Madison 68 Realty LLC v 11 E. 68th St. LLC
2017 NY Slip Op 32051(U)
September 29, 2017
Supreme Court, New York County
Docket Number: 650752/2014
Judge: O. Peter Sherwood
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
-----------------------------------X
MADISON 68 REALTY LLC,
MADISON 68 REALTY II LLC and
MADISON 68 REALTY III LLC,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 650752/2014
Mot. Seq. Nos.: 001 and 002

11 EAST 68TH STREET LLC, as successor to
VNO 11 EAST 68TH STREET LLC, and
ROYAL ABSTRACT OF NEW YORK LLC,

Defendants.
-----------------------------------X
11 EAST 68TH STREET LLC,

Plaintiff,

-against-

Index No. 650771/2014
Mot. Seq. Nos.: 002 and 003

MADISON 68 REALTY LLC,
MADISON 68 REALTY II LLC and
MADISON 68 REALTY III LLC,

Defendants.
-----------------------------------X
O. PETER SHERWOOD, J.:

I. BACKGROUND

These cases concern the sale of a building located at 11 East 68th Street in Manhattan (the Property), which was intended to be converted into condominiums. It is alleged that some of the seller's representations in the Purchase and Sale Agreement (PSA) were incorrect. Madison 68 Realty LLC, Madison 68 Realty II LLC, and Madison 68 Realty III LLC (together, Madison) sold the Property to VNO 11 East 68th St (Vornado). 11 E 68th St LLC is Vornado's successor (together, 11E68). After the dispute arose, Madison filed suit. 11E68 filed a separate suit shortly thereafter regarding the same dispute. The cases have been joined for discovery and trial, but are not consolidated (as that would have put the parties on both sides as plaintiffs and defendants).

A. The Cases and Causes of Action

In *Madison 68 Realty LLC et al v 11 East 68th St LLC et al* (Index No. 650752/2014) (the Madison Action), Madison alleges the following causes of action:

1. Breach of contract against Royal Abstract of New York (Royal), the escrow agent, for failure to disburse the funds held in escrow after December 29, 2012;
2. Breach of good faith and fair dealing against 11E68 regarding the Escrow Agreement, for objecting to disbursement of the funds;
3. Declaratory judgment as to Madison's right to escrow funds and directing disbursement;
4. Breach of contract (the PSA) against 11E68 for failure to respond to reasonable inquiries; and
5. Declaratory judgment that Madison has not breached the PSA.

In *11 East 68th Street LLC v Madison 68 Realty LLC et al* (Index No. 650771/2014) (the 11E68 Action), 11E68 makes the following claims against Madison:

1. Breach of contract (the PSA) for misrepresentation re: Unit SE3;
2. Breach of contract (the PSA) for misrepresentation re: Units SE5 and 6;
3. Breach of contract (the PSA) for misrepresentation re: Units SE7 and 8;
4. Breach of good faith and fair dealing for misrepresentations as to those units; and
5. Fraud and fraudulent inducement for same misrepresentations, failure to disclose information, and failure to provide complete Lease Files.

In the 11E68 Action, Madison makes the following counterclaims:

1. Breach of the implied covenant of good faith and fair dealing re: Escrow Agreement, for objecting to the release of the funds to Madison;
2. Breach of the PSA, for failure to answer reasonable inquiries; and
3. Declaratory judgment that Madison has not breached the PSA.

B. The Motions[1]

The four motions before the court are consolidated for decision here and are as follows:

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[1] As these are motions for summary judgment (motion sequence number 002 in the 11E68 Action excepted), the facts recited below are taken from the parties' Rule 19-a statements.

1. In the Madison Action:

   a. Motion sequence number 001- Madison's motion for partial summary judgment as to the

      (i) First Cause of Action against Royal for breach of Escrow Agreement;

      (ii) Second Cause of Action against 11E68 for breach of the implied covenant of good faith and fair dealing as to the Escrow Agreement; and

      (iii) Third Cause of Action for declaratory judgment that Madison is entitled to the escrow funds.

   b. Motion sequence number 002- 11E68's motion for partial summary judgment dismissing the Fourth Cause of Action for 11E68's failure to respond to certain inquiries. (This motion is the same as motion sequence number 002 in the 11E68 Action).

2. In the 11E68 Action:

   a. Motion sequence number 002- 11E68's motion for partial summary judgment dismissing all counterclaims.[2] The counterclaims are:

      (i) First Counterclaim, breach of good faith and fair dealing, for objecting to the release of the escrow funds;

      (ii) Second Counterclaim for failure to respond to reasonable inquiries; and

      (iii) Third Counterclaim for declaratory judgment that Madison is entitled to the funds.

   b. Motion sequence number 003- Madison's motion for partial summary judgment seeking to dismiss all five causes of action and to grant the first and third counterclaims as follows:

      (i) First Cause of Action - breach of contract for misrepresentation re: Unit SE3;

      (ii) Second Cause of Action - breach of contract for misrepresentation re: Units SE5 and 6;

      (iii) Third Cause of Action - breach of contract for misrepresentation re: Units

[2] 11E68 filed the same papers upon this motion sequence number 002 in the 11E68 Action as those it filed upon motion sequence number 002 in the Madison Action.

SE7 and 8;

(iv) Fourth Cause of Action - breach of the implied covenant of good faith and fair dealing for misrepresentations as to the Units;

(v) Fifth Cause of Action - fraud and fraudulent inducement for the same misrepresentations, failure to disclose information, failure to provide complete Lease Files;

(vi) First Counterclaim - breach of the implied covenant of good faith and fair dealing re: Escrow Agreement for objecting to the release of the escrow funds to Madison; and

(vii) Third Counterclaim - declaratory judgment that Madison has not breached the PSA

II. MADISON ACTION- MADISON PARTIAL SUMMARY JUDGMENT MOTION

A. The Facts

Sale of the Property was accomplished pursuant to the terms of a purchase and sale agreement (the PSA). Section 7.1 of the PSA sets forth certain representations and warranties made by Madison. Section 10.3 of the PSA provides procedures for addressing claims based on breaches of those representations. Also, pursuant to section 2.7, $2.5 million of the sale price was retained by defendant escrow agent Royal Abstract of New York LLC (Royal) as security for certain contingencies incident to the sale.

Section 10.3 of the PSA sets out the process by which 11E68 may claim against the escrow funds for breach of Madison's representations and warranties. That section provides:

> Any claim by Purchaser, whether made prior to or after the Closing, of a breach of one or more of Seller's representations and warranties pursuant to Section 7.1 or a breach of an indemnity set forth herein or in any document delivered by Seller at the Closing (individually or collectively, as applicable (a "Breach") shall be made by Purchaser delivering to Seller written notice (a "Claim Notice") promptly after Purchaser has learned of such Breach and, in all events, prior to expiration of the Representation Survival Period . . . . TIME SHALL BE OF THE ESSENCE in respect of Purchaser's obligation to deliver to Seller a Claim Notice as and when and in the manner herein provided. . . . Purchaser's and Seller's rights and remedies in respect of any alleged Breach shall, without limiting the foregoing, be as hereinbelow provided:

> 10.3.1 Notwithstanding anything to the contrary herein contained, from and after the date of Closing, with respect to any asserted Breach by Seller, (a) Seller shall have no liability to Purchaser (i) if Purchaser has not delivered a Claim Notice with respect thereto as required pursuant to Section 10.3 above (the Breaches described in this clause (i) being herein referred to as "Nonqualifying Breaches") and (ii) unless and until there shall be found to have existed pursuant to a final, nonappealable order of a court of competent jurisdiction one or more Breaches other than Nonqualifying Breaches that would result individually or in the aggregate in a diminution in value of the Property or costs or losses to Seller in excess of the Floor Amount, (b) Purchaser shall in no event whatsoever be entitled to recover consequential damages against Seller with respect to any such asserted Breach and (c) the aggregate liability of Seller arising by reason of or in connection with all such alleged Breaches, whether asserted prior to or after the Closing, shall not in any event exceed $1,700,000.00.
>
> 10.3.2 If Purchaser shall not have made a claim for Claimed Damage within the Representation Survival Period, and if Purchaser shall not have made a claim for CO Costs pursuant to Section 2.7 within the CO Survival Period, the Post Closing Escrow shall be paid to Seller upon the expiration of the CO Survival Period. . . ."

The Representation Survival Period, during which 11E68 could make a claim against the escrow funds by providing a detailed notice simultaneously to Madison and Royal, ended on December 29, 2012, one year after the closing date. The escrow funds were held pursuant to the terms of a Holdback Escrow Agreement (the Escrow Agreement) to which Madison, 11E68, and Royal were parties. If no notice was received prior to expiration of the Representation Survival Period, Royal was required to disburse the funds to Madison.

On May 9, 2012, 11E68 sent Madison a notice asserting breach of certain representations and claiming damages. The representations were related to several units in the Property which 11E68 contends Madison had represented were storage units, and leased as such, but which turned out to be occupied as part of certain residential apartments (the Units).[3] 11E68 claims it incurred damages in the form of settlement payments to the lessees of these units. Madison claims the settlement payments covered disputes with the lessees related to 11E68's construction around

[3] The following units were specified:
Unit SE3, occupied by the Truglio family
Units SE7 and 8, occupied by Geraldine Greengrass
Units SE5 and 6, occupied by Merryl Siegel

those residents' units, relocation during construction, rent abatements, and moving of their storage units.

No notice was sent to Royal prior to December 29, 2012, the expiration of the Representation Survival Period,. On August 1, 2013, Madison sent Royal a letter requesting release of the escrow funds. On August 6, 2013, 11E68 sent Royal a letter, notifying Royal of its dispute with Madison. Royal has not distributed any funds from the escrow account.

B. Arguments

As to the first branch of the Madison motion against Royal for release of the escrow funds, Madison references section 3 of the Escrow Agreement, which provides:

> "Any claim by Purchaser of a Seller Obligation shall be made by written notice (a "Claim Notice") delivered simultaneously to Seller and Escrow Agent . . . promptly after Purchaser has learned of such Seller Obligation and, in all events, during the period ending on the first (1st) anniversary of the Closing Date (the "Survival Period") . . . ."

(Escrow Agreement, Madison Action, NYSCEF Doc. No. 32)[4]. Madison also cites to section 6 of the Escrow Agreement which states:

> "if, upon the expiration of the Survival Period, Escrow Agent has not received any Claim Notices from the Purchaser . . . Escrow Agent shall disburse all Escrow Funds remaining, together with any interest earned thereon, to the Seller . . . and this Agreement shall be terminated."

The notices are required to be in writing and delivered in a particular manner: "Notices shall be valid only if served in the manner provided above" (*id.* at section 9). Madison maintains that proper notice was a condition precedent for Royal to withhold the funds, and that such notice must be strictly enforced. As no claim notice was sent to Royal during the limitations period, Madison argues it was entitled to immediate release of the funds and Royal's failure to deliver those funds constituted a breach of the Escrow Agreement.

As to the second branch of the motion this against 11E68 for breach of the covenant of good faith and fair dealing for objecting to Royal's disbursement of the escrow funds without the proper notice, Madison claims 11E68 is jointly and severally liable for Madison's damages, plus

[4] Royal filed no papers in connection with the motion.

the difference between statutory interest and the interest accrued by the escrow funds. 11E68 argues that any non-compliance with the notice requirements is merely technical, that Madison was aware of its claim, and 11E68 substantially complied with its obligations under the Escrow Agreement, providing Madison with actual notice, which is sufficient (Opp at 9, citing *Peter Scalamandre & Sons, Inc. v FC 80 Dekalb Assoc., LLC*, 129 AD3d 807, 809 [2d Dept 2015][notice provision at issue was "not a condition-precedent type notice provision setting forth the consequences of a failure to strictly comply. Thus, substantial compliance with the notice provision will suffice"] and *Abax, Inc. v Lehrer McGovern Bovis, Inc.*, 8 AD3d 92, 93 [1st Dept 2004]["Since the above-enumerated claims had been the subject of sufficient correspondence to make them well known to the contract manager, complete technical compliance with the notice of claim requirements was not necessary"]). 11E68 also cites *Am. Honda Fin. Corp. v One 2008 Honda Pilot*, for the proposition that "in cases where actual notice was conceded, there are precedents to the effect that strict compliance with the letter of a notice provision was not required" (24 Misc 3d 745, 750 [Sup Ct 2009]).

It is undisputed that Madison received notice. 11E68 points out that the notice provisions in the Escrow Agreement do not state that "time was of the essence" (*id.*). Only the PSA has such a term, and 11E68 complied with that requirement (*id.* at 11-12). Accordingly, 11E68 argues that it substantially complied, that its failure to send Royal a notice was *de minimus*, and that Madison lacks the clean hands required to receive equitable relief. 11E68 also argues that Madison did not give it a reasonable amount of time to perform before demanding release of the escrow funds from Royal, as Madison's notice to Royal did not allow 11E68 time to perform (*id.* at 11-12). 11E68 further claims that Madison's failure to seek return of the escrow funds estops Madison from demanding strict compliance with the notice provision and effectively ratifies the notice (*id.* at 12-13). 11E68 claims the notification cannot provide a basis for Madison's second cause of action, as it was entitled, under the Escrow Agreement, to notify Royal of a dispute.

11E68 also maintains Royal cannot be held liable for breach of the Escrow Agreement, as that agreement has a limitation of liability clause, which states that Royal "shall not be liable for any loss, costs or damage which it may incur as a result of serving as Escrow Agent hereunder, except for any loss, costs or damage arising out of its willful default or gross negligence. (b) Accordingly, Escrow Agent shall not incur any liability with respect to . . . any action taken . . . in

reliance upon any document, including any written notice" (Opp at 15-16, quoting Escrow Agreement at § 10, NYSCEF Doc. No. 114). Thus, Madison cannot establish breach without showing Royal's willful default or gross negligence and Madison has not done so. Accordingly, Madison's motion as to the first cause of action must fail (Opp at 17). Further, once Royal was informed of the existence of a dispute, it was duty bound not to release the funds (Opp at 18).

As to Madison's claim for prejudgment interest, 11E68 argues that the Escrow Agreement provides for the funds to be placed in an interest-bearing account, which interest shall be turned over with the principal funds, Madison is limited to the interest actually earned by the funds (Opp at 21, citing *Ithilien Realty Corp. v 176 Ludlow, LLC*, 139 AD3d 582, 583 [1st Dept 2016][the contract's terms, providing for accrued actual interest, indicated that statutory interest was not contemplated, and "the amount escrowed, including interest earned, should be the exclusive remedy to the wronged party"]).

In its reply, Madison asserts for the first time that it should be granted summary judgment on its Third Cause of Action (declaratory judgment) since Royal, which is in possession of the funds, did not oppose the motion. Madison states that while 11E68 cited cases where contractual notice provisions were not enforced, the notice provision here requires strict compliance, as the Escrow Agreement provides that "[n]otices should be valid only if served in the manner provided above" (Reply at 4, Escrow Agreement at §9, citing *Lynbrook Glass and Architectural Metals Corp. v Elite Assoc., Inc.*, 225 AD2d 525, 526 [2d Dept 1996][enforcing the notice terms of a bond and noting "[t]he enforceability of notice of claim requirements has consistently been upheld"]; *Schiavone Const. Co., Inc. v City of New York*, 106 AD3d 427, 428 [1st Dept 2013] ["allowing plaintiffs to ignore [the notice] procedures would be to contravene long-standing black-letter law that a contract should not be read to 'render any portion meaningless' and should be 'so interpreted as to give effect to its general purpose']). Actual notice to Madison of a dispute does not excuse Royal's obligations under the Escrow Agreement (Reply at 5).

As to 11E68's arguments that time was not "of the essence" and that it was not given a reasonable amount of time to comply after Madison made its request for the release of the funds, Madison maintains that, as the PSA and the Escrow Agreement were entered into at the same time, they should be read in unison. Thus, as the PSA provides that time is of the essence with respect to the provision of a claim notice, the requirement applies to the escrow funds as well (Reply at 5-

6; PSA ¶10.3). Even without the PSA, the Escrow Agreement provides a clear time limitation which should be enforced (Reply at 6, citing *Provident Loan Soc. of New York v 190 E. 72nd St. Corp.*, 78 AD3d 501, 502 [1st Dept 2010]["the clear and unambiguous time requirements for . . . notice-default . . . should be enforced according to the parties' intent as expressed in the lease"]). In any event, 11E68's seven month delay in providing notice is not reasonable. Finally, Royal's obligation to release the funds accrued at the expiration of the limitations period, without any action required by Madison. Thus, no act, or failure to act, by Madison after that date constitutes a waiver (Reply at 7). Royal's failure to distribute the funds, despite the terms of the contract, was a willful default, a mere voluntary default in performance, as distinct from willful misconduct or gross negligence, is sufficient (*id.* at 10 n7).

C Discussion

1. First Cause of Action (Against Royal), Breach of Escrow Agreement

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

11E68 does not dispute the existence of the Escrow Agreement or Madison's performance. The issue is whether Royal's refusal to release the funds was proper, given that the notice provided by 11E68 did not comply with the terms of the agreement and arrived after Madison's timely instruction to Royal to release the funds and long after the expiration of the Survival Period. 11E68 argues the deviations from the terms of the contract were *de minimis*, and, even if the notice was

not proper pursuant to the Escrow Agreement, Royal was required to hold on to the escrow funds once it became aware of the dispute. Finally, the Escrow Agreement limits Royal's liability.

11E68 relies on *Abax, Inc. v Lehrer McGovern Bovis, Inc.*, which states that "[s]ince [certain] claims had been the subject of sufficient correspondence to make them well known . . . , complete technical compliance with the notice of claim requirements was not necessary" (8 AD3d 92, 93 [1st Dept 2004]). However, the First Department noted its decision was limited to the "particular circumstances presented," which were not detailed in the decision (*id.*). 11E68 also relies on *Dellicarri v Hirschfeld*, which declined to enforce the notice requirements at issue because "[a] contingency date . . . may be orally waived even though the sales contract . . . provides that no modification may be made except in writing" (210 AD2d 584 [3d Dept 1994])[5], and *Christy v Premo*, in which the Third Department found the equitable remedy of specific performance was not available to a plaintiff which lacked clean hands by virtue of its receipt of "actual notice of defendant's desire to cancel the contract within the time frame set by the contract," although the notice was sent by fax and mail, rather than the required certified or registered mail (194 AD2d 910, 911-12 [3d Dept 1993]). However, 11E68 claims only to have provided actual notice to Madison, but not to Royal.

The Escrow Agreement provides that

> If, upon the expiration of the Survival Period [December 29, 2012], Escrow Agent has not received any Claim Notices from the Purchaser or if all Claim Notices received from the Purchaser have been resolved by the Seller and the Purchase, Escrow Agent shall disburse all Escrow Funds remaining, together with any interest earned thereon, to the Seller, in accordance with Seller's written instructions, and this Agreement shall be terminated.

(Escrow Agreement, ¶ 6). 11E68 admits that "[a]s of the expiration of the . . . Survival Period, [it] had not made any claim on the Escrow Funds" (19-a Statements, ¶ 29). Accordingly, Royal had an obligation to disburse the funds to Madison without any further action by Madison. Moreover, on August 1, 2013, Madison sent Royal a letter instructing Royal to disburse the funds. Royal's

[5] While that portion of the decision was rendered invalid by General Obligations Law § 15-301, which requires a writing to amend an agreement containing a term which states it cannot be changed orally (*see Club Haven Inv. Co., LLC v Capital Co. of Am., LLC*, 98CIV8564(MBM), 2000 WL 913965, at *1 [SDNY June 21, 2000]), the Escrow Agreement has no such clause.

failure to do so was a breach of the Escrow Agreement, as, at that time, Royal had no notice of any claim or dispute by 11E68.

Regarding 11E68's assertion that Madison's delay in seeking the return of the escrow funds effectively waived strict compliance with the time limitation of the Escrow Agreement and requires, in equity, that the lateness of its notice also be waived, or that 11E68 be given time to perform after Madison's demand for the release of the escrow funds (Opp at 11-14), those claims are without merit. "The doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages" (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). The First Cause of Action is for breach of contract. It is not brought in equity. It seeks damages for Royal's breach of the Escrow Agreement. 11E68's equitable arguments are irrelevant.

As far as 11E68 argues that Royal had a fiduciary duty to both Madison and 11E68, and was obligated not to disburse the funds, the cases cited by 11E68 are inappropriate. In *Greenapple v Capital One, N.A.*, the plaintiff claimed that the document upon which the escrow agent relied for permission to disburse the funds was forged (92 AD3d 548, 549 [1st Dept 2012]). The court noted "an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement" (*id.*). *Takayama v Schaefer* considered "whether an escrow agent, where the escrow agreement is silent as to his or her duties in the event of a dispute, must deposit the funds in court . . . to avoid liability for interest and costs" (240 AD2d 21, 22 [2d Dept 1998]). The First Department, in *Ansonia Realty Co. v Ansonia Assoc.*, noted that the escrow agent should have obtained the purchaser's consent to release the escrow funds when the purchaser was entitled to additional time to close the sale, as the escrow agent, who was also the seller's attorney, was aware of the circumstances and "aided the seller in preventing the purchaser's compliance," making the delivery of the escrow funds "in disregard of the express contractual provisions" (142 AD2d 514, 518 [1st Dept 1988]). Compliance with the contract is paramount. The escrow agent has "a duty not to deliver the escrow to any one except upon strict compliance with the conditions imposed" (*Farago v Burke*, 262 NY 229, 233 [1933], quoted in *Takayama*, 240 AD2d at 25). In this case, the provisions of the Escrow Agreement required Royal to disburse the funds to Madison upon receipt of Madison's instruction. Royal failed to do so.

The limitation of liability clause in the Escrow Agreement is not effective here. Section 10(a) provides that Royal "shall not be liable for any loss, costs or damage which it may incur as a result of serving as Escrow Agent hereunder, except for any loss, costs or damage arising out of its willful default or gross negligence." Willful default merely means a voluntary act constituting a default of the agreement (*see Pearce, Urstadt, Mayer & Greer Realty Corp. v Atrium Dev. Assoc.*, 77 NY2d 490, 493 [1991]). In this sense, Royal's failure to transfer the money after receiving Madison's August 1 instruction was a willful default. Accordingly, Royal may be held responsible for damages.

As to Madison's request for statutory interest on the escrow funds, Madison will receive, as prejudgment interest, the interest earned on escrow account, as contemplated by the Escrow Agreement. "[T]he purpose of awarding interest is to make an aggrieved party whole" (*Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577, 581 [2001]). The Escrow Agreement does not directly address the question of statutory interest. It provides that the Escrow Funds provided by Madison shall be placed in an interest-bearing account, and that the accrued interest be disbursed to Madison along with the remaining Escrow Funds after any dispute over those funds is resolved (Escrow Agreement, ¶ 2). The parties contemplated the prospect of litigation over disbursement of the Escrow Funds, and, in the event of such litigation, considered the interest earned on the Escrow Funds sufficient compensation for being temporarily deprived of the use of the funds (*see id.*, ¶¶ 6-7. *See also Ithilien Realty Corp. v 176 Ludlow, LLC*, 139 AD3d 582, 583 [1st Dept 2016] ["the court improvidently exercised its discretion in awarding statutory prejudgment interest . . . . The contract's terms, requiring that the down payment be placed in an interest-bearing account, so that the party entitled to the down payment would receive compensation for the deprivation of its use of the money in the form of accrued interest, were sufficiently clear to establish that interest paid at the statutory rate was not contemplated by the parties at the time the contract was formed and that the amount escrowed, including interest earned, should be the exclusive remedy"]).

2. Second Cause of Action (Against 11E68), Breach of Implied Covenant of Good Faith and Fair Dealing as to Escrow Agreement

As discussed above, once Royal received Madison's demand for the escrow funds, it was obligated to disburse the funds. Madison claims 11E68 breached the implied covenant of good

faith and fair dealing by subsequently directing Royal not to release the funds in its August 6 letter (NYSCEF Doc. No. 35).

It is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the plaintiff must allege facts that tend to show that the defendants sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 222 AD2d 17, 22 [1st Dept 1996]).

As Madison was entitled to the disbursement of the escrow funds once Royal received the August 1 demand, the undisputed evidence shows that 11E68's August 6 letter was, on its face,

intended to stop Royal from performing pursuant to the Escrow Agreement. However, its actions were as much intended to protect its rights as to which Madison had actual notice, as it was to deny Madison the benefit of the contract pending a resolution of the parties' dispute. This claim shall be denied.

3. Third Cause of Action Declaratory Judgment Regarding Madison Entitlement to Escrow Funds

CPLR 3001 states: "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "Under the principle that a court may legitimately exercise judicial discretion by declining declaratory relief where the plaintiff has another adequate remedy, courts have held that a declaratory judgment action should normally not be entertained when a full and adequate remedy is already provided through other judicial proceedings, such as . . . an action for breach of contract" (NYJUR DECLJUDS § 13). As the breach of contract claim discussed above provides a full and adequate remedy for Madison, this effectively being a claim for delivery of the escrowed funds, this claim shall be dismissed.

III. MADISON ACTION- 11E68 PARTIAL SUMMARY JUDGMENT MOTION

11E68 moves motion sequence number 002, using the same papers in both actions, (i) to dismiss Madison's Fourth Cause of Action in the Madison Action (for 11E68's breach of the PSA by failing to respond to information inquiries) and (ii) for summary judgment dismissing Madison's Second Counterclaim in the 11E68 action (for breach of the PSA) pursuant to CPLR 3212. 11E68 also seeks dismissal of Madison's three counterclaims in the 11E68 Action (breach of the Escrow Agreement's implied covenant of good faith and fair dealing, breach of the PSA and declaratory judgment concerning the PSA) pursuant to CPLR 3211(a)(4).

Madison does not oppose the portion of the motion which seeks to dismiss its Fourth Claim in the Madison Action, for breach of the PSA based on 11E68's failure to respond to information inquiries. Madison also does not oppose the dismissal of its Second Counterclaim in the 11E68 Action, which makes the same claim. Accordingly, the only remaining portion of this motion relates to 11E68th's motion to dismiss the First and Third Counterclaims in the 11E68 Action, and shall be discussed next.

IV. 11E68 ACTION- 11E68 MOTION TO DISMISS COUNTERCLAIMS

A. Arguments

11E68 moves (motion sequence number 002), pursuant to CPLR 3211(a)(4), to dismiss the First and Third Counterclaims in the 11E68 Action as duplicative of the Second and Fifth Causes of Action in the Madison Action, respectively. 11E68 argues that these counterclaims are identical to those claims, and so they may be dismissed (002 Memo at 11, citing *Reynolds Metals Co. v Speciner*, 6 AD2d 863 [1st Dept 1958] ["The court should not, in the exercise of discretion, entertain an action for a declaratory judgment where the matter sought to be adjudicated is the subject of another action pending, which when tried, will dispose of all the issues involved in the declaratory judgment action"] and *JC Mfg., Inc. v NPI Elec., Inc.*, 178 AD2d 505, 506 [2d Dept 1991]["both actions . . . are based on the same contractual agreements and arise out of the same actionable wrongs. Additionally, there is substantial identity of the parties, and the nature of the relief sought is substantially the same. We see no good reason for two actions rather than one"]).

Madison opposes the request, although it does not deny the counterclaims are duplicative. It suggests the court use its discretion to consolidate the claims for trial, rather than dismiss the counterclaims. Madison reminds that the cases have already been consolidated for discovery and trial (*see* Decision and Order dated July 10, 2014 in 11E68 Action, NYSCEF Doc. No. 21). Alternatively, Madison argues that 11E68 has waived this objection by waiting so long to bring this motion (Opp at 11). Finally, Madison points out that these claims are before the court in Madison's various motions for summary judgment (*id.*).

11E68 counters that to keep these counterclaims alive "would serve no useful purpose"(Reply at 9, quoting *Frank Pompea, Inc. v Essayan*, 36 AD2d 745 [2d Dept 1971]). While the two cases were joined for the purpose of discovery and trial, they have not been consolidated, making these counterclaims duplicative and unnecessary (Reply at 10). Further, Madison's Third Counterclaim is duplicative (as a mirror image) of 11E68's breach of contract claims (*id.* at 13). Finally, 11E68 preserved this objection by making it in its answer to the counterclaims.

B. Discussion

CPLR 3211(a)(4) provides that a party may move to dismiss if "there is another action pending between the same parties for the same cause of action in a court of any state or the United

States," although "the court need not dismiss upon this ground but may make such order as justice requires." The First Counterclaim is duplicative of Madison's Second Cause of Action in the Madison Action, for breach of the implied covenant of good faith and fair dealing in the Escrow Agreement. Because the issue has been decided as discussed above, this claim is of no moment. Madison's First Counterclaim shall be dismissed.

Madison has abandoned the Second Counterclaim, regarding the failure to respond to inquiries. This counterclaim too shall be dismissed.

The Third Counterclaim is duplicative of the Fifth Cause of Action (for a declaratory judgment of non-breach) in the Madison Action. It must be dismissed as duplicative and in the interest of efficiency, as the issues raised by this counterclaim will be fully litigated in the Madison Action. While Madison argues that collateral estoppel or res judicata should apply to this claim, to match the outcome to Madison's motion for summary judgment as to the Fifth Cause of Action in the Madison Action, Madison did not move for summary judgment as to the Fifth Cause of Action. It is not at issue here.

V. 11E68 ACTION-MADISON PARTIAL SUMMARY JUDGMENT MOTION-003

A. Facts

In § 7.1.5 of the PSA, Madison represented that:

> "There are no leases or other occupancy agreements or arrangements of all or any portion of the Property entered into by Seller or any predecessor and any Space Lessees other than those set forth in Exhibit E attached here to and made a part hereof (such leases or occupancy agreements, together with all renewals, replacements and amendments thereof entered into after the date hereof . . . being herein referred to as the "Space Leases"). The Space Leases represent the entire agreement between the Seller and the Space Lessees in connection with the occupancy of the space covered by each respective lease. Seller has delivered or made available to Purchaser for its review true and complete copies of the Space Leases and, to the extent in Seller's possession or control, all lease files and all material correspondence (collectively, the "Lease Files"). In the event that there is any discrepancy between (a) the information contained in Exhibit E and Exhibit F and the representations and warranties made herein and (b) the terms and provisions of any of the Space Leases or the materials comprising the Lease Files, the terms and provisions of the Space Leases and the Lease Files shall govern and be effective between the parties, and Seller shall not be deemed to have breached the representations contained in this Section 7.1"

(emphasis added). The PSA also states that "Purchaser has not relied on any representations or warranties other than as expressly set forth herein, in either case express or implied, as to . . . (e) the current or future use of the property . . . [or] (j) the ability to relocate any Space Leases or to terminate any Space Leases" (PSA, §7.3). Section 10.3 of the PSA requires 11E68, if it wished to make a claim for the breach of a representation and warranty, to deliver a written notice to Madison prior to the expiration of the Survival Period, describe the alleged breach, name the section of the PSA implicated, and offer a good-faith calculation of claimed damages. Section 10.3.1 sets the aggregate limit of Madison's liability for possible breaches of representations and warranties at $1,700,000. Section 10.3.2 provides that, at the end of the Survival Period, if 11E68 did not make claims, the escrow agent would deliver the balance of the escrowed funds to Madison.

Before entering into the PSA, and continuing up to the time of the closing, 11E68 conducted due diligence, which included reviewing materials provided by Madison, property tours, and reviews of city records. The materials provided by Madison included what the PSA refers to as the Lease Files. 11E68 disputes whether the Lease Files were complete, and provides deposition testimony in support of that position (Response to SoF, ¶ 21). 11E68 reviewed the Certificate of Occupancy (CofO) for the Property. 11E68 disputes whether it was included as part of the Lease Files, but admits the CofO listed the 7th and 12th floors of the Property as having "maids' rooms" (the Units)(*id.* ¶ 23-24). At the time of closing, 11E68 was aware that certain units in the Property designated "professional" spaces in the CofO were being used as residential units. The parties dispute whether Madison was aware that the "maids' rooms" on the 12th floor were being used other than for storage (SoF and Response to SoF, ¶ 32). 11E68 subsequently relocated the items in the Units to storage spaces elsewhere in the Property. Those actions resulted in disputes and subsequent settlements with the Units' tenants.

On May 9, 2012, 11E68 sent a letter to Madison asserting breach of the PSA based on Madison's failure to disclose that the Units were being used residentially, rather than only for storage, and claiming $1,950,000 in damages. There is no evidence the letter was sent to Royal.

B. Arguments

1. 11E68 Fifth Cause of Action (Fraud and Fraudulent Inducement)

a. Madison Argument

Madison argues summary judgment should be granted to it dismissing the Fifth Cause of Action because it is duplicative of the contractual claims, is covered by a disclaimer in the PSA, and is unsupported by evidence. Madison argues 11E68 cannot establish reasonable reliance on Madison's representations about the status of units SE3, SE5, SE6, SE7, and SE8, either in or out of the PSA (003 Memo at 5). First, in the PSA, 11E68 disclaims reliance on representations outside the four corners of the agreement (*id.*, PSA ¶ 7.3). That clause states: "[11E68] has not relied on any representations or warranties other than as expressly set forth herein . . . as to . . . the current or future use of the property or [,] the ability to relocate any Space Leases and" so on. Therefore, representations made outside the PSA cannot support a fraud claim. Additionally, 11E68 was aware, as of the closing date, that the Units may have been in use for purposes other than storage (003 Memo at 7). 11E68 had access to the Certificate of Occupancy which listed the Units as "Maids' Rooms" (*id.*, SoF ¶¶ 23-24). Having had access to this information, 11E68 cannot establish reasonable reliance on any representations that the Units were merely storage. Nor can 11E68 establish the required fraudulent intent, as there is no evidence Madison even knew the tenants of the Units claimed those Units as part of their residential apartments (003 Memo at 9).

b. 11E68 Opposition

11E68 points to misrepresentations by Madison's principal, Scharf, that the Units were storage rather than part of the tenants' residence (003 Opp at 3). 11E68 argues this claim seeks different damages than the contract claims and is based on different conduct, specifically, failures to disclose information, and to turn over all Lease Files (*id.* at 4). Scharf assured 11E68 that the files were complete but withheld information about Madison's prior negotiations with tenants (*id.* at 6). 11E68 has shown that it would not have done the deal the way it did, had it known the true status of the Units. Notably, when it found out certain other rooms (the Chandel Rooms) were not used as storage, it delayed the closing and required Madison to contribute to a buy-out fund (*id.* at 6-7). 11E68 incurred over $2.3 million in unit relocation costs (*id.* at 7). The damages limitation in the PSA does not apply to this claim, as this claim is distinct *(id.)*. Nor can the PSA's exculpatory clause bar this claim, as the clause is not enforceable when the conduct includes intentional wrongdoing "in contravention of acceptable notions of morality" (*id.* at 8, quoting *Kalisch-Jarcho,*

Inc. v City of New York, 58 NY2d 377, 385 [1983]; *TIAA Glob. Investments, LLC v One Astoria Sq. LLC*, 127 AD3d 75, 86 [1st Dept 2015]).

11E68 also claims that the merger clause in the PSA does not bar this claim, as the PSA includes representations and warranties concerning this subject, and as fraud is an exception to a merger clause (003 Memo at 9; *W. 90th Owners Corp. v Schlechter*, 137 AD2d 456, 459 [1st Dept 1988]; *Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 668 [1st Dept 2011]). Further, 11E68 argues Madison had superior knowledge, peculiarly within Madison's possession, sufficient to support the fraud claim (*see Schooley v Mannion*, 241 AD2d 677, 678 [3d Dept 1997]). Scharf and Madison withheld relevant documents affecting 11E68's plans to use the space occupied by the Units from the Lease Files (*id.* at 11-12). Accordingly, there is a question of fact as to Madison's fraudulent intent (*id.* at 12). Further, the Certificate of Occupancy only shows the Units could legally be used as maid's rooms. Actual use of the Units was concealed *(id.)*. This was important because storage space could be relocated at 11E68's discretion. Residence space cannot.

c. Madison Reply

In reply, Madison maintains all five claims by 11E68 are based on the premise that 11E68 would have been able to relocate Units used for storage without cost, and that the use as part of residences created additional expenses. However, in *Truglio v VNO 11 E. 68th Street LLC*, a case involving these very apartments, the Civil Court of New York held that a landlord may not simply break in, empty, and demolish a maid's room, even one then used for storage (003 Reply at 3, quoting *Truglio v VNO 11 E. 68th St. LLC*, 35 Misc 3d 1227(A) [Civ Ct 2012]; *see also Olsen v 432 E. 57th St. Corp.*, 145 Misc 2d 970, 973 [Sup Ct 1989]). As 11E68 knew that a buyout would be needed, even of storage units, all five claims fail for lack of damages. Madison also argues that this claim is duplicative of the breach of contract claims, as it complains of the same conduct and seeks the same damages (003 Reply at 4-5). Further, 11E68 cannot show Madison's fraudulent intent or 11E68's reliance on any alleged misrepresentations.

2. 11E68 First, Second and Third Causes of Action (Breach of Contract)

a. Madison Arguments

Madison argues summary judgment dismissing these claims regarding uses of the Units should be granted because the conduct alleged did not breach the PSA *(id.)*. Further, the parties

agreed that 11E68's claim for a breach had to be made within the contractual limitations period against the escrowed funds (pursuant to the terms of the Escrow Agreement) (*id.* at 9-10). As 11E68 did not make its claim pursuant to the terms of the PSA, 11E68 has waived the claim (*id.*).

Madison also contends its representations in the PSA were limited (*id.* at 14). It represented that Exhibit E to the agreement accurately reflected the relevant leases along with the associated rents, and that those leases were all of the relevant agreements (*id.*, quoting PSA § 7.1.5). The PSA also states that, to the extent the Lease Files contradicted any representations or warranties, the Lease Files controlled. The Certificate of Occupancy was part of the Lease Files. Madison made no representations as to anyone's rights regarding the Units (003 Memo at 15).

Further, 11E68 admits it was aware of the discrepancy regarding the status of the Units before the closing (003 Memo at 17, SoF ¶ 25). Accordingly, Madison cannot be held liable for a failure to disclose that information (003 Memo at 18). Even if Madison could be held liable, 11E68's damages are limited by the PSA to $1,700,000[6] (*id.* at 18-19 quoting PSA § 10.3.1).

b. 11E68 Opposition

In opposition, 11E68 asserts that questions of fact exist regarding the representations made in the PSA § 7.1, specifically that the Units were used as storage and that the Lease Files were complete. The process for providing notice of a breach was set out in § 10.3 of the PSA. Pursuant to that section, on May 9, 2012, 11E68 sent notice to Madison regarding breach of the representations. The PSA does not provide that a claim against the escrowed funds is 11E68's sole remedy (003 Memo at 15). Any failure to provide notice to Royal under the terms of the Escrow Agreement does not affect the efficacy of 11E68's notice to Madison pursuant to the terms of the PSA (*id.* at 16). Neither agreement bars claims for the breach of the PSA.

11E68 argues triable issues of material fact are presented by its claim that Madison's representations that the Units were used for storage and that it had provided all of the Lease Files were false, constituting a breach of warranties in the PSA, and thus the motion for summary judgment should be denied. 11E68 was entitled to rely on the bargained for representations, and any due diligence reviews 11E68 may have done is irrelevant (*see CBS, Inc. v Ziff-Davis*

[6] At oral argument on the motions, counsel for 11E68 conceded that damages on 11E68's contract claims is so limited.

Publishing Co., 75 NY 2d 496, 503 [1990] ["The critical question is not whether the buyer believed in the truth of the warrantied information [. . .] but whether [it] believed [it] was purchasing the [seller's] promises [as to its truth]]). Further, Madison's misrepresentations were clearly intentional because of its principal's, Sharf's, direct involvement in negotiations with tenants concerning the Units (*id* at 21). Whether the misrepresentations rise to the level of bad faith or were made through mere negligence, presents issues of fact which requires denial of the motion summary judgment.

c. Madison Reply

In its reply, Madison reiterates that 11E68 cannot establish any injury or damages arising from Madison's conduct. Further, 11E68 waived its sole remedy under the PSA, as 11E68 failed to make a timely claim on the escrow funds (003 Reply at 8). While 11E68 gave notice to Madison, the Escrow Agreement required it to provide notice to Royal as well (*id.*).

.Madison also asserts that it did not breach any of the representations in the PSA, as it never represented that the Units were actually being used as storage units (*id.* at 10). The representation in PSA section 7.1.5 merely stated that the leases in Exhibit E to the PSA and the Rent Roll (a defined term) in Exhibit F were accurate and complete (*id.*). Further, Madison argues that the Units were, in fact, used for storage, as the suits filed by tenants after the relocation refer to certain of the Units as "storage space" or "guest room/storage room" (*id.* at 11). As far as 11E68 claims the Lease Files were incomplete, the omitted Siegel correspondence does not contradict the Lease Files or the PSA regarding the use of Mr. Siegel's units, SE5 and SE6 (*id.* at 12). 11E68 was also aware of the uses of the Units before the closing and of the need for negotiated buyouts (Guglielmone aff, attached as Exhibit 32 to Scharf Reply Aff, NYSCEF Doc. No. 179, pp 53-54). Accordingly, Madison cannot be held responsible for a breach of the warranty, and there can be no damages as a consequence of any breach, because 11E68 was aware of the facts (003 Reply at 12-13).

3. 11E68 Fourth Cause of Action (Breach of Implied Covenant of Good Faith and Fair Dealing) and Madison Third Counterclaim (Declaratory Judgment)

11E68's Fourth Cause of Action for breach of the implied covenant of Good Faith and Fair Dealing is based on Madison's (1) failure to disclose the actual use of the Units and (2) obtaining

an interest in the portion of the penthouse with empty storage units, as Scharf knew. Madison responds that 11E68 has provided no evidence of Madison's bad faith and that this claim, which seeks the same remedy as the breach of contract claims, is duplicative (003 Reply at 14-15).

In its Third Counterclaim, Madison seeks a declaration that it did not breach the PSA for the reasons discussed immediately above. 11E68 responds that Madison's breach of the PSA is question of fact, and the PSA does not bar its claim.

C. Discussion

1. 11E68 Fifth Cause of Action (Fraud and Fraudulent Inducement)

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

11E68 bases this claim on allegations that, in the PSA, Madison represented that units SE3, SE5, SE6, SE7, and SE8 were storage units only, and Madison failed to disclose information available to Madison only, including e-mails from the Siegel tenants regarding units SE5 and SE6 (Complaint, ¶¶ 46-51). In the PSA, Madison represented that "[t]here are no leases or other occupancy agreements or arrangements of all or any portion of the Property entered into by Seller or any predecessor and any Space Lessees other than those set forth in Exhibit E attached here to

and made a part hereof" (PSA, § 7.1.5). That section further provides that "[i]n the event that there is any discrepancy between (a) the information contained in Exhibit E and Exhibit F and the representations and warranties made herein and (b) the terms and provisions of any of the Space Leases or the materials comprising the Lease Files, the terms and provisions of the Space Leases and the Lease Files shall govern and be effective between the parties, and Seller shall not be deemed to have breached the representations contained in this Section 7.1" (*id.*).

There are no specific representations in the PSA as to the current uses of the Units. The Units are referred to on Exhibit E to the PSA (which exhibit is the Rent Roll) as "storage". The parties dispute who knew what about how the Units were being utilized by tenants. The uses to which the Units were put by the tenants has varied over time (*see, n. 7, infra*). It is undisputed that the CofO informed 11E68 before the closing that the Units were designated as "Maids' Rooms" (SOMF ¶¶22-23). Further, regardless of whether the Units were used by the tenants as maids' rooms, as portions of their residences, or as storage, the landlord was not entitled to relocate them unilaterally, without bringing a proceeding (*see Truglio*, 35 Misc 3d 1227[A] at *9).[7] Accordingly, there are no damages attributable to any purported misrepresentation by Madison. This claim shall be dismissed.

2. 11E68 First, Second and Third Claims (Breach of Contract)

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The PSA contains not representations regarding uses tenants made of the Units. As noted above, the references to "storage" on the Rent Roll are not warranties as to such uses. In any event and as discussed above, 11E68 cannot show damages from breach of the alleged representations, because, regardless of how the Units were used by tenants, 11E68 could not clear them without a court order. The First, Second and Third Causes of Action must be dismissed.

[7] *Truglio* involved tenants who had possession of Unit 5E3 of the Property. Counsel for 11E68 in this case represented the landlord in the *Truglio* proceeding. As recited in the published decision in that case, prior to 1976, the Units had been used as maid's rooms and were incorporated into the residential leases of the rent regulated apartments (*Truglio*, 35 Misc 3d 1227 [A], *15). Since that time, the Units were rented for storage purposes pursuant to separate agreements. The rent paid by the Truglios included $75.00 per month for Unit 5E3 but their lease made no reference to the unit (*id.* at *6). At various times since the Truglios took possession in 1992, they used the unit as an office/work space, a bedroom, and for storage (*id.* at *5-6).

3. 11E68 Fourth Claim (Good Faith and Fair Dealing Claim)

As with the fraud and breach of contract claims, no damages can be attributed to the alleged misrepresentations because 11E68 would have the same obligations and costs, regardless of how the Units were being used. This claim also shall be dismissed.

4. Madison Third Counterclaim

This claim must be dismissed as duplicative of Madison's Fifth Cause of Action in the Madison Action, as discussed above.

VI. CONCLUSION

With respect to the motions filed in the Madison Action and for the reasons discussed above:

1. As to motion sequence number 001, summary judgment is GRANTED in favor of Madison and against Royal as to the First Cause of Action for breach of contract and Royal shall promptly release the fund it is holding in escrow together with all accrued interest to Madison and post-judgment interest at the statutory rate shall be paid by Royal to Madison;

2. The motion is DENIED as to the Second and Third Causes of Action (see motion sequence number 002 in the 11E68 Action); and

3. The cross motion of 11E68 for partial summary judgment (motion sequence number 002) seeking dismissal of the Fourth Cause of Action is unopposed. The motion is GRANTED.

As to the motions filed in the 11E68 Action and for the reasons stated above:

1. The motion of 11E68 for partial summary judgment (motion sequence number 002) dismissing the first (breach of the implied covenant of good faith and fair dealing for objecting to release of the escrowed funds), second (for failure to respond to inquiries) and third (declaratory judgment that Madison is entitled to the escrowed funds) counterclaims is GRANTED and the First, Second, and Third Counterclaims are dismissed;

2. As to the motion of Madison for partial summary judgment seeking dismissal of the Fifth (fraud and fraud in the inducement), First, Second, and Third (breach of contract for misrepresentation as to Units SE3, SE5 and 6, and SE7 and 8), and the Fourth (breach of the covenant of good faith and fair dealing) Causes of Action and seeking summary judgment on its First (breach of the implied covenant of good faith and fair dealing) and Third (declaratory judgment) Counterclaims, the motion is GRANTED only as to that branch of the motion seeking

dismissal of the First through Fourth Causes of Action and is otherwise DENIED.

Madison shall settle an order on fourteen (14) days' notice.

This constitutes the decision and order of the court.

DATED: September 29, 2017

ENTER,

O. PETER SHERWOOD
J.S.C.