At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of October 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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W.D.G.R. PROPERTIES, LLC,

Plaintiff,

- against -

Index No. 503732/13

DR. RAYMOND REICH,

Defendant.

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The following papers numbered 1 to 8 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers Plaintiff's mem of law, Defendant's mem of law	6,7,8

Upon the foregoing papers, defendant Dr. Raymond Reich moves for an order, pursuant to CPLR 3211(a)(1), (3) and/or (7), dismissing the complaint of plaintiff W.D.G.R. Properties, LLC, in its entirety and awarding defendant with costs of bringing the instant motion and reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1.

Factual Background

The instant action arises out of a lease agreement of two commercial properties located at 110 West End Avenue, Brooklyn, New York (110 property) and 118 West End Avenue, Brooklyn, New York (118 property). Plaintiff W.D.G.R. Properties, LLC (plaintiff) is a limited liability company, and was the fee owner of 110 Property and 118 Property, (collectively, the premises) from August 31, 2004 until January 27, 2014. In the amended complaint, plaintiff alleges that on November 1, 1989, the defendant Dr. Raymond Reich (defendant) and MRP Lieberman, plaintiff's predecessor in interest, entered into a written lease agreement (the lease) pursuant to which MRP Lieberman, as landlord, leased to the defendant, as tenant, for a term commencing on November 1, 1989 and expiring on October 31, 2014. Dr. Reich maintained his ophthalmology practice in the leased premises. Pursuant to the terms of the lease, with respect to the 118 Property, defendant agreed to pay monthly rent of $8,250.00 for the period 11/1/11 - 10/31/12, monthly rent of $8,580.00 for the period 11/1/12 -10/31/13 and monthly rent of $8,923.00 for the period 11/1/13-10/31/14. In connection with the 110 Property, defendant agreed to pay monthly rent of $2,398.56 for 11/1/11-10/31/12, monthly rent of $2,494.50 for 11/1/12-10/31/13 and monthly rent of $2,594.28 for the period 11/1/13 - 10/31/14. Defendant also agreed to pay 16.7% of the real estate taxes as well as additional fees for the demised premises. Plaintiff alleges that, as of November 1, 2012, the defendant defaulted in making rental payments, real estate taxes and late charges pursuant to the lease terms.

Plaintiff commenced this action on July 3, 2013 by filing a summons and complaint seeking to recover the alleged unpaid rent, additional rent and other charges for the premises. In response, defendant has moved, pre-answer, to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (3) and (7). Plaintiff has since served an amended verified complaint on or about June 9, 2014. In this regard, the court notes that both parties have had the opportunity to submit supplemental memorandum of law pertaining to the additional issues raised related to plaintiff's amended complaint and defendant's motion to dismiss pursuant to CPLR 3211(a)(1), (5), and (7).

Discussion

CPLR 3211(a)(3)

As an initial matter, defendant argues that the plaintiff's action should be dismissed pursuant to CPLR 3211(a)(3) because the plaintiff lacks standing to commence this action since the lease was never assigned to it. In this regard, defendant notes that the "Assignment of Lease" produced by the plaintiff lists 102-122 West End Avenue LLC, 990 Stewart Avenue, Garden City, NY, as the "Assignor" and plaintiff WDGR Properties, LLC as the "Assignee." However, defendant contends that although the plaintiff has demonstrated a chain of title of the premises, it has failed to show that the lease was duly assigned from the original lessor, MRP Lieberman, to its several successors in interest and ultimately to the plaintiff. Defendant therefore argues that the plaintiff fails to set forth

how it is the successor in interest to the original landlord, and therefore cannot establish that it has a lease agreement with the defendant upon which it can seek relief.

In opposition, plaintiff maintains that it has standing to sue for unpaid rents under the lease agreement because the lease was "assigned" to it as well as to its prior successors in interest by operation of law pursuant to Real Property Law § 223. That statute provides, in pertinent part:

> **§ 223 Rights where property or lease is transferred**
>
> The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against incumbrances or relating to the title or possession of the premises leased....

It is well settled that Real Property Law § 223 gives the grantee or assignee of the landlord of property the same rights and remedies against the tenant for nonperformance of the agreements contained in the lease as the original landlord would have had (*see 507 Madison Ave. Realty Co. v Martin*, 200 App. Div. 146, 152–153 [1922], *affd mem* 233 NY

683 [1922], *cited in 815 Park Owners, Inc. v West LB Admin., Inc.*, 119 Misc.2d 671, 673 [Civ Ct, New York County 1983]).

Here, the lease at issue, dated November 1, 1989, was entered into between MRP Lieberman, as landlord, and Dr. Reich, as the tenant, for 110 and 118 West End Avenue in Brooklyn, New York. Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 723 [2014]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). In this regard, the plaintiff has submitted documentation establishing that on June 1, 2001, the original landlord, MRP Lieberman, transferred by deed the property located at 102-122 West End Avenue, which includes the premises at issue, to Ronald Lieberman and Mitchell Lieberman as tenants in common, each owning a 50 percent interest (Gokhberg Affidavit, Exhibit 2). Then on July 1, 2001, Ronald Lieberman conveyed his interest in the premises to Mitchell Lieberman (Gokhberg Affidavit, Exhibit 3), and on July 2, 2001, Mitchell Lieberman conveyed his entire interest in the building to 102-122 West End Avenue , LLC (Gokhberg Affidavit, Exhibit 4). About three years later, pursuant to a deed dated August 16, 2004, 102-122 West End Avenue, LLC then transferred the premises to the plaintiff herein, WDGR, "together with the appurtenances and all the estate and rights of the first part in and to said premises." Additionally, an Assignment of Lease, dated August 31, 2004, was executed which listed 102-122 West End

Avenue LLC, as the Assignor, and WDGR, as the Assignee of the subject lease (Shpelfogel Affirm, Exhibit C).

Here, contrary to defendant's contention, upon each transfer of the premises, Section 223 of the Real Property Law gave to the new owner all of the rights which the prior owner had in the subject premises and in the lease. "The owner of leased property may sell it and if there is no reservation the grant conveys the lessor's interest in the lease" (*Grover v Norton*, 113 Misc. 3, 4 [1920]). Since the property was transferred without any reservation, a formal assignment of the subject lease was not necessary to transfer all of the grantor's rights in and under the subject lease (*see Clemente Bros., Inc. v Peterson-Ashton Fuels, Inc.*, 29 AD2d 908 [1968]; *Stogop Realty Co. v Marie Antoinette Hotel Co.*, 217 App. Div. 555 [1926]; *Proctor Troy Properties Co. v Dugan Store*, 191 App.Div. 685 [1920]; *see also United Welfare Fund-Security Div. v. LAP Realty Corp.*, 2002 WL 1414161 [N.Y. App. Term 2002]). The conveyance of the property from MRP Lieberman to the Lieberman brothers, then to 102-122 West End Avenue, LLC, and ultimately to WDGR were all transferred by deeds without any reservation. As such, pursuant to Real Property Law section 223, MRP Lieberman's initial interest in the subject lease with the defendant was transferred to each new owner of the premises, including the plaintiff. Therefore, plaintiff, as the new owner as of August 31, 2004, succeeded to the rights and remedies under the lease possessed by the prior owners.

Defendant additionally argues that, assuming arguendo that the subject lease was assigned to plaintiff by operation of law pursuant to Real Property Law § 223, plaintiff no longer has standing to prosecute this action since it has transferred title to the subject property and is no longer the record owner. In this regard, defendant refers to a deed, dated January 27, 2014, pursuant to which the plaintiff conveyed title of the premises to an entity known as 102 West End Ave. Development LLC.

Contrary to defendant's contention, plaintiff has not lost its standing and rights under the lease including the right to prosecute this action. It is undisputed that the plaintiff was the fee owner of the demised premises from August 31, 2004 until January 27, 2014. As set forth above, Real Property Law § 223 gives the grantee or assignee of the landlord of property the same rights and remedies against the tenant for nonperformance of the agreements contained in the lease as the original landlord would have had (*Tower Mineola Ltd. Partnership v Potomac Ins. Co. of Ill.*, 14 Misc.3d 1238(A) [N.Y.Sup.,2007]). Moreover, section 223 applies to rent accruing subsequent to a transfer of the owner's fee interest and not for rents accrued prior (*Getty Realty Corp. v 2 East Sixty-First Street Corp.*, 171 Misc. 101 [N.Y. Sup. 1939]). Therefore, the plaintiff has standing to seek recovery of rents that accrued during its ownership of the property -- the date the property was transferred to it up until January 27, 2014, the date the property was conveyed to the new owner, 102 West End Ave. In its amended complaint, plaintiff alleges that the defendant failed to pay rent and other fees as of November 1, 2012 and thereafter. Plaintiff has standing to prosecute an action to recover any unpaid rent that

accrued prior to the plaintiff's sale of the property. Accordingly, that branch of defendant's motion seeking to dismiss plaintiff amended complaint pursuant to CPLR 3211(a)(3) is denied.

CPLR 3211(a)(1) and CPLR 3211(a)(7)

Defendant additionally argues that the plaintiff's breach of contract claim fails pursuant to the terms of the lease which specifically relieve the tenant from paying rent in the event of a "casualty" such as Superstorm Sandy. Defendant points out that the plaintiff demands rent as of November 1, 2012, a mere three days after Superstorm Sandy struck the region with devastating effects. Paragraph 5th of the lease states as follows: "If the Premises can not be used because of fire or other casualty, Tenant is not required to pay rent for the time the Premises are unusable." It is defendant's contention that Superstorm Sandy falls within the meaning of a "casualty" as contemplated by the lease. In a sworn affidavit, defendant Dr. Reich states that Superstorm Sandy destroyed the office building in which his ophthalmology practice was located. Dr. Reich avers that plaintiff failed to make the necessary repairs, and that he even paid approximately $65,000 of his own funds toward the repair of the premises but that the damage was too severe. Since the premises remained in an completely unusable condition, Dr. Reich claims that he was left with no choice but to vacate the building and relocate his practice. Defendant therefore argues that he was not obligated to pay rent after November 1, 2012 because Superstorm Sandy was a "casualty" that rendered the premises "unusable."

In addition, defendant contends that an oil spill occurred at the Premises immediately after the storm which further rendered defendant's office space unusable and unsuitable for occupancy. In support of this contention, defendant has submitted a copy of a report from the New York State Department of Environmental Conservation's website, entitled "Spill Incidents Database Search Details. The spill record shows that an oil spill occurred on October 31, 2012 at 118 West End Avenue and as of August 6, 2013, the date the spill record was obtained and printed, the record showed that the spill was "not closed." In a letter date November 18, 2012, GFE, LLC, environmental consultants, concluded that the premises were unsuitable for occupancy as a medical office. Defendant further argues that the complaint should be dismissed since the lease specifically provides that the tenant is not required to pay rent in the event of "casualty."

Defendant additionally contends that he is not liable for unpaid rents because he surrendered his possession of the premises as a result of Superstorm Sandy. Defendant cites Real Property Law § 227 in support of this contention. Real Property Law § 227 provides that, "Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises...." Defendant further contends that the plaintiff made it clear in or about December 2012 that it would not make the repairs to the premises required to make the space habitable and usable again. As such, defendant contends that he had no choice

but to vacate the premises and seek other office space for his ophthalmology practice. Defendant contends that the termination of the lease was unequivocally made by both parties and that the keys to the space were returned to and accepted by Dimitry "Dima" Druzhinsky, one of plaintiff's principals. Thus, in the event any rent is owed to plaintiff, which defendant denies, he claims that it would only be limited to that of November 2012 and a portion of December 2012 when he surrendered the premises on the ground that it was unfit for occupancy.

In opposition, while plaintiff concedes that the premises sustained some damage as a result of Superstorm Sandy, it maintains that there was no structural damage to the building, and no oil spill. Rather, plaintiff contends that damage to the premises merely consisted of damage to the sheetrock, paint and carpets, and that another unrelated property on the block had the oil spill. It is plaintiff's contention that, pursuant to the terms of the lease, the defendant is the one who is obligated to make the necessary non-structural repairs regarding the sheetrock, carpets and paint. With respect to defendant's obligations, plaintiff refers to paragraph 2nd of the lease which states that "The tenant shall take good care of the premises and shall, at the Tenant's own cost and expense make all repairs". Additionally, plaintiff notes that Paragraph 5th of the lease states that the "Landlord need only repair the damaged structural parts of the Premises". Based upon the foregoing language, plaintiff argues that the defendant was obligated to repair the damage as a result of Sandy which was non-structural. Plaintiff therefore argues that it is entitled to recover

the unpaid rent for the premises as of November 1, 2012, when the defendant stopped paying rent.

Where a motion to dismiss is brought pursuant to CPLR 3211(a)(1) on the grounds that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Leon v Martinez,* 84 NY2d 83, 88 [1994]; *Rubinstein v Salomon,* 46 AD3d 536, 539 [2007]). "When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide [the] plaintiff ... with the benefit of every possible favorable inference' " *(AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], *quoting Leon*, 84 NY2d at 87; *see also Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Whether a plaintiff can ultimately establish its allegations "is not part of the calculus to determine a motion to dismiss" (*EBC, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners*, L.P., 5 NY3d at 591; *see also Rovello v Orogino Realty Co.*, 40 NY2d 633, 635–636 [1976]). Such a motion, pursuant to CPLR 3211(a)(7), must fail if the facts as alleged fit within any cognizable legal theory (*see Leon*, 84 NY2d at 87–88; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello,* 40 N.Y.2d at 634).

Accepting the facts alleged in the complaint as true and according the plaintiff the benefit of every possible inference, the court finds that the complaint sufficiently alleges the elements of a breach of contract cause of action to survive a motion to dismiss pursuant to CPLR § 3211(a)(7). In order to plead the requisite elements of a cause of action to recover damages for breach of contract, the plaintiff must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*JP Morgan Chase v. J.H. Elec. of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]). A lease is a contract (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211 [1978]; *Martin v Glenzan Assoc., Inc.*, 75 AD2d 660 [1980]), and the plaintiff has sufficiently alleged the existence of a contract between plaintiff's predecessor-in -interest and defendant, a breach by defendant in failing to pay rents and damages resulting from that breach to withstand a motion to dismiss (see *Sud v Sud*, 211 AD2d 423 [1995]; *Furia v Furia*, 116 AD2d 694 [1986]). As such, that branch of defendant's motion seeking to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied.

That branch of defendant's motion seeking to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1) is also denied. Contrary to the defendant's contentions, the documentary evidence that he has submitted pertaining to Superstorm Sandy damage to the premises, as well as oil spillage damage, does not conclusively establish, as a matter of law, a defense to plaintiff's breach of contract (lease) cause of action. There are several issues of fact as to the extent of the damages to the premises as a result of the destruction

of Superstorm Sandy specifically with respect to whether the damages were structural or non-structural, who was required to make the repairs, and whether the premises were rendered unusable for occupancy. Further it is unclear whether an oil spill in the basement of the building also rendered the leased premises unusable and/or unfit for occupancy. In light of these issues of fact as to the extent of the damage to the premises, and whether the premises was rendered "unusable" it cannot be said that, pursuant to CPLR 3211(a)(1), the documentary evidence conclusively resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim (*see McCully v Jersey Partners, Inc.*, 60 AD3d 562 [2009]).

Based upon the foregoing, defendant's motion seeking to dismiss the plaintiff's action is denied in its entirety. Defendant's request for costs and attorneys' fees is also denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J .S. C.

HON. DAVID I. SCHMIDT