, 74 AD3d 516, 903 NYS2d 26 [1st Dept 2010]). Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d

550, 555, 450 NYS2d 460 [1982]).

The Lease clearly and unambiguously set forth that the Tenant "relies upon its own judgment in computing the square footage" for the leased premises. Further, the Assignment clearly and unambiguously set forth that the leased space was "as is, where is" in relation to the Building.

Inasmuch as plaintiff's allegation that defendant intentionally miscalculated the real estate and operating escalations asserts a claim of misrepresentation, such claim is barred by Article 1.3's statement that "no representations" were made as to the square footage.

Further, plaintiff's argument in opposition that the Lease does not set forth the Tenant's proportionate share of escalation of taxes is misplaced, as such claim was not made under the seventh cause of action. Plaintiff does not allege that it was charged more than 17.32% of defendant's costs. And, whether defendant complied with the Lease provision obligating it to provide all data used in the calculation of Tenant's proportionate share is not a claim asserted in the seventh cause of action.

Therefore, although defendant cannot rely upon the affidavit of George Constantin as to the reasons MMD (plaintiff's predecessor) and defendant agreed to the 17.32% amount (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013] (affidavits do not qualify as "documentary evidence" for purposes of this rule); *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]), dismissal of the seventh cause of action is warranted.

Dismissal of the eighth cause of action for breach of sections 6.3 and 7.5 of the Lease for

failure to state a cause of action is unwarranted. Plaintiff has sufficiently set forth allegations of defendant's obligations to provide supporting documentation regarding real estate tax escalation billings and operating expenses billings, upon plaintiff's request, Tenant's alleged entitlement to dispute the statements, defendant's failure to provide documentation despite plaintiff's requests in April and June of 2015, and a claim of damage to the plaintiff.

Defendants' submission of a statement invoice dated December 15, 2014 accompanied by two statements of the real estate tax escalation and operating expense break downs are insufficient to defeat plaintiff's claim. Section 6.4 expressly provides that the real estate tax "bill shall be accompanied by . . . a computation of the amount payable together with such supporting documentation as Tenant may reasonably require." Defendant failed to submit any documentation showing compliance with this section. Therefore, dismissal of the eighth cause of action is denied.

As to the ninth cause of action for false representation, dismissal for failure to allege this claim with sufficient facts and specificity is denied. The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub,* 219 AD2d 321, 326, 643 NYS2d 33 [1st Dept 1996]). A claim of misrepresentation must be alleged with sufficient particularity as required by CPLR 3016(b). The language of 3016(b), however, merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v D'Agostino,* 21 AD2d 60, 64, 248 NYS2d 121 [1st Dept 1964]). Indeed, the Court of Appeals has specifically noted that this rule "is not to

be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud' " (*Lanzi v Brooks,* 43 NY2d 778, 780, 402 NYS2d 384, 373 NE2d 278 [1977] [citation omitted]). Thus, on a motion to dismiss for failure to state a cause of action, "a plaintiff . . . need only plead that he relied on misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926, 810 NYS2d 880 [Sup. Ct. New York County 2006]).

Contrary to defendant's contention, the Complaint alleges that the lease executed by the Landlord represented that the demised premises were "commercial condominium units under the Declaration of Condominium" (¶126). However, plaintiff alleges, commercial condominium units do not exist under the Declaration of Condominium, and the demised premises are located within "portions of *office* condominium units" (¶126). Further, plaintiff alleges that whether a unit is commercial or office is "central to determining the legal and beneficial rights, remedies, . . financial, or other obligations, . . . that go to the core bundle of rights and property interests that an owner has in the Building regarding their condominium unit" (¶50). Plaintiff, in opposition, points out that billing for a tenant as an occupant of an Office Unit is materially lower that billing for a tenant as an occupant of a commercial unit, which the lease illegally designates as the leased premises. Such allegations are sufficiently specific to identify the purported false representation made, as well as the fraudulent conduct allegedly undertaken by defendant.

The Lease describes the Premises as "that certain *portion of Lower Level 2 (sub-cellar)*, which consists of the entirety of Unit Nos. 11, and 12 as well as a portion of Unit No 10, as more

particularly described in the Declaration (as defined hereafter) . . . ." The Declaration, Article 4, entitled "Description of the Unit" provides:

> Office Units; Commercial Units. The Building . . . is divided into (a) forty-one (41) *office Units ("Office Units") located on the sub-cellar* and the 3rd through 28th floors . . . (b) ten (10) commercial Units (the "Commercial Units") located on the cellar, the ground floor and the second floor . . . , and (c) the General Common Elements . . . . (Emphasis added).

Contrary to plaintiff's allegations, the Declaration states that the Building contains commercial condominium units. And, inasmuch as plaintiff asserts that the demised premises are located within the portions of office condominiums, the Lease describes the "Premises," which description incorporates by reference the Declaration's reference to "sub-cellar," as an "office condominium." In other words, the demised premises is defined by the Lease as located within the "sub-cellar", and Declaration describes the "sub-cellar" units as "office units," and thus, the Lease arguably describes the leased premises as an office unit.

Yet, the Lease *also* affirmatively states, in Article 2.2, that the "Demised Premises are contained with the *commercial* condominium units of the Building." Notably, such description is found under Article II, Inter-Relationships, which sets forth the right of the Condominium Board to be notified of the Lease. Defendant's contention that Article 2.2. provides a "mere descriptive term" is insufficient to warrant dismissal of the misrepresentation claim, at this juncture. Likewise, defendant's contention that the such "mere" description of the premises as a commercial condominium unit is consistent with the Recording and Endorsement Cover Pages, which describe the units as commercial condominium units, does not negate the allegation that the demises premises was an office unit, as opposed to a commercial condominium unit. Since

an office unit, according to plaintiff, receives financial rights and obligations different from those associated with the a commercial condominium unit, it cannot be said that plaintiff failed to state a claim in its ninth cause of action. Whether the representation in Article 2.2 constitutes a material false representation, and defendant's claim that it properly billed plaintiff solely based on the terms of the Lease, are not issues ripe for determination at this juncture. Therefore, dismissal of such claim is unwarranted.

As to the tenth cause of action for breach of implied covenant of good faith, "all contracts imply a covenant of good faith and fair dealing in the course of performance" "which is breached when a party 'acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*Skillgames, LLC v Brody*, 1 AD3d 247, 767 NYS2d 418 [1st Dept 2003]; *Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 888, 908 NYS2d 27 [1st Dept 2010]). "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'" (*Forman*, at 888). Plaintiff alleges that defendant breached this covenant by (1) representing the leased premises as commercial condominium units, (2) misleading plaintiff as to the defendant's knowledge of the noise and vibration situation, and (3) concealing the results of the acoustical tests showing illegal levels of noise and vibrations. In opposition, plaintiff also points out the additional claims in the complaint that (1) defendant entered into the CrossFit lease knowing the problems it would cause in the Building, (2) accepted hundreds of thousands of dollars in rent and expenses plaintiff paid based on promises that defendant would cause CrossFit to abate and cure the nuisance, (3) concealed the numerous complaints from third parties, (4) deceived

plaintiff into believing that defendant was resolving the situation, and (5) failed to involve the Condominium Board to exercise its rights to remediate the nuisance.[2] Such claims are sufficient to sustain the tenth cause of action.

Defendant's claim that it did not misrepresent the nature of the subject premises, and that defendant's alleged concealment of its knowledge of the nuisance does not deprive plaintiff of the benefits under the Lease, are unavailing. As plaintiff asserts, the allegations are sufficient to support plaintiff's claim that defendant's actions and inactions reduced defendant's ability to provide premises suitable for the operation of a medical facility and to provide a Building that would be operated as a first-class building.

Finally, dismissal of the eleventh cause of action for the return of the security deposit *pursuant to Articles 4.9 and 4.10* under the Lease is warranted, as premature. Plaintiff alleges that it served a notice of termination of the Lease dated July 16, 2015 and delivered keys to the Landlord, and that Section 4.9 and 4.10 entitle plaintiff to the return of its security deposit. However, Article 4.10 further provides that:

> . . . . In the event that Tenant shall fully and faithfully comply with all of the material terms, provisions, covenants and conditions of this Lease, the security together with all interest earned thereon shall be returned to Tenant after *the date fixed as the end of the Lease* and after delivery of entire possession of the demised premises to Landlord . . . . (Emphasis added).

Caselaw supports defendant's contention that the Lease unambiguously provides that the security deposit is returnable only after the expiration of the term originally fixed in the Lease,

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[2] Plaintiff also adds that after this action was commenced, defendant obtained, in bad faith, a default judgment of possession against plaintiff based on rent plaintiff withheld due to the unabated nuisance.

i.e., October 23, 2026 (*Rose Container Corp. v Lieberman*, 16 NY2d 818, 263 NYS2d 161, 210 NE2d 453 [1965] (where tenant contended that it "was entitled to the return of its security under the 15th paragraph of the lease" "since the landlords had elected to terminate the tenancy by notice given pursuant to the 17th paragraph of the lease," Court of Appeals affirmed the Appellate Division determination that security deposit was repayable only after the expiration of the term originally fixed in the lease, that is, after February 15, 1965, despite fact that landlord terminated lease for nonpayment on earlier date); *Whiteway Books, Inc. v Cohen*, 70 Misc 2d 940, 335 NYS2d 148 [Civil Court, City of New York, New York County] (interpreting clause requiring the return of security deposited "after the date fixed as the end of the lease" as to "mean that the deposit of security is repayable to the tenant . . . only after the expiration of the term originally therein fixed; *i.e.*, February 26, 1976. The fact that the lease was terminated by Court judgment before its expiration date by a warrant of eviction issued thereunder and by its execution on April 20, 1971, is of no moment.")). The "tenant must await the original expiration date of the lease before he may claim a return of the deposit, because it will only be then that all of the landlord's damages can be ascertained." (Rasch's New York Landlord and Tenant, Including Summary Proceedings, 2 N.Y. Landlord & Tenant Incl. Summary Proc. § 23:75 (4th ed.)). It is uncontested that the Lease ends, by its terms, on June 12, 2028.

Plaintiff's claim that the date of the termination notice constituted the date fixed as the end of the Lease was flatly rejected by the Court of Appeals in *Rose Container Corp. v Lieberman* (*supra*), and plaintiff failed to cite any caselaw to the contrary.[3]

[3] Contrary to defendant's contention, Article 14.2 does not provide that plaintiff's sole remedy in the event of defendant's default is to cure the default and seek damages. Article 14.2 provides that "If Landlord shall default . . . . Tenant may, at its option, without waiving any claim for damages for breach of agreement, at any time thereafter

Therefore, dismissal of the eleventh cause of action is warranted, as such claim is premature.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss the first, seventh, eighth, ninth, tenth and eleventh causes of action is granted solely as to the seventh and eleventh causes of action, and the seventh cause and eleventh causes of action are hereby severed and dismissed; and it is further

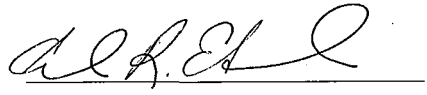
ORDERED that defendant shall serve its answer upon plaintiff within 20 days of entry of this decision; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry and its answer within 20 days of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 8, 2016, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: February 17, 2016



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Footnote 3, cont'd.

cure such default . . . ." Such section gives plaintiff the option to cure, but not does expressly state that such remedy is plaintiff's sole, exclusive remedy. Articles 5.4, 13.2, and 4.4, on which defendant also relies, do not warrant dismissal of the claim for the return of security deposit at this juncture.