

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**  
**Justice**

**PART 17**

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**QUEENS OFFICE TOWER LIMITED**  
**PARTNERSHIP,**

**Plaintiff,**

**Index No.: 28264/06**

**Motion Date: 3/7/07**

**-against-**

**Motion Cal. No.:47**

**COMPUTER CAREER CENTER, INC.**  
**Defendant.**

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The following papers numbered 1 to 9 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a) (7).

	<b>PAPERS NUMBERED</b>
Notice of Motion-Affirmations-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) is denied for the following reasons:

The plaintiff's allegations, which must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770), are as follows: On or about December 30, 1998, Plaintiff entered into a lease agreement with defendant for parts of the fifth and sixth floors of the building located at 95-25 Queens Boulevard, Rego Park, New York. The lease was subsequently amended, but it was to expire on December 31, 2010. In or about February 2006, defendant defaulted in the payment of rent and plaintiff commenced a non-payment proceeding against defendant. This proceeding was settled by a stipulation on March 24, 2006, wherein defendant agreed to make certain payments of monthly rent and additional rent. Failure to make required payments constituted a default under the stipulation. Along with the stipulation, a warrant of eviction issued but its execution was stayed unless and until defendant defaulted in its obligations under the Stipulation of Settlement. On or about September 28, 2006, defendant vacated the demised premises, tendered possession of the demised premises and stopped

making any further payments as provided in the Stipulation. Plaintiff claims this was in breach of the Lease and the Stipulation and brought the instant action to recover, inter alia, \$175,722.87 as owed for fixed rent and additional rent, and interest to December 31, 2010 and Owners' expenses in connection with the termination of this lease, legal expenses and attorney's fees.

Defendant has now moved for dismissal of the complaint, pursuant to CPLR 3211 (a) (7), on the ground that the complaint fails to state a cause of action. According to defendant, the complaint fails to contain a necessary claim that notice, as required by Article 19 Paragraph C.(3) was made. Plaintiff opposes this motion claiming the Lease did not require such notice.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

In the instant case, resolution requires review of Paragraph C.(3) of Article 18 of the Lease, which provides as follows:

The foregoing expenses (referring to Paragraph C.(2) of the Lease) incurred by reason of Tenant's Event of Default shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within (15) days of rendition of any bill or statement to Tenant therefor, with interest thereon at the Interest Rate. If the Term of this Lease shall have been terminated, or if Owner shall have re-entered the Demised Premises at the time of making of such expenditures or incurring of such obligations, such sums shall be deemed Default Expenses and shall be recoverable by Owner as

damages.

A clear reading of this lease provision indicates that notice is required to be given to defendant by plaintiff when plaintiff is seeking expenses that accrued prior to termination of the Lease or prior to the defendant re-entering the premises. In this instance, the expenses are, in essence, added to the rent bill. If the expenses sought accrued after the termination of the lease or after the plaintiff has re-entered the premises then no notice is required and defendant shall seek such expenses as damages for the default. Plaintiff has pleaded that the expenses it seeks accrued after the Lease was terminated by defendant and after plaintiff re-entered the premises. In this regard, the plaintiffs' allegations must be accepted as true for the purpose of this CPLR 3211(a)(7) motion. (See, 1455 Washington Ave. Assocs. v Rose & Kiernan, supra; Esposito-Hilder v SFX Broadcasting Inc., supra.) Furthermore, defendant has not refuted this claim. As such, the Court finds that there was no requirement for plaintiff to give notice to defendant regarding recovery of the expenses sought in the complaint. Accordingly, plaintiff has properly stated a cause of action for breach of the Lease and the Stipulation and the motion is denied.

**Dated: March 8, 2006**

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**ORIN R. KITZES, J.S.C.**