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[1] EQUINOX HUDSON STREET, INC., Plaintiff, -against- HUDSON LEROY LLC AND MOUNTBATTEN EQUITIES, L.P., Defendants. Index No. 651695/12**

651695/12

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2015 N.Y. Misc. LEXIS 1397; 2015 NY Slip Op 30653(U)

April 21, 2015, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] HON. CYNTHIA KERN, J.S.C.

OPINION BY: CYNTHIA KERN

OPINION

HON. CYNTHIA KERN, J.S.C.

Defendant Hudson Leroy LLC ("Hudson") and Mountbatten Equities, L.P. have brought the present motion for partial summary judgment dismissing plaintiff's first, second, third, fourth fifth and ninth causes of action in the second amended complaint. Plaintiff **Equinox Hudson** Street, Inc. ("**Equinox**") has brought a cross-motion for summary judgment on its first, second, third and fifth causes of action. For the reasons stated below, defendants' motion to dismiss the first, second, third, fifth and ninth causes of action is granted but the motion to dismiss the fourth cause of action is denied and plaintiff's cross-motion is denied in its entirety.

The relevant facts are as follows. On or about December 15, 2010, (the "Commencement Date"), **Equinox** and **Hudson** entered into a written sublease (the "Sublease") of certain premises (the "Premises") identified in the Sublease as seven commercial condominium units in the **[**2]** Printing House Condominium (the "Condominium") located at 421 Hudson Street, in the County, City and State of New York (the "Building"). In addition to the 1st floor, Equinox occupies the Building's 9th and 10th floors **[*2]** which house an adjacent outdoor roof deck and pool. The Sublease between the parties provided that all work required to prepare the Premises for plaintiff's business would be performed by Equinox at its own cost and expense and that Hudson would have no obligation to perform any work to prepare the Premises for Equinox's occupancy. However, the Sublease did provide that Hudson had certain obligations to perform work pursuant to the Sublease. One of the circumstances where an obligation was imposed on Hudson to perform work was with respect to the roof deck adjacent to the 9th and 10th floors. The Sublease provided, in paragraph 13.02, as follows:

> With respect to the roof deck adjacent to the 9th and 10th floors of the Premises, Landlord shall be responsible, at its sole cost, for the repair and replacement of structural defects, including leaks, that existed prior in time to the commencement by Tenant of renovation work on such roof deck. Tenant shall review the structural integrity of the roof deck within 30 days following the Commencement Date and shall provide landlord with notice of any alleged structural defects. Upon such notice the parties shall act in good faith to determine **[*3]** whether there are, in fact, existing structural defects. To the extent the parties are unable to agree, the parties shall select an independent structural engineer that shall render an opinion on the structural condition of the roof deck. The independent engineer's opinion shall be final and binding and the parties shall act in accordance therewith. Tenant shall not perform any work on the roof deck prior to review and notice, if applicable. To the extent structural defects are

> uncovered following the commencement of Tenant's work in such area, Tenant shall be responsible, at its sole cost, for all repair obligations.

The responsibility for monitoring, cleaning-up and complying with all legal requirements with respect to "Hazardous Materials" such as asbestos was also vested with Hudson in **[**3]** accordance with the express terms of paragraph 4.06 of the Sublease which states in pertinent part:

> (f) Landlord shall be responsible for all costs including, but not limited to, those resulting from monitoring, clean-up or compliance in accordance with all Legal Requirements incurred with respect to any Hazardous Materials placed in the Premises by Landlord or by its agents, employees or its contractors. **[*4]**
>
> (g) Landlord shall indemnify and hold Tenant harmless from and against any and all costs, claims, suits, causes of action, losses injuries or damage, including without limitation, personal injury damage (including death) as well as damage to property as well as any and all sums paid for settlement of claims, reasonable attorney's and consultants' fees arising during or after the Term as a result of a breach of the foregoing obligations, representations, or warranties of Landlord.

There were also obligations imposed on Hudson with respect to the HVAC system in the leased premises, pursuant to paragraph 15.05(a) of the Sublease, which states:

> Landlord shall furnish, install, maintain, and operate, at Landlord's sole cost, three fully-functional chilled water air handlers, each equipped with a hot water heating coil and a chilled water cooling coil. These units shall perform and provide cooled and heated air in sufficient quantities and pressures to satisfy Tenant's design, (anticipated to be approximately 20,000 CFM). Cooling season air discharge temperature shall not be more than 580F, and heating season air discharge temperature shall not be less than 880F. Actual discharge temperatures **[*5]** shall be controlled by Tenant. Both air handlers and all associated equipment, process fluid, and utility connections shall be fully operational no later than August 15, 2011 and there shall be no interruptions to such air delivery thereafter. Tenant shall not be required to pay any fee for the production or generation of chilled water. Tenant shall be responsible for the payment of electrical charges, in accordance with Article 15.02(d), for the running of the air handlers.

The Sublease further provided that:

> Provided Landlord delivers the permanent equipment and services **[**4]** in performing condition as described in Article 15.05(a) no later than August 15, 2011, Tenant agrees to make a one time payment to the Landlord in the amount of $35,000.00 no later than September 1, 2011. If Landlord fails to deliver the equipment and services as describe in Article 15.05(a) by August 15, 2011, Tenant has the right to install all temporary or permanent equipment and services as may be required for the cooling and heating of their Premises including, but not limited to, cooling systems, pumping systems, and power systems, and may install these Tenant designed systems at times and in locations as reasonably **[*6]** determined by Tenant. All charges for the aforementioned temporary or permanent equipment and services shall be at the Landlord's sole cost and expense with the exception of the period between August 15, 2011 and September 6, 2011, during which time the prorated costs of any temporary services only shall be at the Tenant's sole cost and expense.

Equinox brought the present action against Hudson based on its allegations that Hudson did not comply with its obligations to perform the work required of it under the Sublease pursuant to the foregoing paragraphs to repair the structural defects with respect to the roof deck adjacent to the 9th and 10th floors, including asbestos abatement and to install the appropriate air climate control equipment. It claims that it provided Hudson with notice of the pre-existing defective and dangerous conditions of the roof deck and that Hudson refused to perform the necessary repairs. It also alleges that Hudson failed to install a system to power Equinox's internal HVAC system, which it was required to do pursuant to

the Sublease no later than August 15, 2011. **Equinox** alleges that due to **Hudson's** failure to perform its obligations under the Sublease, **[*7]** Equinox was forced to perform the required work at its own cost and expense. Equinox also alleges that defendants asked it to perform certain improvements to the Building's mechanical, electric and plumbing and other systems which were outside the scope of the tenant's work required under the Sublease and which benefitted the Building and the interests of **[**5]** defendants and that defendants refused to reimburse **Equinox** for this work. **Hudson** claims that it was not required to perform any of this work pursuant to the Sublease because Equinox did not follow the steps it was required to take under the Sublease which would have triggered Hudson's obligation to pay for any of the work.

Equinox commenced this action, asserting various claims. Its first cause of action for breach of contract is based on its claim that Hudson refused to perform its obligation under the Sublease to repair the structural defects of the 9th and 10th floor roof deck and perform the necessary asbestos abatement. Its second cause of action is based on its claim that Hudson breached its obligation under the Sublease to perform the necessary HVAC work required of it. Its third cause of action is for attorneys' fees based **[*8]** on defendants' alleged breach of the Sublease. Its fourth cause of action is for unjust enrichment based on its claim that it performed additional work not required of it under the Sublease at defendants' request and for defendants' benefit. Its fifth cause of action asserts a claim for a breach of the covenant of good faith and fair dealing based on defendants' failure to fulfill their obligations under the Sublease. Finally, the ninth cause of action asserts a claim for breach of the covenant of quiet enjoyment contained in the Sublease.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986)*. Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)*. Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in **[**6]** admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The first issue the court must address is **Hudson's** claim that **Equinox** cannot recover on any of its money **[*9]** claims (its first, second, third, fifth and ninth causes of action,) which are all based on **Equinox's** claim that **Hudson** defaulted in the performance of its obligations under the Sublease, because **Equinox** failed to provide **Hudson** with the written notice required pursuant to paragraph 24.04 of the Sublease. That provision provides as follows:

> Landlord shall not be in default of any of its obligations under this Lease unless and until (i) Landlord shall have received written notice from Tenant specifying such failure and (ii) Landlord shall fail to perform any of its obligations under this Lease specified in such written notice within twenty (20) days after receipt of such written notice: provided, however, that if any such default cannot...be cured within a period of twenty days,...Landlord shall duly commence ...and thereafter diligently prosecute to completion....

The courts have consistently held that where a contract provides that a party will not be in default unless it fails to cure after being provided with written notice of default and such notice has not been served, the party is not in default and the other party may not pursue contractual remedies based on the party being in **[*10]** default. *See Environmental Safety & Control Corp. v. Board of Educ. of Camden Cent. School District, 179 A.D.2d 1012, 1013, 580 N.Y.S.2d 595 (4th Dept 1992)* (counterclaims "based upon breach of contract should also have been dismissed based upon defendant's failure to comply with the condition precedent of written notice as required by [provision] of the contract"); *Cinema Dev. Corp. v. Two Thirty Eight Realty Corp., 149 A.D.2d 648, 540 N.Y.S.2d 305 (2d Dept 1989)* ("provision of the lease governing default requires that the tenant be given written notice of any default in its performance of any covenant in the lease before the landlords act on it....this notice provision is a condition precedent to the landlords' ability to use a default as **[**7]** a reason to deny the plaintiff's rights under the lease"); *Carnegie Successors v. Gross, 166 A.D.2d 224, 560 N.Y.S.2d 436 (1st Dept 1990)* ("seller was not then entitled to repudiate the contract because, also under the contract, buyer was entitled to 10 days' written notice of any default, which seller never gave").

Moreover, it is well settled that construction of a written contract is a question of law, appropriately decided by the court on a motion for summary judgment, as long as the contract is unambiguous and the intent of the parties can be determined from the face of the agreement. *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 291, 298 N.E.2d 96, 344 N.Y.S.2d 925 (1973)*.

This court finds that Hudson is not in default as a matter of law under any of the provisions in the Sublease because it is undisputed that Equinox never provided it with **[*11]** written notice specifying any default under the Sublease. Pursuant to the unambiguous provisions of the Sublease, Hudson is not in default unless it is provided with written notice of default and an opportunity to cure. In the present case, the undisputed facts establish that **Equinox** never provided **Hudson** with any written notice of default with respect to any of Hudson's obligations under the Sublease and never gave Hudson any opportunity to cure any alleged default under the Sublease. Under these circumstances, Equinox has failed to establish that there is any default by Hudson under the provisions of the Sublease for which it can be held responsible.

The cases cited by Equinox in support of its argument that it satisfied any notice requirement imposed by the Sublease are inapposite as those cases only hold that a written notice will not be invalidated simply because of the method of mailing of such notice. *See Juleah Co., L.P. v. Greenpoint-Goldman Corp., 49 A.D.3d 282, 853 N.Y.S.2d 313 (1st Dept 2008)* (service of request for an **[**8]** estoppel certificate was not invalid on the ground that it was served by regular rather than registered mail); *Ring v. Arts Int, Inc., 7 Misc.3d 869, 792 N.Y.S.2d 296 (Sup Ct NY Co 2004)* (respondent's use of regular mail rather than registered or certified mail to notify petitioner of condition **[*12]** of premises sufficient). In the instant case, it is undisputed that Equinox never provided any written notice to Hudson of default under the Sublease via any method.

To the extent that Equinox argues for the very first time in its reply papers to its cross-motion that Hudson has waived the notice requirements contained in paragraph 24.04 of the Sublease, the court declines to consider such argument as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco, 184 A.D.2d 415, 585 N.Y.S.2d 360 (1st Dept 1992)*. Even if the court were to consider the new argument raised for the first time in reply papers, none of the cases cited by plaintiff in its reply papers stand for the proposition that plaintiff cites them for--none of these cases hold that an unambiguous provision in a lease requiring written notice to a party of default and providing an opportunity to cure before there is any default can be orally waived. *See, e.g., Baker v Norman, 226 A.D.2d 301, 643 N.Y.S.2d 30 (1st Dept 1996)* (although notice not provided in precise form designated by contract, written notice of cancellation was provided); *Kenyon & Kenyon v. Logany, LLC, 33 A.D.3d 538, 823 N.Y.S.2d 72 (1st Dept 2006)* (landlord waived written notice of exercise of option **[*13]** to lease extension space where never disputed that oral extension was effective).

Moreover, the reason that parties to a commercial lease usually put a requirement in a lease that written notice of a default and the opportunity to cure be provided is because it is often ambiguous whether any party is in fact taking a position that there has been a default in the **[**9]** performance of an obligation under the lease. Therefore, it is reasonable to impose a requirement, which these parties have done, that any notice of default be in writing and giving the other party an opportunity to cure. In the absence of compliance with these requirements, there would be no certainty between the parties to the lease whether either side is actually taking the position that a default has even occurred.

Finally, **Equinox's** argument that **Hudson** had notice of a default under the Sublease because it knew that Equinox was taking the position that there were structural defects and that the parties discussed ways that these defects could be repaired is without merit. The notice that was required under the Sublease was notice that Equinox was taking the legal position that there was a default under the Sublease and that **[*14]** Hudson's time to cure the default was running. It is undisputed that this notice was never provided. Rather, after **Equinox** notified **Hudson** of its position that there were structural defects and discussed how these defects could be repaired, Equinox went ahead and made the repairs itself rather than notifying Hudson that it was in default under the Sublease based on its failure to make the repairs and that its time to cure the default was running. Similarly, **Equinox** never provided **Hudson** with notice that it was in default under the Sublease based on its failure to comply with its obligations to provide the specified HVAC equipment. Among all the documents and affidavits submitted in support of Equinox's cross-motion, there is no document which reflects that Equinox ever provided any notice to Hudson that it was in default of its obligations under the Sublease and that its time to cure had begun to run. Under these circumstances, there is no basis for a claim of waiver of the notice requirement as a matter of law.

[10]** The court also finds that Equinox's fifth cause of action for breach of the covenant of good faith and fair dealing must be dismissed even if no notice of default is required **[*15]** for this claim pursuant to the Sublease. In its fifth cause of action, Equinox alleges that to the extent that Hudson's actions did not constitute a violation of the express provisions of the Sublease, that it violated the implied covenant of good faith and fair dealing owed by **Hudson** to **Equinox** under the Sublease. Under New York law, a covenant of good faith and fair dealing will only be found "where the implied

term is consistent with the other terms of the contract." *SNS Bank v. Citibank, 7 A.D.3d 352, 777 N.Y.S.2d 62 (1st Dept 2004)*. In the present case, it would be inconsistent with the express terms of the Sublease requiring that Hudson be provided with written notice before it can be found in default to find that it is in default of its obligations under the. Sublease based on a implied covenant of good faith and fair dealing.

Finally, the court must address plaintiff's fourth cause of action for unjust enrichment, in which it alleges that it performed substantial work to the Building's mechanical, electrical, plumbing and other systems that were outside of the scope of the "Tenant's Initial Work" as defined in the Sublease. A plaintiff asserting a claim for unjust enrichment must show "that (1) the other party was enriched, (2) at that party's **[*16]** expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 944 N.E.2d 1104, 919 N.Y.S.2d 465 (2011)*.

This court finds that Hudson is not entitled to summary judgment dismissing the fourth cause of action on two separate grounds. Initially, it has not established as a matter of law that the work for which Equinox seeks recovery was work performed pursuant to the terms of the Sublease. Equinox has consistently taken the position that it performed this work at Hudson's **[**11]** request and that the work was not necessitated by Equinox's use of the Premises. Moreover, summary judgment on this cause of action is premature as the parties have not yet completed discovery and have not even taken any depositions of any of the parties and Equinox is entitled to take discovery on these issues.

Based on the foregoing, defendants' motion to dismiss the first, second, third, fifth and ninth causes of action is granted but the motion to dismiss the fourth cause of action is denied and plaintiff's cross-motion is denied in its entirety. The foregoing constitutes the decision and order of the court.

Dated: 4/21/15

Enter: /s/ Cynthia S. Kern

J.S.C.