To commence the statutory time period of appeals as of right pursuant to (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: COMMERCIAL DIVISION

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GEORGE PAGANIS,

Plaintiff,

- against -

KALLIE EDGE, DIMITRIOUS VITALIOTIS, and VASILIOS GARGEROS,

Defendants.

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Index No. 60365/2018
Motion Seq. # 1, 2
Motion Date: 1/7/19

DECISION AND ORDER

WALSH, J.

Defendants Kallie Edge ("Edge"), Dimitrious Vitaliotis ("Vitaliotis"), and Vasilios Gargeros ("Gargeros") (collectively "Defendants") move pursuant to CPLR 3015(e)[1], 3211(a)(1), 3211(a)(5) and 3211(a)(7) for an Order dismissing each and every cause of action in the Amended Complaint filed by Plaintiff George Paganis ("Plaintiff") (Mot. Seq. No. 001). Plaintiff opposes the motion and cross-moves pursuant to CPLR 3211(a)(1), (5), and (7) for an Order dismissing each and every Counterclaim brought by Defendants (Mot. Seq. No. 002).[2]

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[1]Defendants refer to CPLR 3015(e) in their Motion to Dismiss and supporting Memorandum. As Defendants state the basis for this argument to be that the "allegations of fraud are inadequately pled in that Plaintiff does not allege fraud with any degree of particularity," they appear to be referring to CPLR 3016(b). The Court will reference this provision throughout this Decision and Order in place of CPLR 3015(e).

[2] Because Plaintiff did not receive permission to file this cross-motion pursuant to Commercial Division Rule 24, the Court has only considered the cross-motion to the extent it provides opposition to Defendants' motion. The denial of Plaintiff's cross-motion is without prejudice to Plaintiff's right to seek dismissal following the conclusion of discovery.

FACTUAL AND PROCEDURAL HISTORY

This action was initiated with Plaintiff's filing of a Summons and Complaint on July 6, 2018. The dispute between the parties arises out of Plaintiff's purchase of the business Briars Restaurant Corp. ("Briars Restaurant") from Defendant Gargeros and George Vitaliotis, the predecessor in interest of Defendants Edge and Vitaliotis, pursuant to a Contract of Sale executed on May 3, 2006 (the "Contract"). It also arises out of Plaintiff's subsequent lease of a building owned by Defendants located at 512 North State Street, Briarcliff Manor, Westchester County, New York (the "Premises") in which Briars Restaurant operates. The parties executed a Lease Agreement and a Rider (collectively the "Lease") for the Premises on July 5, 2007.

Essentially Plaintiff is claiming that he was induced to enter into the Lease based on false and misleading representations made by Defendant Gargeros and George Vitaliotis as to the condition of the Premises, primarily relating to adverse environmental conditions on the Premises. The Amended Complaint alleges that due to "Defendants' inability to cure these environmental issues, despite Plaintiff's requests, Plaintiff has been unable to use the entire Premises to operate Briars Restaurant for the past eleven (11) years, and will be unable to use the entire Premises to operate Briars Restaurant for the next nineteen (19) years" (Amended Complaint ¶ 10).

Defendants Edge and Gargeros filed Answers with Counterclaims and Plaintiff filed Replies to the Counterclaims. On October 26, 2018, Plaintiff filed an Amended Complaint and in December 2018 Defendants filed Answers with Counterclaims. On December 19, 2019, Plaintiff filed a Reply to Defendant Vitaliotis' Counterclaims. On January 7, 2019 Defendants filed the joint motion to dismiss the Amended Complaint currently at issue.

Discovery has not been stayed pending this motion to dismiss and based on the Preliminary Conference Order entered on October 10, 2018, all discovery must be completed by July 30, 2019 and a Trial Readiness Conference is scheduled for July 31, 2019.

THE AMENDED COMPLAINT'S ALLEGATIONS

Because the Court must accept as true the allegations of the Amended Complaint, unless they are utterly refuted by documentary evidence, for the purposes of this motion, the Court will undertake a summary of the Amended Complaint's allegations.

Plaintiff alleges that Defendants Edge, Vitaliotis, and Gargeros and/or their predecessors

in interest induced Plaintiff to enter into a Contract of Sale, dated May 3, 2006 to purchase Defendants' business known as Briars Restaurant for $450,000.00 (Amended Complaint ¶¶ 2, 20, 21). At the time the parties entered into the Contract, Briars Restaurant was operating its business at the Premises (*id.* ¶¶ 4, 19). Defendants allege that Plaintiff entered into the Contract based upon certain promises, including that: (a) "the premises is not contaminated by any toxic or hazardous waste and contains no contamination," and (b) that the seller would deliver " a valid and subsisting Certificate of Occupancy . . . covering the building(s) and all other improvements located on the property authorizing their uses as a commercial-restaurant business at the date of closing" (*id.* ¶ 22). Plaintiff further alleges that Defendant Gargeros and George Vitaliotis also induced Plaintiff to enter into a 30-year Lease Agreement (the "Lease") in order for Plaintiff to continue conducting the business at the Premises (*id.* ¶ 23).

Plaintiff asserts that, prior to entering into the Lease, he had a structural and environmental inspection of the Premises conducted by Certified Inspections, Inc. (the "Inspection Report") (*id.* ¶ 24). According to Plaintiff, the Inspection Report, dated November 15, 2006, indicated the potential presence of asbestos and lead paint throughout the Premises (*id.* ¶ 25). Plaintiff alleges that, upon receiving the Inspection Report, Plaintiff raised the potential presence of asbestos and lead paint as issues to Defendant Gargeros and George Vitaliotis (*id.* ¶ 26). Plaintiff further contends that Defendant Gargeros and George Vitaliotis made assurances that there was no asbestos or lead paint conditions existing on the Premises prior to Plaintiff entering into the Lease (*id.* ¶ 27). According to Plaintiff, they explained that the only environmental condition existing on the Premises previously was asbestos in the basement, which was the subject of an OSHA Complaint and adequately remediated (*id.* ¶ 27).

Plaintiff claims that, pursuant to the Rider to the Lease, Defendant Gargeros and George Vitaliotis assured Plaintiff that they had rectified the asbestos contamination in the basement (*id.* ¶ 28). Plaintiff alleges that, specifically, the Rider stated that "Landlord further warrants and represents that during the term Landlord's ownership and occupation of the Premises preceding the date of this Lease, Landlord upon information and belief has not adversely affected the environment of the Premises nor is aware of any claim of any environmental contamination except a claim by OSHA, Complaint No. 205178213, which said Complaint has been rectified

and/or corrected by the Landlord" (*id.* ¶ 29).

Plaintiff alleges that he entered into the Lease based upon these promises, specifically including that: (a) there was a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that none was required, covering the building and all improvements located on the Premises; (b) the second floor of the premises could be used and/or occupied as part of the business; and (c) there were no environmental hazards or conditions at or on the Premises (*id.* ¶ 30). Plaintiff claims that due to all of the foregoing alleged misrepresentations and lies made by Defendant Gargeros and George Vitaliotis, Plaintiff entered into the Contract of Sale and Lease (*id.* ¶ 31). Plaintiff alleges that he would not have entered into the Contract of Sale and Lease if Defendant Gargeros and George Vitaliotis had been honest about the conditions of the Premises (*id.* ¶ 31).

Plaintiff alleges that, at the time he entered into the Contract of Sale and Lease, the second floor of the Premises was being used and/or occupied by Defendant Gargeros and George Vitaliotis (*id.* ¶ 32). Plaintiff further alleges that Defendant Gargeros and George Vitaliotis were aware of the use of the second floor at that time (*id.*). Specifically, Plaintiff claims that Defendant Gargeros and George Vitaliotis used the second floor to provide housing for certain of their employees (*id.* ¶ 33). Plaintiff alleges that he believed the use of the second floor was valid and legal based upon the existing use and assurances from Defendant Gargeros, George Vitaliotis, and their agents in the Lease and Contract of Sale (*id.* ¶ 34). Plaintiff further alleges that, as a result of these assurances, he entered into the Contract of Sale, and negotiated the purchase price thereunder (*id.* ¶ 35). Plaintiff also alleges that, as a result of Defendant Gargeros' and George Vitaliotis' assurances, he also entered into the 30-year Lease, and negotiated the rental price thereunder (*id.* ¶ 36). According to Plaintiff, the negotiated rental price included a base rent of $7,500.00 per month, plus real estate taxes (*id.* ¶ 37). This rental price was allegedly based upon the occupation and/or use of the entire square footage of the Premises, which included the second floor of the Premises (*id.* ¶ 38).

After taking possession of the Premises, Plaintiff claims that he learned from the Town that the second floor could not legally be used for the operation of the Briars Restaurant (*id.* ¶ 39). According to the Plaintiff, the inability to use the second floor of the Premises, which comprises

1,047 square feet of the 2,818 square foot Premises, made it difficult for Plaintiff to operate a restaurant that was profitable enough to meet the rental price (*id.* ¶ 40). In 2008, Plaintiff alleges that he legally improved, expanded, and built out the Premises with an addition (the "Improvements") (*id.* ¶ 41). Plaintiff claims that he made such Improvements at his own expense (costing him approximately $500,000.00) (*id.* ¶ 42). Plaintiff alleges that the Improvements were necessary for Plaintiff to realize the maximum return on his rental of the Premises and to ensure that he could make adequate profit to meet the rental price (*id.* ¶ 43).

Plaintiff alleges that, upon information and belief, in October of 2013, George Vitaliotis died (*id.* ¶ 44), and, pursuant to the Last Will and Testament of George Vitaliotis, his two children, Defendants Edge and Vitaliotis, inherited the Premises (*id.* ¶ 45). Thereafter, Plaintiff alleges, on July 14, 2014, George Vitaliotis' interest in the Premises was transferred by deed to Defendant Edge and Defendant Vitaliotis (*id.* ¶ 46). Plaintiff contends that, upon inheriting the Premises, Defendants Edge and Vitaliotis became responsible for the landlord's performance under the Lease (*id.* ¶ 47).

Plaintiff alleges that, due to the cost of the Improvements and inflated rental price, more recently, in late 2016 through the beginning of 2017, Plaintiff again explored the option and cost of utilizing the second floor of the Premises for the operation of Briars Restaurant (*id.* ¶ 48). Specifically, Plaintiff claims that he needed additional space to make adequate profit in order to meet the rental price, and pay for the operations of the business (*id.* ¶ 49). During this time, Plaintiff contends that he withheld rental payments as a method of "self-help" during the months of December 2017, January 2017, February 2017, March 2017, April 2017 and May 2017 (*id.* ¶ 50). Plaintiff alleges that Defendants' attorney served a Notice for a Non-Payment Proceeding against Plaintiff, dated May 11, 2017 (the "Non-Payment Proceeding") (*id.* ¶ 51).

Plaintiff alleges that, upon information and belief, on May 25, 2017, counselors for Defendants and Plaintiff appeared at the Village of Ossining Justice Court in connection with the Non-Payment Proceeding (*id.* ¶ 52). He claims that, at the Court appearance, the Court set a trial date for the matter for July 27, 2017 (*id.* ¶ 53). Plaintiff further alleges that, in June 2017, while preparing for trial, he retained Kara Restoration Corp., a certified asbestos and lead paint testing

and removal company, to test the Premises for lead paint and asbestos (*id.* ¶ 54). Plaintiff contends that Kara Restoration Corp. determined that there was in fact lead paint and asbestos on the second floor and gave Plaintiff a scope of work and cost estimate to remediate the adverse environmental conditions on the second floor of the Premises (*id.* ¶ 55). Plaintiff further contends that in July 2017, while preparing for the trial, he contacted the Town of Ossining Building & Fire inspector via e-mail to determine whether there was a valid Certificate of Occupancy for the second floor of the building and whether the second floor could be used. (*id.* ¶ 56). The Building & Fire Inspector allegedly informed Plaintiff via e-mail that there is no Certificate of Occupancy on the original building, which includes the second floor, and that the second floor could only be used upon issuance of a building permit and compliance with all state and local ordinances (*id.* ¶ 57).

Plaintiff claims that, on July 27, 2018, Plaintiff and Defendants, and/or their representatives, appeared before the Village of Ossining Justice Court for the trial (*id.* ¶ 58). Plaintiff claims that, upon information and belief, the Court ordered him to pay all rent due and owed to Defendants, and required Defendants to test for lead paint and asbestos on the Premises (*id.* ¶ 59). Plaintiff alleges that, pursuant to the Justice Court's instructions, Defendants retained a certified environmental company, Environmental Assessments & Solutions, Inc. ("EAS"), to verify the findings of lead paint and asbestos from the Kara Report (*id.* ¶ 60). Plaintiff further alleges that EAS conducted an independent investigation of the Premises and subsequently issued a report verifying the existence of asbestos and lead paint on the second floor (the "EAS Report") (*id.* ¶ 61). Plaintiff claims that, despite the Kara Report and EAS Report verifying the asbestos and lead paint conditions on the Premises, Defendants have refused and continue to refuse to remediate the conditions (*id.* ¶ 62). Plaintiff claims that he has made several oral requests to Defendant Gargeros for Defendants to make such remediation (*id.* ¶ 63). More recently, Plaintiff claims, his attorney, Zarin & Steinmetz, also requested that Defendants abate the asbestos and lead paint conditions on the Premises, via letter dated March 2, 2018. Plaintiff alleges that Defendants failed to respond to the letter or remedy/abate the environmental conditions (*id.* ¶ 64).

Additionally, Plaintiffs claims, in or around July or August of 2017, he discovered evidence of a potential petroleum leak in the basement of the Premises (*id.* ¶ 65). Plaintiff alleges

that he had previously used the basement for dry-storage purposes associated with the operation of Briars Restaurant (*id.* ¶ 66). Plaintiff argues that, since the observation of a potential petroleum leak in the basement of the Premises, his use of that space has been severely limited to his detriment (*id.* ¶ 67). According to Plaintiff, his attorney's March 2, 2018 letter also requested that Defendants abate the petroleum leak conditions on the Premises. Plaintiff alleges that Defendants failed to respond to the letter (*id.* ¶ 68). To date, Defendants have refused to remediate the adverse environmental conditions despite numerous requests by and on behalf of Plaintiff (*id.* ¶ 69).

Plaintiff argues that he has been caused to suffer damages as a direct result of the Defendants' conduct (*id.* ¶ 70). Such damages include overpayment of rent for the past eleven (11) years, in an amount to be determined at trial, but no less than $504,680.00 (*id.* ¶ 71). He claims that these damages are derived from a report prepared by Balog Consulting (the "Balog Report"), which was retained by Plaintiff to determine the appropriate rental price for the square footage of the Premises out of which Plaintiff could actually use and/or operate Briars Restaurant out of (*id.* ¶ 72). According to Plaintiff, the Balog Report concludes that Plaintiff has been overpaying $45,880.00 in rent per year for the past eleven (11) years (*i.e.*, since the Lease began in 2007), because Plaintiff cannot use 1,047 square feet of the 2,818 square foot Premises (*i.e.*, the second floor) that he pays for (*id.*). Damages also include the cost incurred by Plaintiff to construct the addition in an act of "self-help" to mitigate lost profits, due to the inability to utilize the second floor of the Premises, in the amount of $500,000.00 (*id.* ¶ 73).

Plaintiff claims that Defendants' continued failure to remediate the adverse environmental conditions at the Premises constitutes a continuous harm to Plaintiff, because Plaintiff is unable to realize the return on his investment he initially anticipated and relied upon when entering into the Lease and Contract of Sale (*id.* ¶ 74). He argues that Defendants' continued failure to remediate the adverse environmental conditions at the Premises is also a continued violation of the Lease (*id.* ¶ 75). Furthermore, he alleges, that unless and until Defendants remedy the adverse environmental conditions at the Premises and obtain a Certificate of Occupancy for the entire Premises, Plaintiff's rent should be reduced to reflect fair rental value for only the portion of the Premises that can be used (*id.* ¶ 76). Plaintiff claims that his damages are a direct consequence of Defendants' acts or failure to act. (*id.* ¶ 77).

Plaintiff asserts five causes of action. For his First Cause of Action, he alleges that Defendants breached the Lease through failing to comply with "certain covenants in the Lease, including the covenant of quiet enjoyment." He argues that when a landlord does not "comply with applicable health and safety code provisions such as those relating to lead-based paint and asbestos removal, such inaction may give rise to a claim of breach of the covenant of quiet enjoyment" (*id.* ¶¶ 79, 80). He also claims that his "inability to use the second floor" is a breach of the Lease and Contract (*id.* ¶ 77). Plaintiff argues that he is entitled to damages "for overpayment of moneys previously paid to Defendants under the Lease" of an amount to be determined but no less than $504,680.00 (*id.* ¶ 84).

In his Second Cause of Action, Plaintiff alleges partial constructive eviction and argues that his "inability to use or occupy the second floor (due to the presence of asbestos and lead paint) and basement (due to the petroleum leak) since 2017 constitutes a constructive eviction of part of the Premises" (*id.* ¶ 87). He argues that he had no reason to know of the conditions because of affirmative statements made by Defendant Gargeros and George Vitaliotis, and the fact that the Rider expressly stated that "Landlord upon information and belief has not adversely affected the environment of the Premises nor is aware of any claim of any environmental contamination" (See Rider at 1) (*id.* ¶ 88). Plaintiff argues that he cannot be obligated to continue to pay future rent for the portions of the Premises that cannot be used (*id.* ¶ 89), and that he should not have been obligated to pay rent during the past eleven (11) years for portions of the Premises that could not be used (*id.* ¶ 90). He further alleges that Defendants are liable for abatement of the environmental conditions and rent abatement until the environmental conditions are restored and the full Premises can be used (*id.* ¶¶ 91-93). He seeks money damages including the costs of "proper and professional" asbestos and lead paint remediation and remediation of the petroleum leak, costs to repair the Premises from any damage caused by the remediations, costs to obtain a building permit, and the costs required to bring the second floor of the Premises into compliance with the applicable codes. He further seeks $504,680.00 in overpayment of rent and rent abatement until the environmental conditions are restored (*id.* ¶ 116).

Plaintiff's Third Cause of Action is for private nuisance. He alleges that "Defendants' failure to cure the adverse environmental conditions found at the Premises in 2017 has caused

substantial interference with Plaintiff's ability to use and enjoy the Premises" and as a result he has been prevented from "using the second floor whatsoever" and his use of the basement has been "severely limited" (*id.* ¶¶ 95, 96). He claims that Defendants' actions constitute an unreasonable interference with the use and enjoyment of the Premises and are, and at all times herein mentioned were, a nuisance and Defendants' failure to cure these conditions has been intentional, reckless and/or negligent (*id.* ¶¶ 98-102). Plaintiff alleges that Defendants' actions have caused damage to Plaintiff through the overpayment of rent (*id.* ¶ 103).

Plaintiff's Fourth Cause of Action is a claim of unjust enrichment and based on allegations that "[u]nder the principals of equity and good conscience, Defendants should not be permitted to retain moneys it received from Plaintiff for renting the entire Premises when Plaintiff could not use the entire Premises" (*id.* ¶¶ 105-107). He argues that, "[a]s a result of the wrongful receipt of moneys by Defendants, he has sustained damages in the amount of at least $504,680.00 together with interest" (*id.* ¶¶ 108).

Plaintiff's Fifth and final Cause of Action alleges fraudulent misrepresentation in that Plaintiff claims he "relied upon Defendant Gargeros' misrepresentations with respect to the ability to use the full Premises, and the Premises having no adverse environmental conditions when entering into the 30-year Lease and Contract of Sale" (*id.* ¶ 110). He claims that he learned of these conditions in 2017 when he "realized portions of the Premises could not be used" (*id.* ¶¶ 111). He alleges that Defendant Gargeros "entered into the Lease, Rider and Contract of Sale with knowledge that the assurances contained therein were misrepresentations and with the intent to deceive and induce Plaintiff into entering into the Lease, Rider and Contract of Sale" and that he entered into them without knowledge of the misrepresentations (*id.* ¶¶ 113, 114). He further claims that he relied upon Defendant Gargeros' misrepresentations in entering into the Lease, Rider and Contract of Sale and, as a result, has been damaged in the amount of $504,680.00. He further alleges that he is being continually damaged for overpayment of rent and seeks "rent abatement until the environmental conditions are restored and the full premises can be used" (*id.* ¶ 116). Finally, Plaintiff also seeks reasonable attorneys' fees (*id.*).

A. Defendants' Contentions in Support of Their Motion

In support of their motion, Defendants submit an affirmation from counsel, which attaches

a copy of the Amended Complaint and Exhibits (including the Contract, Lease, and Inspection Report) and a Memorandum of Law ("Defs' Mem.")

The essence of Defendants' motion is that: (1) CPLR 3211(a)(1) requires dismissal of all claims in the Amended Complaint because the Contract, Lease, and Inspection Report constitute documentary evidence that "utterly refute" all of Plaintiff's claims; (2) CPLR 3211(a)(5) requires dismissal of the First (Breach of Contract), Second (Partial Constructive Eviction), Fourth (Private Nuisance), and Fifth (Unjust Enrichment) Causes of Action because the statute of limitations has expired with respect to those claims; (3) the allegations of fraud are inadequately pled pursuant to CPLR 3016(b); and (4) pursuant to CPLR 3211(7) the Plaintiff lacks standing to bring any claims arising out of the transactions in the Amended Complaint as he is not a party to the Contract or Lease and is otherwise without privity with Defendants.

Defendants argue that the Contract, Lease, and Inspection Report constitute documentary evidence that inherently contradicts Plaintiff's factual claims. Defendants contend that certain clauses contained in the Contract and Lease are merger clauses and constitute "conclusive documentary proof that the parties' agreements, covenants and understandings with respect to the Premises are contained exclusively within the four corners of the Contract and Lease" (Defs' Mem. at 5-7). They argue that these merger clauses render the representations Plaintiff alleges as the basis for his claims to be "completely irrelevant and barred by the plain language of the Contract and Lease" as to all of Plaintiff's claims (*id.*). In support of their argument, Defendants reference the following provisions of the Contract:

> **33.01.** **No other Agreements.** The parties acknowledge that there are no agreements, representations or warranties, implied or expressed, which are not set forth herein and this agreement shall be binding upon the successors, assigns and legal representatives of the parties.

Defendants reference the following provisions of the Lease:

> **1.03.** Tenant has leased the Demised Premises after a full and complete examination thereof, as well as the title thereto and knowledge of its permitted uses and prohibited uses. Tenant accepts the premises in the condition or state in which they now are ("as is condition") and Tenant shall have no recourse to Landlord, as to the title thereto, the nature, condition or usability thereof or the use or uses to which the Demised Premise or any part thereof may be put except or otherwise provided in this Agreement ... Landlord shall not be required to furnish any services or facilities or to make any

> repairs, alterations or extensions or additions in or to the Demised Premises, throughout the term hereof and Tenant hereby assumes the full and sole responsibility for the condition, construction, operation, repair, demolition, additions, extensions, replacement, maintenance and management of the Premises.
>
> **33.01. Entire Agreement.** This Lease, the exhibits, schedules and all agreements and documents executed by Tenant referred herein and/or attached hereto and forming a part hereof, including Contract of Sale dated May 3, 2006 by and between Seller and Buyer, set forth all of the covenants, promises, agreements, conditions and understandings between Landlord, Seller, Secured Party, Buyer and Tenant concerning the Leased Premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth, and/or referred to herein.

Defendants further argue that all of Plaintiff's claims are barred because the Inspection Report is documentary evidence providing Plaintiff with actual notice of the alleged asbestos and lead paint conditions set forth in the Amended Complaint prior to entering into the Lease (*id.*).

Defendants then argue that CPLR 3211(a)(5) requires dismissal of the First (Breach of Contract), Second (Partial Constructive Eviction), Fourth (Private Nuisance), and Fifth (Unjust Enrichment) Causes of Action because the statute of limitations has expired with respect to those claims (Defs' Mem. at 8-12). They claim that "[e]ach cause of action alleged in the complaint stems from the same purported facts in the complaint, i.e. that the Defendants or their predecessors in interest misrepresented the condition in the premises as to asbestos, lead paint, and the certificate of occupancy relative to the second floor" (Defs' Mem. at 8). They argue that Plaintiff's claims are untimely because "Plaintiff knew of the complained of conditions of asbestos and lead paint both at the time Plaintiff entered into the Lease and Contract and over the past 'eleven (11) years,'" which is beyond the statute of limitations for each of those causes of action (Defs' Mem. at 9).

Defendants' next argument is that the allegations of fraud are inadequately pled pursuant to CPLR 3016(b). Finally, Defendants claim that Plaintiff lacks standing to bring this action because he is not a party to the Contract or Lease.

B. Plaintiff's Contentions in Opposition

In opposition to Defendants' motion, Plaintiff submits an affirmation from his counsel Kate Roberts, Esq. with exhibits, an Affidavit of George Paganis with an exhibit, and a

Memorandum of Law in opposition ("Plf's Opp. Mem.").

As an initial argument, Plaintiff contends that the motion to dismiss is premature because it asks the Court to make a determination as to several fact specific issues without the opportunity for discovery. For example, Plaintiff argues that Defendants have asked the Court to "assume that Defendants did not make fraudulent representations as to the (lack of) Environmental Conditions on the Premises dating back to 2006 and 2007, that Defendants did not have unique knowledge as to these Environmental Conditions, and that Plaintiff had knowledge that these conditions were constructively evicting him at a much earlier time" (Plf's Opp. Mem. at 6-8).

Regarding Defendants' argument that Plaintiff's claims should be dismissed based on documentary evidence, Plaintiff argues that such a dismissal is warranted only where the documentary evidence utterly refutes the plaintiff's factual allegations and that here the Inspection Report is not documentary evidence, as it does not contain unambiguous facts of undisputed authenticity (Plf's Opp. Mem. at 9). Plaintiff further argues that the merger clauses relied upon by Defendants are general and do not preclude valid causes of action sounding in fraud. Plaintiff also argues that, even if the Court were to determine that the merger clauses at issue pertained to the specific subject matter at issue, where the "allegedly misrepresented facts are peculiarly within the misrepresenting party's knowledge, even a specific disclaimer will not undermine another party's allegations of reasonable reliance on the misrepresentations" (Plf's Opp. Mem. at 13, *citing Warner Theatre Associates Limited Partnership v Metropolitan Life Ins. Co.*, 149 F3d 134, 136 [2d Cir 1998]).

Plaintiff argues that Defendants' motion should be denied because he has adequately stated a claim for fraud through specific allegations that "Defendant Gargeros and Defendants' Predecessor made fraudulent misrepresentations to him personally and in the Agreements" (Plf's Opp. Mem. at 16). In support of this argument, Plaintiff submits an affidavit further detailing the allegations of fraud (Plf's Opp. Mem. at 15-19; Paganis Affidavit).

Plaintiff next contends that his causes of action are timely. He argues that the "continuing wrong doctrine" applies to extend the statute of limitations to the date of the last wrongful act because Defendants "had a continuing duty under the Lease and Rider to ensure the original building on the Premises had no Environmental Conditions and to remediate such conditions as

they arise" (Plf's Opp. Mem. at 20). He further contends that questions of fact, including the date of discovery of injury and whether it is continuing, make the accrual dates of the applicable statutes of limitation a factual matter inappropriate for resolution on a motion to dismiss. With respect to the timeliness of his fraud claim, Plaintiff argues that, because a fraud claim may be brought within two years from the time the plaintiff discovered or could have, with reasonable diligence, discovered the fraud, his claim is timely. He alleges that he discovered the fraud in 2017 "after the Ossining Justice Court matter when all environmental tests were conducted" (Plf's Opp. Mem. at 24). He also argues that equitable estoppel tolls the statute of limitations because Defendants "wrongfully concealed facts about the Environmental Conditions of the Premises for over eleven (11) years" (Plf's Opp. Mem. at 24-25).

Plaintiff argues that he has standing to bring the claims because "Plaintiff's individual name also appeared on the signature lines" of the Contract and Lease and Defendants "understood Plaintiff to be the equivalent of Agora Gourmet Foods, Inc." (Plf's Opp. Mem. at 25-26). Notwithstanding that argument, he seeks leave to amend the Amended Complaint to add Agora Gourmet Foods, Inc. as a party pursuant to CPLR 3025(b) (*id.*).

Finally, Plaintiff moves to dismiss Defendants' counterclaims for reimbursement of legal fees and alleged breach of contract because Defendants fail to allege basic facts to establish the elements of the causes of action, including what provisions of the Lease Plaintiff allegedly breached and any facts or provisions of the Contract entitling them to attorneys' fees (Plf's Opp. Mem. at 26-27). He contends that Defendants' breach of contract claim is barred by the statute of limitations. Plaintiff also argues that the Lease is documentary evidence which "conclusively establishes that fees are only to be awarded to the Defendant-landlords in actions 'brought for recovery of possession of the Leased Premises, for recovery of rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant contained on the part of Tenant to be kept or performed, and a breach resulting in material damages shall be established" (Plf's Opp. Mem. at 28; Lease § 23.04). He argues that "the provision of the Lease entitling Defendants to attorneys fees does not apply when Plaintiff-tenant brings the types of causes of action in the Complaint" (Plf's Opp. Mem. at 28).

C. Defendants' Contentions in Further Support of Motion

In further support of their motion and in opposition to Plaintiff's cross-motion to dismiss, Defendants submit a Reply Memorandum of Law ("Defs' Reply"). In it, Defendants claim that the Paganis Affidavit "is of little probative value for the purposes of this motion" and does not "cure Plaintiff's deficient claims" (Defs' Reply at 2-3). They argue that the Court should consider the Inspection Report as documentary evidence because it was attached to Plaintiff's Amended Complaint and that it "conclusively establishes that Plaintiff knew of the potential conditions at the Premises prior to signing the agreements" (Defs' Reply at 3). Defendants also reiterate their argument that the merger clauses in the Contract bar Plaintiff's claims and that the Contract contains specific language addressing the misrepresentations at issue regarding the condition of the Premises and therefore this language "conclusively eviscerates" any claim for fraud (Defs' Reply at 5). They further contend that Plaintiff had actual knowledge of the conditions prior to entering into the Lease (Defs' Reply at 7).

Defendants next argue that Plaintiff cannot rely on the "continuing wrong doctrine" because he is alleging a breach of the ongoing obligation by Defendants to maintain habitable premises, but this claim is limited to residential properties and there are no provisions in the Contract of Lease guaranteeing that the second floor was habitable for commercial purposes and Plaintiff accepted the Premises "as is" (Defs' Reply at 8). They argue that because "an alleged breach of representations in an agreement occurs when the agreement is executed," the six year statute of limitations governing Plaintiff's claims "expired long before the filing of the instant case, irrespective of when the beach is actually 'discovered'" (Defs' Reply at 9).

Defendants also contend that the Paganis Affidavit should be "wholly rejected" because Plaintiff's fraud claim is "not meritorious and additional affidavits may only be submitted to clarify potentially meritorious claims" (Defs' Reply at 9). They reiterate their argument that Plaintiff fails to properly plead his fraud claim because he "fails to allege or specify the intent element of fraud" and does not identify the statements or which Defendant made the statements. Defendants also argue that Plaintiff failed to conduct proper due diligence in entering into the Lease and that, in any event, "Defendants fully disclosed and Plaintiff was aware of all of the conditions at the Premises prior to signing the Contract" (Defs' Reply at 11-12).

Finally, Defendants reiterate their argument that Plaintiff lacks standing to sue as the Paganis Affidavit "fails to explain or justify why the [Amended] Complaint fails to plead any facts or special relationship between Plaintiff and Agora Gourmet Foods, Inc. - the party to the Contract and Lease" (Defs' Reply at 12).

LEGAL DISCUSSION

Defendants move to dismiss all causes of action of the Amended Complaint pursuant to CPLR 3016(b), 3211(a)(1), 3211(a)(5) and 3211(7).

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired ...The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable statute of limitations period" (*Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2d Dept 2015]). On such a motion, affidavits may properly be considered, provided that the affidavits come from persons with personal knowledge of the facts (*Zhinin v Vicari*, 50 AD3d 786, 787 [2d Dept 2009]).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Props. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra* 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra* 98 NY2d at 152).

Where the plaintiff submits evidentiary material, the Court is required to determine

whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein,* 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern,* 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]). On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello, supra* 40 NY2d at 635-636; Pace v Perk, 81 AD2d 444, 449-450 [2d Dept 1981]; see *Kempf v Magida,* 37 AD3d 763, 765 [2d Dept 2007]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.,* 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.,* 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis,* 95 AD2d 822 [2d Dept 1983]).

Here, Plaintiff has submitted an Affidavit and the Court will consider it in determining whether Plaintiff has a cause of action.

PLAINTIFF'S STANDING

Defendants argue that because Agora Gourmet Foods, Inc., rather than Plaintiff, is the party to the Contract and Lease Plaintiff "is otherwise without any privity with Defendants" and lacks standing to sue Defendants (Defs' Mem. at 15-16). Plaintiff is the Chief Executive Office of Agora Gourmet Foods, Inc. and from "the inception of Agora Gourmet Foods, Inc. in 2005, Plaintiff was the sole officer, shareholder, and director" (Plf's Opp. Mem. at 25-26).

The Court agrees that Plaintiff lacks standing to bring this action. However, this is an easily remedied defect as leave to amend to add an additional plaintiff is freely granted (*see*

Catnap, LLC v Cammeby's Management Company, LLC, 170 AD3d 1103 [2nd Dept 2019]; *Bruce Fulgum v Town of Cortlant Manor*, 19 AD3d 444 [2d Dept 2005]). Rather than defer resolution of this motion, the Court will proceed as though Agora Gourmet Foods is the plaintiff in this action. The Court anticipates that the parties will stipulate to an amendment to add Agora Gourmet Foods as a plaintiff without the necessity of further motion practice.

DEFENDANT HAS NOT SET FORTH SUFFICIENT DOCUMENTARY EVIDENCE TO WARRANT DISMISSAL

Defendants argue that the Contract, Lease, and Inspection Report constitute documentary evidence that inherently contradicts Plaintiff's factual claims. Defendants further argue that the merger doctrine prohibits the introduction of evidence beyond the Contract and Lease and therefore any representations or evidence beyond those documents are irrelevant to thwart requiring the dismissal of all claims in the Amended Complaint. Defendants further claim that the Inspection Report demonstrates that Plaintiff had actual knowledge of the conditions prior to entering into the Lease (Defs' Mem. at 5-7).

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Cap. Funding Partners, L.P. v State Street Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys – Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary evidence (*Fontanetta, supra* 73 AD3d at 84-86).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC,* 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

To the extent that Plaintiff's claims turn on a contract, the actual provisions of the contract – rather than Plaintiff's characterization of the terms in their pleading – are controlling (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.,* 26 AD3d 74, 82 [1st Dept 2005]). Therefore, "[w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1)" (*159 Broadway N.Y. Assoc. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; *see also Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, "[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint"]).

The Inspection Report is not "unambiguous and of undisputed authenticity" as is required to be considered documentary evidence (*id.*). In any event, the Inspection Report does not refute Plaintiff's claims. As set forth more fully herein, while the provisions of the Contract and Lease presently refute Plaintiff's First Cause of Action for breach of contract, these documents alone are insufficient to resolve all factual matters as a matter of law and conclusively dispose of Plaintiff's claims. The relevance of this evidence must be considered with respect to each individual cause of action.

PLAINTIFF HAS ADEQUATELY STATED A TIMELY CLAIM FOR FRAUDULENT MISREPRESENTATION[3]

[3] At present, based on the allegations set forth in the Amended Complaint and the Affidavit of George Paganis, Plaintiff appears to allege facts that might support a claim for fraudulent concealment as well as fraudulent misrepresentation. The Amended Complaint currently only contains a claim for fraudulent misrepresentation. If Plaintiff wishes to pursue a claim for fraudulent concealment, he may request a Commercial Division Rule 24 pre-motion conference and seek leave to amend the Amended Complaint.

To plead a *prima facie* case of fraudulent misrepresentation, the complaint should set forth all the essential elements of fraud, *i.e.,* (1) the making of a material representation by the defendant; (2) that the representation was false; (3) that the defendant knew it was false and made it with the intention of deceiving the plaintiff; (4) that the plaintiff believed the representation to be true and justifiably acted in reliance on it, and was deceived; and (5) that the plaintiff was damaged thereby (*Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43 [1999]; 60A NY Jur 2d Fraud and Deceit § 232).

Pursuant to CPLR 3016, a complaint asserting a claim for fraud must make factual allegations sufficient to support each element of a cause of action for fraud (*see Kaufman v Cohen,* 307 AD2d 113 [1st Dept 2003]) and bare allegations of fraud without allegations of the details constituting the wrong are insufficient (*Gervasio v DiNapoli,* 126 AD2d 515 [2d Dept 1987]).

Here, Plaintiff alleges that Defendants were aware of the asbestos, lead paint, and oil tank when the parties executed the Lease and "made assurances to Plaintiff that there was no asbestos or lead paint conditions existing on the Premises prior to Plaintiff entered into the Lease" and that "the only environmental condition existing on the Premises previously was asbestos in the basement, which was the subject of an OSHA Complaint and adequately remediated" (Amended Complaint ¶¶ 27).

Plaintiff's affidavit further details the specific representations at issue.[4] In his affidavit he alleges, among other representations, that "George Vitaliotis and Vasilios Gargeros assured me that they would have all environmental conditions taken care of, specifically including the lead paint and asbestos" (Paganis Affidavit ¶ 41). He further alleges that "George Vitaliotis and Vasilios Gargeros informed me that OSHA had removed all asbestos from the Property" (Paganis Affidavit ¶ 44). Plaintiff contends that "[b]ased upon these representations made in the Contract of Sale, Lease, Rider, and verbally to me by the former owners of Briars and continuing

[4] As discussed above, the Court will consider the Paganis Affidavit and facts alleged therein in determining whether Plaintiff has a cause of action for fraud.

owner/landlord of the Property, I entered into the Lease and Rider" (Paganis Affidavit ¶ 50).[5]

The Contract and Lease also contain representations concerning the environmental condition of the Premises. The Contract provides that "To the best of Seller's knowledge Premises is not contaminated by any toxic or hazardous waste and contains no contamination as defined by NYS and Federal Environmental and Hazardous waste laws, rules, and regulations." and that "Seller further covenants and warrants that all of the representations and warranties set forth in this contract shall be true and correct at closing" (Contract § 1.05). The Lease provides that Landlord further warrants and represents that during the term Landlord's ownership and occupation of the Premises preceding the date of this Lease, Landlord upon information and belief has not adversely affected the environment of the Premises nor is aware of any claim of any environmental contamination except a claim by OSHA, Complaint No. 205178213, which said Complaint has been rectified and/or corrected by the Landlord" (Lease Rider at 3).

Plaintiff has sufficiently alleged that there were affirmative misrepresentations by Defendants which were knowingly false and were made for the purpose of inducing Plaintiff to rely upon them; justifiable reliance by Plaintiff; and injury (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,178 [2011]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *MBIA Ins. Corp v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]).

Moreover, contrary to Defendants argument that the Contract and Lease contain merger clauses that demonstrate "conclusive documentary proof that the parties' agreements, covenants and understanding with respect to the Premises are contained exclusively within the four corners," (Defs' Mem. at 6), of these documents, the merger doctrine does not bar Plaintiff's fraud claim. As an initial matter, it is well settled that a claim of fraud is an exception to the merger doctrine

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[5] To the extent that Plaintiff alleges that he entered into the Lease based on Defendants representations that "there was a valid and subsisting Certificate of Occupancy," such allegations are an insufficient predicate for a claim of a fraudulent misrepresentation. The existence of a Certificate of Occupancy is a matter of public record and therefore any reliance by Plaintiff on Defendants' statements with respect to it is not reasonable (*see Danann Realty Corp. v Harris*, 5 NY2d 317 [1999]; *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2d Dept 2009]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96 [1st Dept 1997]; *Vermeer Owners, Inc. v Guterman*, 169 AD2d 442 [1st Dept 1991] *lv denied* 77 NY2d 937 [1991]).

(*West 90th Owners Corp. v Schlechter*, 137 AD2d 456, 458 [1st Dept 1988]; *Schooley v Mannion*, 241 AD2d 677 [3d Dept 1997]; *Lunal Realty, LLC v DiSanto Realty LLC,* 88 AD3d 661 [2d Dept 2011]). However, "[w]hile a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a 'specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral [mis]representations'" (*Weiss v Shapolsky,* 161 AD2d 707, 707 [2d Dept 1990], *lv dismissed* 76 NY2d 889 [1990], *quoting Danann Realty Corp. v Harris,* 5 NY2d 317, 320-321 [1959]). The rationale for the rule is that a "person claiming to have been defrauded has by his own specific disclaimer of reliance upon oral representations himself [has] been 'guilty of deliberately misrepresenting [his] true intention'" (*Citibank N.A. v Plapinger*, 66 NY2d 90, 94 [1985], *quoting Danann Realty Corp.*, 5 NY2d at 323).

In *Danann*, the New York Court of Appeals held that plaintiff's claim of fraud in the inducement could not stand because plaintiff had "in the plainest language announced and stipulated that it [was] not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations ...." (*Danann Realty Corp., supra*, 5 NY2d at 320-321). A merger clause will "preclude a fraud claim only where the clause 'specifically disclaims representations concerning the very matter to which the fraud claim relates" (*Pike Co., Inc. v Jersen Constr. Group, LLC*, 147 AD3d 1553, 1555 [4th Dept 2017]).

Here, the merger clauses at issue are general boilerplate and will not bar a claim of fraud. As an initial matter, some of the provisions on which Defendants rely as "merger clauses" are not in fact merger clauses at all, but relate to the parties' agreement. Defendants cite to Section 1.03 of the Lease, which pertains to the "as is" conditions of the Premises (Defs' Mem. at 5-6), as well as Section 10.05, which deals with obligations of the landlord and tenant during the term of the Lease (Defs' Reply at 4-5). The merger clause contained in the Contract provides that:

> **33.01. No other Agreements.** The parties acknowledge that there are no agreements, representations or warranties, implied or expressed, which are not set forth herein and this agreement shall he binding upon the successors, assigns and legal representatives of the parties.

The merger clause contained in the Lease provides that:

> **33.01. Entire Agreement**. This Lease, the exhibits, schedules and all agreements and documents executed by Tenant referred herein and/or attached hereto and forming a part hereof, including Contract of Sale dated May 3, 2006 by and between Seller and Buyer, set forth all of the covenants, promises, agreements, conditions and understandings between Landlord, Seller, Secured Party, Buyer and Tenant concerning the Leased Premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth, and/or referred to herein.

Such merger clauses are quintessential general boilerplate and certainly do not "specifically disclaim representations concerning the very matter to which the fraud relates" (*see Pike Co., Inc., supra*, 147 A.D.3d at 1555). As such, they do not bar Plaintiff's fraud claim.

Plaintiff's fraudulent misrepresentation claim is also not duplicative of his breach of contract claim. As set forth above, "[t]he elements of a cause of action alleging fraud are a representation of a material existing fact, falsity, scienter, deception and injury" (*260 Mamaroneck Ave., LLC v Guaraglia,* 2019 NY Slip Op 03307 [2d Dept 2019]). Where a plaintiff sufficiently alleges that a defendant made false representations in a Contract or other agreement, such as a Lease and Rider, between the parties, a cause of action for fraud is not duplicative of a breach of contract cause of action (*id.* [holding that the plaintiff had stated claims for breach of contract as well as fraudulent inducement and fraudulent concealment where the defendant falsely represented in the contract of sale that he had not granted any rent abatements or concessions to one of the building's commercial tenants and falsely represented that the tenant was current on its rent payments]).

Plaintiff's fraudulent misrepresentation claim is also timely. A cause of action based upon fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213[8]). The two year period is measured from when discovery of the fraud should, with reasonable diligence, have been discovered and begins to run when the circumstances reasonably would suggest to the plaintiff that he or she may have been defrauded, so as to trigger a duty to inquire on his or her part (*Pericon v Ruck,* 56 AD3d 635 [2d Dept 2008]).

To start the two year period running, knowledge of the fraudulent act is required and mere

suspicion will not constitute a sufficient substitute and, unless it conclusively appears that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of fact (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). Plaintiff alleges that he did not and could not have known of the fraud "until 2017 after the Ossining Justice Court matter when all environmental tests were conducted" (Plf's Opp. Mem. at 23-24; Paganis Affidavit ¶¶ 72-79, 101, 105). Plaintiff has adequately alleged a timely claim for fraudulent misrepresentation.

Additionally, there are sufficient allegations of deceptive conduct present to raise triable issues of fact that Defendants may be equitably estopped from invoking the statute of limitations (*see Morando v Morando*, 41 AD3d 559 [2d Dept 2007]), including allegations that Defendants knew the extent of the environmental conditions when inducing Plaintiff to enter into the Lease.

Accordingly, for the reasons set forth above, the branch of Defendants' motion seeking to dismiss the fraudulent misrepresentation shall be denied.

PLAINTIFF'S BREACH OF CONTRACT CLAIM FAILS TO STATE A CAUSE OF ACTION

Defendants seek the dismissal of Plaintiffs' breach of contract claim based upon CPLR 3211(a)(1), (a)(5), and (a)(7). Plaintiff admits that the implied warranty of habitability does not apply to commercial nonresidential properties, (Plf's Opp. Mem. at 21), but alleges that Defendants "failure to comply with applicable health and safety code provisions such as those relating to lead-based paint and asbestos removal" may give rise to a claim for breach of the covenant of quiet enjoyment (Amended Complaint ¶ 80).

A convenient of quiet enjoyment may be implied in the context of a commercial, non-residential lease (*Disunno v WRH Properties, LLC*, 97 AD3d 780 [2d Dept 2012]). However, where the parties have set forth their duties and obligations with respect to the conduct allegedly violating this covenant, the express terms of the contract govern the dispute (*Welson v Neujan Bldg. Corp.*, 264 NY 303 [1934] [holding that, where the lease provided the tenant would keep the premises in good repair, the failure to do so would be attributed to the tenant]; *Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 174 1st Dept 2010] [recognizing the difference between commercial tenants "that are able to negotiate the terms of their leases" and residential

tenants who "require protection from non-negotiable form leases containing terms that deprive them of statutory rights" and holding that "inclusion in the lease of an express term declaring Real Property Law § 223-a to be inapplicable takes the lease out of the statute's purview"]).

To begin with the Court does not agree with Defendants' argument that the Lease and Contract make clear that Plaintiff was accepting the Premises as-is and Defendants had no duty to remediate environmental conditions. The parties' duties with respect to environmental remediation are set forth in the Contract and Lease.[6] Based on the clear and unambiguous provisions of the Contract and Lease, Plaintiff's obligation to cure environmental conditions is limited to "conditions that were not in existence prior to the commencement of Tenant's tenancy" (Lease § 10.05). However, pursuant to the Rider to the Lease Defendants are obligated to remedy environmental conditions that existed as of the date of Plaintiff's tenancy, but these obligations are contingent upon the issuance of a formal complaint or violation by a municipal authority (Lease Rider at 3).

Here, Plaintiff does not allege that any formal complaint or violation has been issued by any municipal authority. Therefore, the Court shall grant the branch of Defendants' motion seeking dismissal of the breach of contract claim based on CPLR 3211(a)(7) because Plaintiff has not yet alleged a breach. Accordingly, Plaintiff's cause of action for breach of contract shall be dismissed without prejudice.

PLAINTIFF'S CAUSE OF ACTION FOR PARTIAL CONSTRUCTIVE EVICTION IS TIMELY

It is well settled that a commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from either the whole or a part of the leasehold (*Jovlaine Rlty. Co. LLC v Samuel*, 100 AD3d 706 [2d Dept 2012]; *Johnson v Babrera,* 246 AD2d 578 [2nd Dept 1998]). A constructive eviction occurs where "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

The one year statute of limitations for constructive eviction typically "begins to run at such

[6] The terms and conditions of the Lease have been incorporated by reference into the Contract (*see* Contract at 1).

time that it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return" (*Gold v Schuster*, 264 AD2d 547, 549 [1st Dept 1999]). To the extent that any of the alleged constructive eviction occurred within one year from the commencement of the action, the claim is not time-barred (*Gross v 420 E. 72nd St. Tenants Corp.*, 21 Misc 3d 629, 633 [Sup Ct NY County 2008]).

For purposes of determining whether a claim is timely under the statute of limitations, the Court must accept as true Plaintiff's allegations. Because there are allegations in Plaintiff's Amended Complaint and the Paganis Affidavit that fall within the one year time period and would support a claim of partial constructive eviction, the branch of Defendants' motion to dismiss Plaintiff's cause of action for constructive eviction shall be denied.[7]

PLAINTIFF'S CAUSE OF ACTION FOR UNJUST ENRICHMENT SHALL BE DISMISSED

A plaintiff claiming unjust enrichment must show: (1) that the defendant was enriched; (2) that the enrichment was at plaintiff's expense; and (3) it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mandarin Trading Ltd., supra* 16 NY3d at 182). However, an action to recover for unjust enrichment sounds in restitution or quasi-contract (*Waldman v Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept 1983]) and rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another (*Miller v Schloss*, 218 NY 400, 407 [1916]). Because the theory of unjust enrichment lies as a quasi-contract claim, where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

Here, Plaintiff alleges that the parties entered into a Contract and Lease. Since neither party disputes that their relationship is governed by these agreements, the unjust enrichment claim must fail and the Court shall grant this branch of Defendants' motion.

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[7] While in their Notice of Motion Defendants moved to dismiss the cause of action for private nuisance based on the statute of limitations, Defendants' motion papers fail to set forth any argument in this regard. To the extent that Defendants are moving on this basis, the motion is denied.

CONCLUSION

The Court read the following papers with regard to this motion:

(1) Notice of Motion dated January 7, 2019; Affirmation of Carl Finger, Esq. dated January 7, 2019, together with exhibits annexed thereto;

(2) Memorandum in Support of Defendants' Motion to Dismiss dated January 7, 2019;

(3) Notice of Motion dated February 6, 2019; Affirmation of Kate Roberts, Esq. dated February 6, 2019, together with the exhibits annexed thereto;

(4) Memorandum of Law in Opposition to Defendants' Counterclaims and Motion to Dismiss and in Support of its Motion to Dismiss dated February 6, 2019;

(5) Affidavit of George Paganis dated February 6, 2019;

(6) Reply Memorandum of Law in Further Support of Motion to Dismiss and in Opposition to Cross-Motion to Dismiss dated February 27, 2019.

Based on the foregoing, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendants Kallie Edge, Dimitrious Vitaliotis, and Vasilios Gargeros to dismiss the Amended Complaint of Plaintiff George Paganis is granted in part and denied in part; and it is further

ORDERED that the branch of the motion seeking to dismiss the First Cause of Action for Breach of Contract is granted and said cause of action is dismissed without prejudice; and it is further

ORDERED that the branch of the motion seeking to dismiss the Fourth Cause of Action for Unjust Enrichment is granted and said cause of action is dismissed with prejudice; and it is further

ORDERED that in all other respects, Defendant's motion is denied; and it is further

ORDERED that the cross-motion by Plaintiff George Paganis to Dismiss the Counterclaims of Defendants Kallie Edge, Dimitrious Vitaliotis, and Vasilios Gargeros is denied without prejudice; and it is further

ORDERED that counsel shall appear for a conference on May 28, 2019 at 9:30 a.m. for the purpose of addressing any motion Plaintiff may seek to make to amend the Amended Complaint.

Dated: White Plains, New York
May 20, 2019

ENTER

Gretchen Walsh

HON. GRETCHEN WALSH, J.S.C.

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