SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

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AUDTHAN LLC,

Plaintiff,

- v -

NICK & DUKE, LLC,

Defendant.

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INDEX NO. 652050/2015

MOTION DATE 05/31/2024, 05/31/2024

MOTION SEQ. NO. 029 030

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 029) 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1218, 1219, 1220

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND AND ALLEGED FACTS

This action concerns disputes about the parties' allegations of breach regarding a Ground Lease dated May 24, 2013 (the "Lease") for 182-188 Eleventh Avenue, New York, New York ("the Property").

The Lease contemplated an initial term of 40 years, with an option to renew for another 48 years and seven months. Plaintiff entered the Lease to build and develop on the Property a mixed-use, residential and commercial building of approximately 58,000 square feet.

Due to a harassment finding issued by HPD on April 2, 2009, the New York City Department of Buildings would not issue a building permit until a cure of such harassment finding was effectuated.

The Lease provided that Plaintiff would enter into a multilateral agreement with HPD, Landlord, and a not-for-profit company pursuant to which a single-room occupancy hotel on the Property (the "SRO") would be replaced with the Building, which would include approximately 15,000 square feet of permanent low-income housing. It affirmatively obligated Plaintiff to pursue the HPD Cure with commercially reasonable diligence and obligated Landlord to cooperate in good faith with Plaintiff in executing any agreements required to effectuate the HPD Cure.

During the pendency of this action Landlord issued several notices alleging defaults under the lease and Plaintiff obtained several Yellowstone injunctions. The alleged defaults concerned failure to cure outstanding violations on the property, as well as an alleged failure to maintain the necessary insurance for the Property.

On June 4, 2021, Landlord wrote a letter to HPD asserting that it would never approve any version of an agreement to effectuate an HPD Cure. Plaintiff interpreted this letter as a repudiation of the contract and surrendered possession of the premises on or about July 30, 2021.

Following its surrender of the Property, Plaintiff amended the complaint to assert that Landlord's June 4, 2021 constituted a repudiation of the Lease, entitling Plaintiff to terminate and sue for money damages and a claim for damages based on Landlord's breach of the covenant of quiet enjoyment.

Landlord's motion to dismiss the Third Amended Complaint was granted to the extent of dismissing so much of the Complaint's first cause of action for breach of contract as sought

money damages for repudiation of the Lease based on Landlord's June 4, 2021 letter, but denied as to the second cause of action for breach of quiet enjoyment. The Court also dismissed so much of the Complaint's third cause of action as sought attorneys' fees as damages.

By unanimous Opinion dated April 25, 2024, the Court of Appeals (Wilson, C.J.) reinstated Plaintiff's repudiation claim. The Court of Appeals held in pertinent part:

> The first cause of action alleges N & D engaged in multiple acts that breached the ground lease agreement: a set of acts in refusing to sign the cure agreement tendered in 2015, and a 2021 statement that it would never sign any agreement. Contrary to the conclusions of the courts below, a claim for breach and a claim for anticipatory repudiation can both be stated on these facts at the pleading stage.
>
> According to the complaint, N & D's refusal to sign the 2015 PCA was based on a specific aspect of the agreement that N & D claimed was not compliant with the lease and therefore needed to be modified for N & D to execute the PCA—namely, Audthan's alleged failure to account for the court adjudicated rent-stabilized tenancies. By comparison, the complaint alleged that N & D's 2021 letter to HPD was a blanket refusal to sign "any" cure agreement. Under these circumstances, the complaint sufficiently alleges that N & D's refusal to sign the PCA in 2015 fell short of its contractual requirements without amounting to a total breach. Importantly, Audthan highlights, N & D's conduct in 2015 was not accompanied by any statement or indication that it would never perform its obligations with respect to the PCA, potentially making it, as the Appellate Division dissent claimed, "different in kind" from the 2021 letter, which the complaint alleges constituted a clear and unequivocal statement that N & D would never perform its obligations at any point (*Audthan LLC,* 211 A.D.3d at 423, 180 N.Y.S.3d 81 [Rodriguez, J., dissenting]).
>
> Taking the facts alleged in the complaint as true, which we must do at this stage of the proceeding, Audthan sufficiently demonstrated that N & D's 2021 statement was both a new development and a distinct "material breach that escalated, for the first time, to an unequivocal repudiation" (*id.* at 424, 180 N.Y.S.3d 81). As Supreme Court held with regard to the alleged breaches occurring before 2021, questions of fact remain as to whether N & D's acts constituted breaches. That is also true as to the alleged 2021 breach. Ultimately, Audthan could lose its claim that N & D breached the contract before it refused to sign any agreement yet prevail on the alleged 2021 anticipatory repudiation claim. A plaintiff, of course, is permitted to plead in the alternative (*see* CPLR 3014, 3017). Accordingly, Audthan alleged a cognizable cause of action that N & D's 2021

> statement was a repudiation of its core obligations under section 14.01 and the lower courts' dismissal of this claim was premature.

Audthan LLC v. Nick & Duke, LLC, 42 N.Y.3d 292, 303–04 (2024).

PENDING MOTIONS

On June 18, 2024, both parties moved for summary judgment. Plaintiff moved for summary judgment as to liability on its causes of action for repudiation and breach of quite enjoyment, and defendant moved for summary judgment on the same claims.

The motions were fully briefed and marked submitted on August 8, 2024, and the Court reserved decision. The motions are consolidated herein and determined as set forth below.

DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

The Court finds that neither party has made a *prima facie* showing of entitlement to law on the issue of anticipatory repudiation, or breach of contract and that there are material questions of fact requiring a trial on these claims.

> " 'An anticipatory breach of contract by a promisor is a repudiation of [its] contractual duty before the time fixed in the contract for ... performance has arrived' " (*Princes Point LLC v. Muss Dev. L.L.C.,* 30 N.Y.3d 127, 133, 65 N.Y.S.3d 89, 87 N.E.3d 121 [2017], quoting 10–54 Corbin on Contracts § 54.1 [2017]; *see Wester v. Casein Co. of Am.,* 206 N.Y. 506, 514, 100 N.E. 488 [1912]; 13 Williston on Contracts § 39:37 [4th ed]). Under the doctrine of anticipatory repudiation or anticipatory breach, "if one party to a contract repudiates [its] duties thereunder prior to the time designated for performance and before [it] has received all of the consideration due ... thereunder, such repudiation entitles the nonrepudiating party to claim damages for total breach" (*Long Is. R.R. Co. v. Northville Indus. Corp.,* 41 N.Y.2d 455, 463, 393 N.Y.S.2d 925, 362 N.E.2d 558 [1977]). To constitute repudiation, "there must be some express and absolute refusal to perform" (*Ga Nun v. Palmer,* 202 N.Y. 483, 489, 96 N.E. 99 [1911]) that is "positive and unequivocal" (*Tenavision, Inc. v. Neuman,* 45 N.Y.2d 145, 150, 408 N.Y.S.2d 36, 379 N.E.2d 1166 [1978]; *see Princes Point LLC,* 30 N.Y.3d at 133, 65 N.Y.S.3d 89, 87 N.E.3d 121).

Audthan LLC v. Nick & Duke, LLC, 42 N.Y.3d 292, 303 (2024).

The factual allegations in this action span a period of close to ten years and do not lend themselves to summary determinations.

One question of fact is when the time fixed in the contract for approval of the PCA came due. Based on the parties' submissions this could have been anywhere from 2015 to the 2021 letter. Other questions of fact include, but are not limited to, whether the lease was terminated and whether Plaintiff was in breach of the lease at the time of the alleged anticipatory repudiation, whether the PCA complied with the lease given the newly created rent-stabilized tenancies and the change in square footage resulting therefrom, what condition the subject premises was in at the time of the alleged surrender, and whether the landlord's actions in issuing the termination notices were in good faith.

The Court finds it appropriate to consider the affidavit of Gurdayal Kohly. It could be true that Mr. Kohly was physically and mentally unable to sit for s deposition, but able to sign an affidavit, for example attesting to the state that the premises was in when surrendered.

For all of the above reasons, the Court finds that neither party is entitled to summary judgment on the claim of anticipatory repudiation and breach of quiet enjoyment.

SECTION 33.09 BARS PLAINTIFF'S CLAIM FOR MONEY DAMAGES

Section 33.09 of the Lease is a sole remedy provision stating that if Landlord unreasonably refuses to approve the PCA, Plaintiff's only remedy is injunctive relief mandating such approval. The provision provides:

> Whenever Lessor's or Lessee's consent or approval is required under the terms of this Ground Lease, such consent or approval shall not be unreasonably withheld, conditioned, or delayed unless otherwise specified herein. Each of Lessor and Lessee hereby waives to the fullest extent permitted by law any right to damages (actual, incidental or consequential) based upon either party's actually or allegedly wrongfully withholding, conditioning or delaying any consent or approval under or in connection with this Ground Lease. Such party's sole remedy for any wrongfully withheld, conditioned or delayed consent or approval shall be the right to seek injunctive relief. (Exhibit DD, Section 33.09)

Plaintiff's reliance on *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 (1983) is misplaced. In *Kalisch-Jarcho*, the Court of Appeals found that exculpatory clauses that purport to insulate a party from willful conduct or gross negligence, to provide a party no remedy or nominal damages in the event of a breach, can be circumvented upon a showing bad faith.

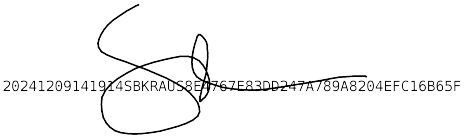
It is fundamental that "when parties set down their agreement in a clear, complete document, their writing should be as a rule enforced according to its terms." (*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v Nomura Credit & Cap., Inc*., 30 NY3d 572, 581 [2017].

In *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 354 (2020) the Court of Appeals held that the public policy concerns raised in *Kalisch-Jarcho* do not apply with equal force where, as here, sophisticated commercial parties choose a remedy that will be available in the event of a breach of contract to the exclusion of others. In this action the parties specifically

negotiated a remedy for such breach which excluded monetary damages and there is no basis applicable to the facts in this case to negate that provision of the contract.

Based on the foregoing, Landlord's motion to dismiss the claim for monetary damages for breach of Section 33.09 of the lease is granted and the balance of relief requested in both motion is denied.

This constitutes the decision and order of the Court.



12/9/2024
DATE

SABRINA KRAUS, J.S.C.

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