SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 58

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DR. MICHAEL FARAHNICK,

Plaintiff, Index Number: 158363/2015

-against-

123 E. 37 OWNERS CORP.,

DECISION AND ORDER

Defendant.

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David B. Cohen, J.

Plaintiff Dr. Michael Farahnick (Plaintiff), a dentist, brings the instant action against defendant 123 E. 37 Owners Corp. (Defendant), a cooperative corporation where Plaintiff maintains his dental office (Premises) in Defendant' s building located at 123 E. 37 Street, New York County. In the complaint, Plaintiff asserts two causes of action: a declaratory judgment that no sublet fees are permitted to be charged by Defendant for the Premises and that all sublet fees paid to Defendant must be refunded to Plaintiff, plus interest; and a declaratory judgment that Defendant improperly billed Plaintiff for legal fees incurred in connection with researching the issue of sublet fees. In this motion (sequence number 002), Defendant seeks summary judgment, pursuant to CPLR 3212, dismissing the complaint in its entirety with prejudice. For the reasons stated below, Defendant's motion is granted.

Background

The following description is derived from Plaintiff's complaint dated August 12, 2015 (Complaint; NYSCEF Doc. No. 1). In November 1999, Plaintiff purchased the shares for the Premises (commercial unit 1 C) and the appurtenant proprietary lease "with the understanding that he would be able to share the Premises with other dentists without obtaining Board approval" (Complaint, ¶¶ 5-6). The "Offering Plan" stated that the tenant of the Premises "may

sublet any portion of the Commercial Space, without the consent of the Corporation" and that the "tenant may allow one or two Doctors in addition to himself to occupy the Premises" (*id.*, ¶ 7).

Starting in 2000, Plaintiff shared the Premises with one part-time dentist, and in 2003, he began to share the Premises with two part-time dentists (*id.*, ¶ 8). From 2000 to 2012, Defendant was aware that Plaintiff shared the Premises with other dentists but did not object, as the names of all other dentists were listed on the entrance to the Premises (*id.*, ¶ 9). In May 2012, new members were elected to serve on Defendant's board of directors (Board), and at meetings held in August, October and November 2012, the Board's president, Stan Chrein, met with Plaintiff to discuss a possible sublet issue for the Premises (*id.*, ¶¶ 11-16).

At the meeting held on December 4, 2012, the Board passed a resolution which stated, among other things, that Plaintiff "shall deliver a sublet fee in the amount of two months maintenance on or before December 15, 2012," and starting from October 1, 2013, Plaintiff "shall deliver one annual sublet fee of three months maintenance" (*id.*, ¶ 18). In fear of losing his shares and proprietary lease, Plaintiff paid the sublet fee in December 2012 (*id.*, ¶ 19).

In June 2013, Plaintiff received Defendant's letter advising him that his account was in arrears for legal fees incurred by Defendant's counsel for review of the sublet issue (*id.*, ¶ 20). In August 2013, Plaintiff's counsel informed the Board that a review of the proprietary lease, by-laws and the "Offering Plan" showed that there was "no basis" to charge a sublet fee, and that the legal fees were improper because there was "no default" under the proprietary lease for the Premises (*id.*, ¶¶ 21-22). Thereafter, the parties exchanged correspondences in which they undertook opposing positions; the minutes of the Board meeting held on November 5, 2013 also stated that "the sublet issues remained unsolved" for the Premises (*id.*, ¶¶ 23-28).

In November 2013, Plaintiff was provided with a Board resolution certificate which stated, among other things, that Plaintiff "shall pay one annual sublet fee for up to three Subtenants of the Unit for each sublease year provided that [Plaintiff] continues his dental practice full time in the Unit," and that Plaintiff "agreed to pay the legal fees incurred by the Corporation in connection with this matter" (*id.*, ¶ 29). Plaintiff refused to sign the certificate, as he disputed his obligation to pay the sublet fees and the legal fees (*id.*, ¶ 30). However, Plaintiff continued to pay the sublet fees (by checks) stating that the payments were "under protest without prejudice/all rights reserved," but refused to pay the legal fees (*id.*, ¶¶ 32-33).

Plaintiff spoke to the former president of the Board and was advised that a decision of the Board to charge sublet fees for "professional units would have to be a new proposal presented at a meeting of a majority of shareholders voting on this issue to amend the proprietary lease," but no shareholders' meeting was held with respect to charging a sublet fee for a professional unit (*id.*, ¶¶ 36-37).[1] Plaintiff has entered into agreements with other dentists permitting them to occupy the Premises on a part-time basis, and Plaintiff has not vacated the Premises and continues to operate his dental office at the Premises on a daily basis (*id.*, ¶¶ 39-40).

As of the commencement of this action in August 2015, Plaintiff has "tendered payment of improperly charged sublet fees in the total amount of $15,195.28" (*id.*, ¶ 45). In the first cause of action of the Complaint, Plaintiff seeks a judgment declaring that no sublet fees are permitted to be charged, and that all sublet fees paid to Defendant must be refunded with interest (*id.*, ¶¶ 48-53). In the second cause of action, Plaintiff seeks a declaration that the legal fees were improperly charged by Defendant, because there was no default under the proprietary lease

[1] While this allegation was raised by Plaintiff in the Complaint and denied in Defendant's answer, it appears that the parties did not address it in their briefs, as discussed below.

(*id.*, ¶¶ 55-56). As noted above, by the instant motion, Defendant moves for summary judgment, pursuant to CPLR 3212, dismissing all causes of action of the Complaint.

Applicable Legal Standards

In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails this showing, the motion should be denied (*id.*). However, if this showing is made, the burden then shifts to the party opposing the motion to produce sufficient evidentiary proof to establish the existence of a material issue of fact which requires a trial of the action (*id.*).

In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Where different conclusions may reasonably be drawn from the evidence, the motion should also be denied (*Jaffe v Davis*, 214 AD2d 330 [1st Dept 1995]). On the other hand, bare allegations or conclusory assertions are insufficient to create genuine issues of fact to defeat the motion (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Rotuba Extruders, Inc., v Ceppos*, 46 NY2d 223, 231 [1978]). Moreover, issues with respect to witness credibility are generally inappropriate for resolution in a summary judgment motion (*Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 436 [1st Dept 2013]).

Discussion

In its moving brief in support of the instant motion (Def. Brief; NYSCEF Doc. No. 62), Defendant raises a "threshold" argument that the Complaint is barred, pursuant to CPLR 217 (1), by its underlying four-month statute of limitations (Def. Brief at 15; citing, inter alia, *Buttitta v*

Greenwich House Coop Apts., Inc., 11 AD3d 250, 251 [1st Dept 2004] [claim alleging that cooperative board treated plaintiffs unequally was time barred when it was filed six months after claim's accrual date; court applied the four-month limitation period and scrutinized the substance of the declaratory judgment action to determine the applicable statue of limitations]). Defendant explains that a claim accrues on the date that a plaintiff "receives notice of the determination that aggrieved him" (Def. Brief at 15; *quoting Matter of Johns v Rampe*, 23 AD3d 283, 285 [1st Dept 2005]). Defendant asserts that the limitation period on the first cause of action began to run in December 2012 when Plaintiff was provided with the Board's resolution stating that he would have to pay sublet fees, but since this action was commenced in August 2015, it is time-barred under CPLR 217 (1) (*id.*, at 16). As to the second cause of action, Defendant argues that the claim accrued on November 22, 2013 when Plaintiff received "the final notice for the legal fees he claims the Co-op improperly billed him," and that such claim is time-barred when this action was commenced in August 2015 (*id.*, at 16-17).

Besides raising the statute of limitations defense, Defendant argues that the first cause of action must be dismissed because Plaintiff is subject to the same governing documents as other shareholders, which require all to pay sublet fees; Plaintiff's commercial use of the Premises does not preclude Defendant from applying the sublet policy and fees to Plaintiff; Plaintiff's agreements with the other dentists are subleases of the Premises; Defendant's past failure to collect sublet fees does not prohibit it from collecting such fees now and in the future; and if Plaintiff's arrangement with the other dentists are not subleases, they are unauthorized uses of the Premises and he must pay fees for such uses (*id.*, at 17-24). Defendant further argues that, to the extent the first cause of action seeks to recoup sublet fees already paid, the Complaint fails to plead a claim whereby Plaintiff can recover monetary damages, and the business judgment rule

shields Defendant from having to repay the sublet fees (*id.*, at 25-26). As to the second cause of action, Defendant argues that Plaintiff is bound by his oral agreement to pay the legal fees, and that the doctrine of promissory estoppel bars this claim (*id.*, at 27-30).

Based on the foregoing arguments, and the documents submitted in support thereof (NYSCEF Doc. Nos. 40-60, consisting of, among other things, relevant governing documents, minutes of meetings and resolutions of the Board, letters and emails exchanged by the parties and deposition transcripts), Defendant has made a prima facie case for summary judgment.

In opposition (Plf. Opp.; NYSCEF Doc. No. 66), Plaintiff contends, as a preliminary matter, that Defendant's summary judgment motion should be denied because of a procedural technicality or defect. Specifically, Plaintiff contends that, because Defendant failed to submit a copy of the answer to the Complaint with its moving papers, and failed to provide an affidavit from someone with knowledge of the facts, the law requires a denial of the instant motion (Plf. Opp., ¶¶ 18-20; citing various cases for the proposition that a failure of the movant seeking summary judgment to submit copies of the pleadings with its moving papers is a fatal defect, irrespective of whether the pleadings are otherwise before the court).

Plaintiff's contentions are unavailing. While a summary judgment motion requires supportive pleadings, the court has the discretion to determine whether the moving papers were "sufficiently complete" (*Leary v Bendow*, 161 AD3d 420, 420 [1st Dept 2018] [court exercised its discretion in considering whether the record was sufficiently complete]; *Serowik v Leardon Boiler Works Inc.*, 129 AD3d 471, 472 [1st Dept 2015] [same]). The First Department has held that even though a party failed to include pleadings with its summary judgment motion, "the error was properly overlooked, as the pleadings were filed electronically and thus were available to the parties and the court" (*Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept

2012] [internal citations omitted]). Also, where "the responsive pleading was attached to the reply papers," the court rejected the contention that defendant's motion should be dismissed "for failure to annex their answer to the initial moving papers" (*Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008] [internal citation omitted]). Here, Defendant's answer was filed electronically in October 2015 (NYSCEF Doc. No. 3) and was available to both parties and this court. Moreover, the answer is also now annexed as an exhibit (NYSCEF Doc. No. 69) to Defendant's reply paper (Def. Reply; NYSCEF Doc. No. 71). In the exercise of discretion, this court holds that the record for this summary judgment motion is "sufficiently complete," despite Plaintiff's contention to the contrary. Indeed, Plaintiff does not argue that he has been prejudiced by this procedural defect, particularly in light of the fact that he actually relied on the language in the previously filed answer in contending that Defendant's statute of limitation defense was not pled with particularly, as discussed below. Additionally, the contention that this motion must be dismissed because Defendant did not provide an affidavit from someone with personal knowledge of the facts has no merit. Indeed, a similar contention was rejected by the courts (*Zuckerman*, 49 NY2d at 563 ["affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admission form'"]). As noted above, attachments to Defendant counsel's affirmation in support of this motion included, inter alia, relevant governing documents ("Offering Plan" amendments, by-laws, house rules and proprietary lease), as well as letters and emails written by the parties or their counsel, resolutions and minutes of Board meetings and parties' deposition transcripts), which are "evidentiary proof in admission form" that support a prima facie case for a summary judgment motion.

Next, Plaintiff contends that Defendant waived the statute of limitations affirmative defense "by not adequately pleading it in the Answer," where it merely "alleges in a vague and conclusory fashion a statute of limitations defense without reference to CPLR 217 (1), and without any supporting facts, this is not adequate to preserve such a claim" (Plf. Opp., ¶ 29). Plaintiff also contends that, even if the statute of limitations defenses was not waived, in a declaratory judgment action (such as this action), it is necessary to examine the substance of the action to identify the relationship in which the claim arose and the relief sought so as to resolve which statute of limitations is applicable, and if a party has "no other form of proceeding" to resolve the declaratory judgment action, the six-year limitation period of CPLR 213 (1) applies (*id.*, ¶ 30; citing *Ciccone v One W. 64th St., Inc.*, 2017 NY Slip Op 32001 (Sup Court, NY County 2017), *affd* 171 AD3d 481 [1st Dept 2019]). Plaintiff further contends that a "fair reading of the Complaint" shows that his claims are grounded in "contract interpretation of the relevant provisions of the Proprietary Lease," which is governed by the six-year limitation period under CPLR 213 (2) (*id.*, ¶ 31).

Plaintiff's contentions are without merit. As pointed out by Defendant, the Court of Appeals has held that a defendant need not plead a statute of limitations defense with specificity (Def. Reply at 9; citing *Immediate v St. John's Queens Hosp*., 48 NY2d 671, 673 [1979] ["It was sufficient under CPLR 3013 that respondent pleaded the 'statute of limitations' as a defense; it was not required to identify the statutory section relied on or to specify the applicable period of limitations"]). Indeed, when pleading an affirmative defense, "brevity is not only permissible, but encouraged" (Siegel, N.Y. Practice section 223, at 370 [4th ed 2005]). Plaintiff's assertion that the six-year limitation period should be applied to this declaratory judgment action is also flawed. The seminal case on this issue is *Solnick v Whalen* (49 NY2d 224 [1980]), where the

plaintiff sought declaratory relief challenging a determination by the State Commissioner of Health on Medicaid reimbursement rates, and the plaintiff argued that the six-year limitation period applied to the action, which was filed more than four months but less than six years after the rate reduction. The Court of Appeals concluded that the allegation in a declaratory judgment action was amenable to resolution as an Article 78 proceeding, and was governed by the four-month limitation period under CPLR 217 (1) (*Solnick*, 49 NY2d at 233; *accord Board of Educ. of Altmar-Parish-Williamstown Cent. School Dist. v Ambach*, 49 NY2d 986 [1980]; *New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194 [1994]). Requiring courts to examine the substance of declaratory judgment actions for the applicable statute of limitations applies not only to challenges to governmental determinations, but also to suits by shareholders challenging determinations of cooperative or condominium boards (*see e.g. Buttitta*, 11 AD3d at 251 [court applied four-month limitation period to bar declaratory judgment action by shareholder challenging cooperative board's decision on stock redemption]; *Katz v Third Colony Corp.*, 101 AD3d 652 [1st Dept 2012] [dismissed declaratory judgment action as untimely where shareholder challenged validity of cooperative board's flip tax decision three years after its enactment]). Indeed, in the *Ciccone* case relied on by Plaintiff, the First Department dismissed the shareholder's declaratory judgment action challenging the validity of the board's amendment of the proprietary lease provision regarding occupancy rights on the ground that it was "barred by the four-month statute of limitations on proceedings against bodies such as cooperative boards" (*Ciccone*, 171 AD3d at 481). Thus, Plaintiff's assertion that this action is governed by the six-year statute of limitations is unconvincing, as it is discredited by applicable caselaw. Indeed, as argued by Defendants, Plaintiff's attempt to "rebrand" this action as a "contract interpretation"

case is a "transparent ploy to evade the applicable statute of limitations" (Def. Reply at 13), as explained below.

Assuming, arguendo, that this action is not time-barred under CPLR 217 (1), Plaintiff's contention that a "fair reading of the Complaint" shows that this action is grounded on "contract interpretation" of the proprietary lease is largely flawed. As discussed above, with respect to the first cause of action seeking declaratory relief as to the sublet fees, the Complaint does not point to a specific provision in the lease that might have been breached by Defendant; instead, it points to the Board resolutions and various letters written by Plaintiff and/or his counsel challenging the resolutions (Complaint, ¶ ¶ 18-33, 36-41, 48-53).[2] Also, Plaintiff's assertion that the Offering Plan permitted him to "allow one or two Doctors to occupy the Premises" without the consent of the Board (Complaint, ¶ 7) is fully rebutted by Defendant. Specifically, Defendant points to the fact that the commercial lease that Plaintiff relied upon was cancelled in 1983, pursuant to the Fifth Amendment to the Offering Plan, more than 15 years before he purchased the shares and proprietary lease appurtenant to his commercial unit in 1999, and therefore his unit has been "subject to the same proprietary lease as all other shareholders for the past 36 years, and the long-since defunct commercial lease has no bearing on this action" (Def. Brief at 5-7, 17-18; explaining and attaching Offering Plan amendments, by-laws, house rules and proprietary lease as exhibits to the motion to evidence that Defendant has the right to limit the use of premises and assess sublet fees to all shareholders, including Plaintiff). In his opposition to this motion, Plaintiff failed to address or challenge Defendant's evidentiary proof and documentary support.

[2] Discussion of the disputed legal fees issue requires a somewhat different analysis, as explained further below.

Notwithstanding the foregoing, Plaintiff contends that he is simply seeking a declaration that he "did not breach the Lease by merely *licensing* a portion of the subject premises on a part-time basis to fellow dentists with the irrefutable knowledge of the Defendant for over a decade, and is consequently entitled to a refund of any sublet fees he paid under protest" (Plf. Opp., ¶ 35; emphasis added). Specifically, Plaintiff contends that the purported "subleases" that he entered into with his fellow dentists were mere "license agreements" because "no absolute control and possession" was ever transferred to the other dentists thereby, and because he has "continuously shared the subject premises with his licensees" (*id*., ¶¶ 38-43; citing *American Jewish Theatre v Roundabout Theatre Co.* (203 AD2d 155, 156 [1st Dept 1994)] for the proposition of law that "the transfer of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights," and "a license connotes use or occupancy of the grantor's premises, [while] a lease grants exclusive possession of designated space to a tenant"). Plaintiff asserts that because the other dentists were granted "use" and not "exclusive use" of a portion of the Premises, and there is nothing in the agreements that prevents him from cancelling them at will, he did not violate paragraph 15 of the proprietary lease that governs the subletting of premises (Plf. Opp., ¶ 39). In Plaintiff's view, Defendant failed to prove that he "sublet" the Premises, and thus is not entitled to sublet fees (*id.*, ¶ 46).

On the other hand, Defendant points out that for the first 13 years after 2001, Plaintiff entered into agreements with the dentists to sublet a portion of the Premises and titled such agreements as "Leases," but after 2013, he changed the title to "Licenses to occupy portion of the premises" at the direction of his counsel (Def. Brief at 19; referencing exhibits and deposition transcripts). Defendant argues that, based on caselaw, regardless of how Plaintiff titled the agreements, they are subleases (not licenses) and thus are subject to sublet fees (*id*., at 19-21;

citing, inter alia, *Nextel of NY, Inc. v Time Mgt. Corp*., 297 AD2d 282-283 [2d Dept 2002] [a license is a still a lease if it grants the exclusive use of even a portion of the property]; *Tsabbar v Auld*, 276 AD2d 442 [1st Dept 2000] ["plaintiff's agreements with other health care professionals granted an 'exclusive right to use and occupy' part of plaintiff's apartment at certain times, were not mere licenses, but subleases for which approval was required under plaintiff's proprietary lease with defendant cooperative corporation"]). Repeating these arguments in its reply, Defendant asserts that Plaintiff's contentions, that the dentists do not have exclusive use of the "entire" Premises and the agreements do not contain the specific words "exclusive use," are legally insignificant to the lease versus license determination because Plaintiff has not refuted the binding caselaw holding that an agreement granting exclusive use of even a "portion" of the property constitutes a lease (Def. Reply at 17). Pointing to the "undisputed facts" and deposition testimony, Defendant argues that Plaintiff's arrangements with the dentists were subleases regardless of whether the term "exclusive use" appeared in the agreements (*id.*, at 17-19). Defendant also points out that the *American Jewish Theatre* case relied upon by Plaintiff does not support his contention, but refutes it. In particular, Defendant asserts that the key holding in that case was: "Where one party's interest in another's real property exists for a fixed term, not revocable at will, and terminable only on notice, a landlord-tenant relationship has been created" (*id.*, quoting *American Jewish Theatre*, 203 AD2d at 156). Because all of the agreements at issue "were for a fixed term, as opposed to terminable at will," Defendant argues "none of the cases" Plaintiff cites to are contrary to Defendant's position (*id.*, at 18-19).

Defendant further argues that, besides paragraph 15 of the proprietary lease that governs subletting of all units in the building and charges all shareholders sublet fees, paragraph 14 thereof (titled "Use of Premises") delineates what constitutes authorized uses of the units, and

that Plaintiff's shared use of his Premises with other dentists constitutes an "unauthorized use" thereunder (*id.*, at 14-17). Thus, Defendant argues that it is entitled to require Plaintiff to pay fees for his unauthorized use, even if the dentists may be deemed "licensees as opposed to lessees" (*id.*, citing *Campaniello v Greene St. Holding Corp.*, 2013 NY Slip Op 33682 [U] [Sup Ct, NY County 2013] [summary judgment granted in favor of cooperative building defendant where commercial shareholder plaintiff challenged defendant's right to charge sublet fees, and where defendant collected fees from all shareholders who sublet a portion of their space, including those who own shares to commercial spaces]). Upon scrutiny, Plaintiff's attempt to distinguish *Campaniello*, contending that the defendant there "*always* treated all shareholders the same" since 1980 but Defendant did not start to collect sublet fees until 13 years after he has been sharing the Premises with the other dentists (Plf. Opp., ¶ ¶ 59-61), is unpersuasive and unavailing because a difference in the duration of "treatment" is legally insignificant.

Despite the foregoing, Plaintiff contends that Defendant has waived its right to collect sublet fees because it knowingly accepted maintenance payments from him for over a decade, without objection to his sharing the Premises with other dentists (Plf. Opp., ¶ ¶ 47-54; citing *Jefpaul Garage Corp. v Presbyterian Hosp.*, 61 NY2d 442 [1984] [*Jefpaul*]; *TSS-Seedman's Inc. v Elota Realty Co.*, 72 NY2d 1024, 1027 [1988] [parties may waive non-waiver clause in lease where reasonable expectations of both parties were modified by subsequent actions]).

Defendant argues that the cases cited by Plaintiff are distinguishable because none of them stand for the proposition of law that "the waiver of a remedy for a violation the landlord knew about while accepting rent," which the cases support, is equivalent to "the waiver [by the landlord] of the ability to ever enforce the lease provision again," which no cases support (Def. Reply at 20-21; citing *1890 Adam Clayton Powell LLC v Penant*, 52 Misc 3d 76, 76-78 [1st Dept

App Term 2016] [assuming landlord waived a breach of the lease in the past by accepting rent with knowledge of tenant's unauthorized use of premises, court rejected argument that "such past waiver precludes enforcement of the occupancy restrictions for the duration of the tenancy"]). In other words, Defendant asserts that, in the instant action, it is not alleging that Plaintiff's failure to pay sublet fees constitutes a breach of the proprietary lease, nor is it attempting to "back-bill past sublet fees" or to terminate the lease, but it is simply "attempting to prospectively enforce the Proprietary Lease provisions that clearly apply, and Plaintiff has not cited to any authority preventing [Defendant] from doing so" (Def. Reply at 20). Defendant further argues that Plaintiff cannot claim that "he has been prejudiced by the Co-op's former boards' failure to charge him sublet fees" or that "he relied to his detriment on that failure," while on the other hand, "Plaintiff received a windfall, profiting greatly by leasing his unit without paying the same sublet fees that other shareholders had to pay" (*id.*, at 23, referencing deposition transcript where Plaintiff testified that his sublet fees *per year* were $5,855 while his *per month* income derived from subletting was $7,623 [Def. Brief at 24]).

Also, Plaintiff's reliance on *Jefpaul* is misplaced because the Court held in that case that the non-waiver clause in the lease was unambiguous, that the parties mutually assented to its term, that the clause "should be enforced to preclude a finding of waiver of the conditions precedent to renewal," and that absent prejudice to the tenant, "a waiver of the right to terminate the tenancy will not automatically result in a waiver of the conditions precedent to renewal" (*Jefpaul*, 61 NY2d at 446-448). In so ruling, the Court reversed the Appellate Division's grant of summary judgment in favor of the tenant plaintiff and reinstated the trial court's decision denying the plaintiff's motion for summary judgment (*id.* at 449). Here, the non-waiver clause in the subject lease clearly states, in relevant part, that "[t]he failure of the Lessor to insist . . .

upon a strict performance of any of the provisions of this lease . . . shall not be construed as a waiver, or a relinquishment in the future, of any such provisions . . . [which] shall continue and remain in full force and effect" (Proprietary Lease, NYSCEF Doc. No. 45, ¶ 26). It is also noteworthy that Plaintiff does not deny that he has "profited greatly" by subletting the Premises and, as such, the equities in this case do not militate in his favor. Accordingly, based on the foregoing, even assuming the first cause of action is not time-barred by CPLR 217 (1), it should be dismissed in its entirety because there is no material disputed fact which requires a trial and the applicable law requires entry of summary judgment in favor of Defendant.

With respect to the second cause of action that seeks a declaration that Plaintiff is not in default under paragraph 28 of the lease, which sets forth the circumstances under which a tenant-shareholder is required to reimburse Defendant's legal expenses, Plaintiff contends that he is not obligated to pay Defendant the legal fees incurred in connection with this sublet fee dispute, and that Defendant's counsel failed to "actually conduct the legal research and services stipulated for" (Plf. Opp., ¶¶ 68-69). Plaintiff also contends that this cause of action is not time-barred because it is grounded upon a breach of the "oral contract," as asserted by Defendant, and is therefore subject to the six-year statute of limitations under CPLR 213 (2) (*id.*, ¶ 70).

To the extent that the legal fees sought from Plaintiff is depended on an oral contract, which Defendant does not dispute, the second cause of action is governed by the six-year limitation period, and therefore is not time-barred under CPLR 217 (1). However, as to whether Plaintiff was in default under the proprietary lease so that Defendant can demand reimbursement of legal fees incurred, Defendant argues that the legal fees charged to Plaintiff were not pursuant to the terms of the lease, but pursuant to an "oral contract" with Plaintiff in which he agreed to pay in the event Defendant's counsel ruled in its favor on the sublet issue (Def. Reply at 26-27;

referencing email exchanges of the parties and deposition transcript of Plaintiff that are annexed as exhibits to the motion; NYSCEF Doc. Nos. 48, 53 and 56). Based on the evidentiary support, it cannot undisputed that Plaintiff has agreed to pay Defendant legal fees. With respect to whether Defendant's counsel has conducted research on the issue of the co-op's sublet policy, there is also evidentiary support that counsel has reviewed the governing documents, applicable caselaw, correspondences between the parties, as well as participated in phone calls (Def. Reply at 27-28; referencing various exhibits and relevant portions of the deposition transcript). Thus, despite Plaintiff's conclusory allegations that Defendant's counsel indisputably "failed to perform the legal research stipulated for," and that the oral contract for him to "blindly pay legal fees for Defendant's inept legal research and any such theoretical agreement is unequivocally unconscionable and unenforceable" (Plf. Opp., ¶ 73), Plaintiff is estopped from raising such untenable allegations, and the second cause of action is barred by the doctrine of promissory estoppel (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011] [stating the elements of a promissory estoppel claim and explaining that the claim is extrinsic to the contract sued upon]). Accordingly, the second cause of action should be dismissed and summary judgment should be entered in favor of Defendant.

Conclusion

Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is granted, and Plaintiff's complaint is dismissed in its entirety, Clerk to enter judgment accordingly.

Dated: July 24, 2020

DAVID B. COHEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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DR. MICHAEL FARAHNICK

Plaintiff,

- v -

123 E. 37 OWNERS CORP.,

Defendant.

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INDEX NO. 158363/2015

MOTION DATE 11/22/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

Upon the foregoing documents, defendant's motion for summary judgment is granted as per the annexed decision and order.

7/24/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**