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Vladeck, Waldman, Elias & Engelhard, P.C. v Paramount Leasehold, L.P.
2015 NY Slip Op 50298(U)
Decided on March 4, 2015
Supreme Court, New York County
Bransten, J.
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Supreme Court, New York County

Vladeck, Waldman, Elias & Engelhard, P.C., Plaintiff,

against

Paramount Leasehold, L.P., Defendant.

653416/2011

The attorneys on the matter were Peter N. Wang and Alisha L. McCarthy of Foley & Lardner, LLP (for Plaintiff) and Warren A. Estis, Norman Flitt, Jeffrey Turkel, and Cori A. Rosen of Rosenberg & Estis, P.C. (for Defendant).

Eileen Bransten, J.

This landlord-tenant dispute comes before the Court on two motions: Plaintiff Vladeck, Waldman Elias & Engelhard, P.C.'s ("Plaintiff") motion for sanctions (motion sequence 007), and Defendant Paramount Leasehold, L.P.'s ("Defendant") motion for summary

judgment (motion sequence 008). Both motions are opposed.

Background [FN1]

Plaintiff is a law firm concentrating in labor and employment law and has been a tenant at 1501 Broadway, also known as the Paramount Building (the "Premises"), for about forty years. This case arises from a January 1, 2010 Assignment of Lease ("Lease") executed by the parties in January 2011. Under the Lease, Plaintiff renewed its tenancy at the Premises. As [*2]incentive to renew, Defendant committed in the Lease to reimburse Plaintiff for up to $266,000 for renovation of its unit.

Hotel Conversion Plan

In 2009 and 2010, Defendant began to consider repurposing the Premises from office space to a hotel ("Hotel Conversion Plan"). Defendant also considered combining the Premises with the New York Times Building to create a larger hotel. The Hotel Conversion Plan would have required Plaintiff to vacate its unit.

At the time the parties signed the Lease, Plaintiff alleges that it did not know that Defendant intended to convert the Premises into hotel space before the term of the Lease expired. Plaintiff contends that it would not have executed the Lease if it knew about Defendant's plan.

Before Plaintiff learned about the Hotel Conversion Plan, Plaintiff asserts that it invested in the Premises. Plaintiff spent hundreds of thousands of dollars upgrading its phone and computer systems. Plaintiff also planned further improvements on the Premises, expecting that Defendant would contribute $266,000 as required by the Lease.

When Plaintiff informed Defendant of its plan to begin the additional improvements, Defendant told Plaintiff not to do so since the owners of the building were discussing

converting the Premises to a hotel. According to Plaintiff, Defendant also stated that it planned to end Plaintiff's Lease early.

After learning of the Hotel Conversion Plan, Plaintiff ended its improvement plans and notified its subtenant of Defendant's plans. The subtenant terminated its sublease.

Events Preceding Instant Motions

Plaintiff withheld rent for the months of October, November and December 2011. On December 2, 2011, Defendant served Plaintiff with a five-day notice of intention to terminate the Lease. On December 12, 2011, Plaintiff commenced this action seeking a Yellowstone injunction. This Court denied Plaintiff's Yellowstone injunction due to Plaintiff's failure to pay rent.

Plaintiff paid its back rent and currently resides in the Premises. In April 2012, Defendant decided to abandon the Hotel Conversion Plan.

Plaintiff's Initial Complaint

Plaintiff filed this action on December 12, 2011, asserting three causes of action in its initial Complaint: (1) anticipatory repudiation, alleging that Defendant reneged on its obligation to contribute $266,000 for renovations; (2) declaratory judgment that Plaintiff did not breach the Lease; and (3) permanent injunction preventing Defendant from terminating the Lease.

Plaintiff's Amended Complaint and Defendant's Counterclaims

On November 12, 2013, this Court granted Plaintiff's motion for leave to amend its Complaint. The Amended Complaint removed the declaratory judgment and permanent injunction claims and asserted three causes of action: (1) fraudulent

inducement, (2) breach of the implied covenant of good faith and fair dealing, and (3) anticipatory repudiation.

Defendant's Answer to the Amended Complaint asserts two counterclaims: (1) breach of contract seeking to recoup ten months of free rent that Defendant provided Plaintiff at the start of the Lease, and (2) attorneys' fees.

Instant Motions

In motion sequence 007, Plaintiff seeks an order (1) striking Defendant's Amended Answer for discovery violations pursuant to CPLR 3126, and (2) imposing costs and sanctions for Defendant's frivolous conduct in connection with the discovery process pursuant to 22 N.Y.C.R.R. Section 130-1.1.

In motion sequence 008, Defendant seeks an order (1) granting summary judgment dismissing the Amended Complaint, and (2) severing and continuing Defendant's counterclaims. Each motion will be considered in turn.

Motion Sequence 007 — Plaintiff's Motion for Sanctions

Plaintiff moves in motion sequence 007 for entry of an order striking Defendant's Amended Answer and sanctioning Defendant for frivolous conduct during discovery.

Plaintiff's Allegations of Defendant's Discovery Conduct

Plaintiff argues that Defendant engaged in sanctionable conduct in three ways. First, Defendant failed to implement a litigation hold to prevent deletion of critical documents and certain documents may have been destroyed. Second, Plaintiff alleges that Defendant failed to conduct a thorough search for relevant documents and improperly included critical correspondence on its privilege log. Third, Defendant's

late production of pertinent documents, either just before depositions or after depositions ended, forced Plaintiff to repeat multiple depositions.

Litigation Hold

Plaintiff first alleges that Defendant improperly failed to implement a litigation hold. Plaintiff argues that Defendant was on notice that litigation was likely before the Complaint was filed in December 2011, triggering a duty to preserve documents. Arthur Cohen, a principle of Defendant, testified during his December 2013 deposition that he had not been instructed to preserve documents and some may have been destroyed. A senior executive of Defendant's managing agent, Newmark Grubb Knight Frank ("Newmark"), Rhonda Singer, also stated she did not receive any preservation instruction.

According to Plaintiff, spoliation occurred despite the Court's June 10, 2013, direction to Defendant's counsel to ensure that no documents were destroyed. *See* Affirmation of Peter Wang [*3]("Wang Affirm.") Ex. L, at 39. Plaintiff notes that both Newmark and Robert Parnes, the architect involved in the Hotel Conversion Plan, provided documents not previously produced by Defendant, including a draft 2010 hotel plan and emails from 2009 showing Cohen's interest in a hotel project combining the Premises and the New York Times Building.

Document Search and Privilege Log

Second, Plaintiff alleges that Defendant's counsel engaged in a general pattern of delaying discovery. The delay can be seen from the lapse in time between Plaintiff's November 2012 subpoena and the February 2013 production, when Newmark produced eighty-two illegible documents. The documents that were produced were only from Singer, and Plaintiff alleges that Defendant did not instruct anyone other than Singer to search for relevant documents until December 2013.

Plaintiff further contends that even Singer's search was inadequate. Although Singer claimed to have conducted an email search with the terms "Vladeck," and "1501

Broadway," Newmark did not produce a November 2, 2011 email with the subject line "Vladeck Waldman Elias & Engelhard P.C. — 1501 Broadway, NY, NY," until April 2014.

Plaintiff argues that in June 2013, Defendant was ordered to produce documents relating to the timing of the Hotel Conversion Plan. Defendant produced 50,000 documents in the spring of 2014. On May 16, 2014—the eve of the extended discovery deadline and after all depositions were completed—Defendant produced an additional 9,000 documents.

Beginning with its first document requests in April 2012, Plaintiff sought "documents concerning converting the Building, in whole or in part, to hotel use." *See* Wang Affirm. Ex. C, at 5. Plaintiff contends that Defendant withheld these documents, which related to the Complaint's anticipatory repudiation claim, until late in 2014.

Plaintiff also contends that Defendant improperly included non-privileged emails on its privilege log. Specifically, Defendant's counsel included a November 2, 2011 email that contradicts Defendant's representations that the Hotel Conversion Plan was not considered until after the Lease was signed. On the privilege log, the email had an incorrect subject line, failed to indicate that there were non-attorney recipients, and had a misleading description.

Depositions

Finally, Plaintiff alleges that Defendant's late document production interfered with numerous depositions. Instead of producing Cohen, who multiple witnesses stated had personal knowledge of the Hotel Conversion Plan, Defendant produced Stanley Garber, who was unfamiliar with the Hotel Conversion Plan.

Plaintiff argues that Defendant never had Garber search for documents before his deposition. Garber's documents were only produced in 2014, so Plaintiff was never able to depose anyone about them. After Garber's deposition revealed his limited knowledge about the Hotel Conversion Plan, this Court granted Plaintiff's motion to

compel Cohen's deposition.

When Defendant produced Hotel Conversion Plan documents on the eve of various depositions, Plaintiff contends that it had to extend or retake many depositions. For example, Cohen's deposition lasted three days because his emails were not produced until after the second day. Both Singer and Newmark's President, Jeffrey Gural, were deposed a second time when [*4]Defendant produced more documents.

Defendant and Newmark each were represented by Rosenberg & Estis from December 2011 until December 2013. In December 2013, Newmark hired independent counsel and began to produce additional documents. Rosenberg & Estis still represents Defendant. Plaintiff summarizes its argument by stating that "[w]hat changed was the lawyers, not the issues."

Defendant's Response

Defendant responds that its conduct was entirely proper and does not warrant imposing any sanctions. The extreme sanction of striking a pleading is inappropriate where Defendant's late production was caused by Plaintiff expanding its pleading with the Amended Complaint.

Defendant asserts that its conduct has not met the "contumacious" standard because it did not violate any court orders and there was no motion to compel. Without a proper warning, discovery sanctions are improper. Defendant argues that mere delay in producing documents is insufficient to strike pleadings or award sanctions.

Finally, Defendant argues that Plaintiff has not produced any "smoking gun" email and does not identify any document that absolutely proves that Defendant would not honor the Lease.

Analysis

Whether the Court exercises it discretion to dispense sanctions depends on whether the proceeding results from frivolous conduct. *See Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 (1st Dep't 1999). Conduct may be considered frivolous under 22 N.Y.C.R.R. Section 130-1.1(c) if it falls into any of three categories: "the conduct is without legal merit, or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or asserts material factual statements that are false." *Levy*, 260 AD2d at 34.

Further, the severity of the sanctions should be proportional to any violation. *See Young v. City of New York*, 104 AD3d 452, 454 (1st Dep't 2013) ("In monitoring discovery, any sanction levied by a court must be proportionate to the conduct at issue"). Pertinent to this motion, the First Department has reversed the striking of pleadings as a sanction where production was tardy, but ultimately was made. *See Allstate Ins. Co. v. Buziashvili*, 71 AD3d 571, 572-73 (1st Dep't 2010) ("It took defendant four years from the first discovery request to produce only a small number of the documents . . . . [However,] the court's orders did not warn defendant that his answer might be stricken if he did not comply, nor did the court issue a conditional order . . . . Under these circumstances, we believe a lesser sanction is appropriate").

Improper Conduct

Defendant's counsel admits that it failed to instruct either of its clients to institute a litigation hold. Further, Defendant does not deny that it did not instruct its clients to search for documents related to the Hotel Conversion Plan before Plaintiff filed the Amended Complaint. Nor does Defendant deny that its tardy production caused the need for repeated depositions.

Gural was first deposed in February 2013, without a search of his email account. After that deposition, Defendant produced illegible screenshots of some of Gural's emails. During Gural's second deposition, in February 2014, Gural testified that his emails again had not been searched [*5]prior to the deposition. After the first day of the deposition, Newmark produced an additional 3,000 pages of emails from Gural's account.

Similarly, Plaintiff was forced to depose Singer multiple times because of the slow document production. Plaintiff's initial subpoena to Singer, dated November 13, 2012, requested documents related to the Hotel Conversion Plan, but documents were not produced in time for Singer's initial deposition on February 27, 2013.

Like Singer and Gural, Cohen's deposition lasted three days because Defendant failed to produce his emails until after the second day of the deposition.

Finally, on May 16, 2014, one business day before the Note of Issue deadline on Monday, May 19, 2014, and after depositions had been completed, Defendant produced another 9,000 documents. Due to the delay in document production, Plaintiff deposed Cohen and Singer three times, and Gural twice.

Defendant contends that the documents produced after depositions were completed were not relevant to the initial Complaint's cause of action for anticipatory repudiation. The Court finds that the documents were relevant and that Defendant was required to produce those documents before the depositions occurred.

Relevance

In New York, documents are relevant if they have "any bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Osowski v. AMEC Constr. Mgmt., Inc.*, 69 AD3d 99, 106 (1st Dep't 2009) (quoting *Allen v. Crowell-Collier Publ'g Co.*, 21 NY2d 403, 406 (1968)).

The "controversy" was Plaintiff's cause of action for anticipatory repudiation. Anticipatory repudiation occurs when a party to a contract makes a "definite and final communication of the intention to forego performance." *See Rachmani Corp. v. 9 E. 96th St. Apartment Corp.*, 211 AD2d 262, 267 (1st Dep't 1995). Discerning exactly what constitutes "a definite and final communication" is a fact-intensive inquiry. As the Court of Appeals has stated, "[w]hen . . . the apparently breaching party's actions are equivocal or less certain, then the nonbreaching party who senses an approaching

storm cloud, affecting the contractual performance, is presented with a dilemma, and must weigh hard choices and serious consequences." *See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 (1998).

A central issue in this action is whether Defendant definitely and finally communicated its intent to forego performance under the Lease. Defendant stated that the Hotel Conversion Plan was the reason that Plaintiff should not commence any renovations. The existence and status of the Hotel Conversion Plan was relevant to the initial Complaint's cause of action for anticipatory repudiation because it was Defendant's stated motive for its direction to Plaintiff. Whether Defendant was considering the Hotel Conversion Plan when it advised Plaintiff not to commence renovations has "a bearing on the controversy" over the finality of the statement. *See Osowski v. AMEC Constr. Mgmt., Inc.*, 69 AD3d 99, 106 (1st Dep't 2009).

Accordingly, documents sought by Plaintiff were relevant to the initial Complaint and Defendant was required to produce them before the depositions occurred.

Proper Sanctions

"Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that [*6]they are useful in deterring future frivolous conduct . . . . The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics." *Levy v. Carol Mgmt. Corp.*, 260 AD2d 27, 34 (1st Dep't 1999).

In *Allstate Insurance Co. v. Buziashvili*, 71 AD3d 571 (1st Dep't 2010), documents were produced several years after initially sought, supporting a sanction award. Here, too, the production was made two years after the initial request. In addition, the late production has prolonged the case unnecessarily and has required repeated depositions of Gural, Cohen, and Singer.

Defendant's counsel's conduct during discovery in the instant action was frivolous within the meaning of 22 N.Y.C.R.R. Section 130-1.1(c). Defendant's counsel failed to

direct its clients to implement a litigation hold, failed to produce relevant documents until depositions were underway, and improperly included relevant non-privileged emails on its privilege log. Defendant's counsel's conduct supports an award of sanctions. *See Red Apple Supermarkets, Inc. v. Malone & Hyde, Inc.*, 251 AD2d 78, 79 (1st Dep't 1998) (granting sanctions where plaintiff did not timely produce documents to allow defendant to prepare for depositions).

The Court concludes that an award of costs adequately serves the purpose of sanctioning Defendant's counsel and is proportional to Defendant's counsel's dilatory conduct.[FN2]

Defendant's counsel is directed to pay Plaintiff's costs and attorneys' fees incurred in bringing this motion for sanctions (motion sequence 007).

In addition, Defendant's counsel is directed to pay the costs and attorneys' fees associated with the depositions of Gural, Cohen, and Singer. Specifically, (1) the depositions of Jeffrey Gural dated February 11, 2013 and February 20, 2014; (2) the depositions of Rhonda Singer dated February 27, 2013, January 29, 2014, and May 14, 2014; and (3) the depositions of Arthur Cohen dated December 13, 2013, January 9, 2014, and February 20, 2014.

Motion Sequence 008 — Defendant's Motion for Summary Judgment

Defendant seeks an order (1) dismissing the Amended Complaint in its entirety and (2) severing and continuing Defendant's counterclaims. There are three causes of action asserted in the Amended Complaint: fraudulent inducement, breach of the implied covenant of good faith and fair dealing, and anticipatory repudiation.

Summary Judgment Standard

The standards for summary judgment are well-settled. The movant must tender

evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the [*7]sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 NY2d at 562.

Fraudulent Inducement

The Amended Complaint's first cause of action asserts that Defendant fraudulently induced Plaintiff to enter into the Lease. Plaintiff avers that Defendant concealed the Hotel Conversion Plan to induce Plaintiff to sign the Lease. Plaintiff alleges it would not have signed the Lease or would have negotiated a lower rent if it knew about the Hotel Conversion Plan.

Defendant argues that any person of reasonable intelligence reading the Lease would understand that Defendant was either actively pursuing a plan to demolish the space or might pursue such a plan during the remainder of the Lease.

For a plaintiff to recover on a cause of action for fraudulent inducement arising out of an omission, the plaintiff must show that (1) the defendant had a duty to disclose material facts, (2) the defendant omitted a material fact, (3) the defendant withheld that fact to induce the plaintiff to rely on its absence, (4) that plaintiff justifiably relied on the omission, and (5) injury. *See Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 179 (2011).

Defendant's summary judgment motion on the fraudulent inducement claim must be denied because there are a number of factual issues that need to be determined. These issues include the extent of the special relationship between the parties, the reasonableness of Plaintiff's inquiry into the Hotel Conversion Plan, whether the Hotel Conversion Plan was a material omission, and whether Plaintiff suffered damages as a result.

Issue of Fact Exists Concerning Duty to Disclose

A duty to disclose arises in two scenarios. First, the duty arises where there is a special relationship of trust and confidence between the parties. *See Kimmell v. Schaefer*, 89 NY2d 257, 264 (1996) ("The existence of such a special relationship may give rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech"). Second, under the "special facts" doctrine, the duty arises where one party's superior knowledge of essential facts renders a transaction inherently unfair without disclosure. *See Jana L. v. W. 129th St. Realty Corp.*, 22 AD3d 274, 277 (1st Dep't 2005).

a.*Duty to Disclosure Due to Special Relationship*

A "special relationship" can arise out of a long contractual relationship. *See AFA Protective Sys., v. Am. Tel. & Tel. Co. Inc.*, 57 NY2d 912, 914 (1982) (denying defendant's summary judgment motion regarding lack of special relationship due to 100-year history between a telephone company that provided communications services to a fire alarm company) (for facts in *AFA*, see dissenting opinion below, 86 AD2d 584 (1st Dep't 1982)); *see also Herron v. Essex Ins. Co.*, 34 AD3d 913, 913, 915 (3d Dep't 2006) (denying defendant's dismissal motion concerning special relationship where defendant was "a general insurance agency that had allegedly served plaintiffs for many years").

Defendant argues that Plaintiff failed to raise a triable issue of fact because Plaintiff relies on [*8]Gural's testimony to establish the relationship. Defendant contends that Plaintiff's principal, Anne Vladeck, must have thought of Gural as a "trusted friend," not the other way around. In Defendant's view, because Plaintiff cites Gural's testimony to establish the close relationship, Plaintiff has failed to establish that Anne Vladeck viewed Gural as a confidante.

Plaintiff has raised an issue of fact concerning the existence of a special relationship. Plaintiff was Defendant's tenant for forty years and worked with Gural during Gural's multi-decade career with Defendant. *See* Wang Affirm. Ex. 3, at 11, 15 (Gural Dep.). Vladeck communicated directly with Gural about problems relating to the Premises,

unlike other tenants. *See id*. Ex. 3, at 31-32.

Defendant's arguments are unavailing because Plaintiff merely needs to raise an issue of fact requiring trial to defeat the motion for summary judgment. The Court finds that if Gural viewed Anne Vladeck as a friend for forty years, then there is an issue of fact as to whether Anne Vladeck viewed Gural in a similar way.

b.*Duty to Disclose Under Special Facts Doctrine*

Under the "special facts" doctrine, a duty to disclose material facts arises when one party has superior knowledge of essential facts that would render a transaction inherently unfair without disclosure. *See Jana L. v. W. 129th St. Realty Corp.*, 22 AD3d 274, 277 (1st Dep't 2005).

"[The special facts] doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of [Defendant], and that the information was not such that could have been discovered by [Plaintiff] through the exercise of ordinary intelligence." *Jana L. v. W. 129th St. Realty Corp.*, 22 AD3d 274, 278 (1st Dep't 2005) (internal citations omitted).

Defendant argues that as in *Jana L v. West 129th St. Realty Corp.*, 22 AD3d 274 (1st Dep't 2005), the special facts doctrine does not apply because Plaintiff never inquired about the Hotel Conversion Plan.

Defendant points to three aspects of the Lease to show that Plaintiff should have "exercised ordinary intelligence" by inquiring directly about the Hotel Conversion Plan. First, Defendant notes the "Lease Termination" clause. This clause permits Defendant to terminate the lease on 180-days' notice, which must state that Defendant plans to substantially alter the space. Second, Defendant refused to include a renewal option. Finally, the "Relocation" clause permits Defendant to move Plaintiff into a similar space within the Premises, at Landlord's expense.

Plaintiff has raised a triable issue of fact regarding the various Lease clauses. For example, the Premises is a Landmark Building. The Landmark Preservation Commission would have to approve any major renovation, meaning that substantial alteration of the entire building was unlikely. Defendant also promised to contribute $266,000 towards repairs of Plaintiff's unit, weighing against the theory that Plaintiff should have known Defendant was considering evicting Plaintiff and substantially altering the building.

Defendant's argument that Plaintiff should have been put on notice to inquire about a potential renovation is also defeated by the statement of Defendant's agent, Gural. Gural stated that Defendant was giving Plaintiff a shorter lease to prevent the lease term from aligning with the downward cycle of commercial real estate in New York. *See* Affirmation of Peter Wang in Opposition to Summary Judgment ("Wang SJ Affirm.") Ex. 8, at 80-81 (Vladeck Dep.).

Gural made other statements that raise issues of fact about the reasonableness of Plaintiff's inquiry. Gural stated that Plaintiff should not worry about renewing the Lease if it was [*9]current on the rent. *Id.* Ex. 3, at 90 (Gural Dep.). Plaintiff also asked about the lease term of another tenant, the Consulate of the Dominican Republic, and was told it would continue until 2024. The Consulate's long lease term reduced the possibility that the Premises would be demolished within five years.

Defendant argues that this case is analogous to *Jana L v. West 129th St. Realty Corp.*, 22 AD3d 274 (1st Dep't 2005). In *Jana L.*, the Plaintiff made a "conclusory statement that the information . . . could not have been obtained by it through the exercise of ordinary intelligence.'" 22 AD3d, at 278. The First Department noted that the plaintiff did not make any inquiries into whether defendant had knowledge of incidents implicating a contractual indemnification clause. *Id.* The presence of Gural's statements distinguishes this case from *Jana L.*

Here, Defendant's agent explained the various "signs" that Defendant now points to as obviously triggering a duty to inquire. Gural stated he knew Plaintiff was seriously considering relocating, so he told Plaintiff that renewal would not be a problem. *See* Wang SJ Affirm. Ex. 3, at 90-91 (Gural Dep.). In September 2011, Vladeck asked Gural about the Hotel Conversion Plan. *See* Wang SJ Affirm. Ex. 3, at 120 (Gural Dep.). Gural did not confirm the existence of the plan, but rather stated he would inquire about it. *Id.*

The Court cannot say that Plaintiff failed to exercise ordinary intelligence as a matter of law. Whether Plaintiff properly inquired about the Lease's term and "exercise[d] ordinary intelligence" sufficient to rely on the special facts doctrine is a question of fact for the jury. *See Swersky v. Dreyer & Traub*, 219 AD2d 321, 327 (1st Dep't 1996) (holding that there were issues of fact regarding "whether plaintiffs could have through the exercise of ordinary intelligence' independently ascertained" the omitted fact).

Plaintiff has raised an issue of fact concerning both the existence of a special relationship and whether Plaintiff exercised ordinary intelligence to discuss the Hotel Conversion Plan.

Issue of Fact Exists Concerning Materiality

Defendant further argues that summary judgment is appropriate dismissing Plaintiff's fraudulent inducement claim because the Hotel Conversion Plan never actually occurred and that its existence therefore cannot be considered a material fact.

A fact is material if it is "something which would have controlled the [tenant's] decision to accept the [lease]." *See Alaz Sportswear v. Public Service Mut. Ins. Co.*, 195 AD2d 357, 358 (1st Dep't 1993). "A fact may not be dismissed as immaterial unless it is so obviously unimportant . . . that reasonable minds could not differ on the question of [its] importance." *Swersky v. Dreyer & Traub*, 219 AD2d 321, 328 (1st Dep't 1996) (quoting *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 45 (2d Cir. 1991). Plaintiff has raised an issue of fact concerning the materiality of the Hotel Conversion Plan.

Plaintiff's principal testified that if Defendant disclosed the Hotel Conversion Plan, Plaintiff would not have executed the Lease. *See* Wang SJ Affirm. Ex. 9, at 82-83 (Vladeck Dep.). There were maintenance issues with the Premises, according to Plaintiff, and Plaintiff considered relocating. *Id.* Plaintiff also testified that it relied on the Lease [*10]and statements about renewal before engaging in major renovations of its unit. *Id.*

The Court cannot say that the Hotel Conversion Plan is immaterial as a matter of law and that reasonable minds could not differ on its importance. Plaintiff has raised an issue of fact concerning the materiality of the Hotel Conversion Project.

Issue of Fact Exists Concerning Justifiable Reliance

Defendant also argues that Plaintiff could not have justifiably relied on any purported omission. Akin to the special facts doctrine, Defendant contends that Plaintiff could not be justified in its reliance on any omission without first exercising ordinary intelligence.

As stated above, Plaintiff has raised an issue of fact concerning whether it exercised ordinary intelligence and sufficiently inquired about the Lease. *See Swersky v. Dreyer & Traub*, 219 AD2d 321, 327 (1st Dep't 1996) (holding that there were issues of fact regarding "whether plaintiffs could have through the exercise of ordinary intelligence' independently ascertained" the omitted fact). The issue of Plaintiff's justifiable reliance on Defendant's statements presents an issue of fact for the jury.

Issue of Fact Exists Concerning Damages

Defendant argues that its concealment of the Hotel Conversion Plan did not cause Plaintiff any damages. Defendant contends Plaintiff is still in possession of its unit and that it has no one to blame but itself for foolishly informing its subtenant about the Hotel Conversion Plan.

Plaintiff has raised an issue of fact concerning whether Defendant's actions caused its damages. Plaintiff alleges that it would not have entered into the Lease if it had known about the Hotel Conversion Plan when the Lease was signed. The fact that the Hotel Conversion Plan never occurred does not preclude, as a matter of law, the possibility that Plaintiff may have suffered damages at the time the Lease was signed. Whether Plaintiff's damages, suffered as a result of Defendant's omission, where reasonably

foreseeable at the time of the Lease presents an issue of fact.

Plaintiff has sufficiently raised issues of fact as to its fraudulent inducement claim. Defendant's motion for summary judgement is denied.

Breach of the Covenant of Good Faith and Fair Dealing

Every contract contains an implicit promise of good faith and fair dealing, which is breached when a party to a contract deprives its counterparty of the right to receive the benefits of the contract, even though its actions are not expressly forbidden by any contractual provision. *See Skillgames, LLC v. Brody*, 1 AD3d 247, 252 (1st Dep't 2003).

Plaintiff avers that Defendant's conduct led Plaintiff to believe, for an extended [*11] period of time, that it had to vacate the Premises. As a result, Plaintiff lost its long-term subtenant and put off Premises improvements until it was too late to use the allowance. Plaintiff also alleges that Defendant breached the covenant of good faith when it frustrated Plaintiff's attempts to install a new subtenant.

"Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." *Mill Fin., LLC v. Gillett*, 122 AD3d 98, 104 (1st Dep't 2014). Further, "[t]he conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts." *Id.* at 104-05.

Here, Plaintiff's good faith claim is duplicative of its anticipatory breach claim. Both claims arise from Defendant's alleged repudiation of its obligations under the Lease. Plaintiff's good faith claim alleges that it is based upon Defendant "notifying Vladeck that it would need to vacate[,] . . . [and] instructing Vladeck to refrain from Tenant Improvements." *See* Am. Compl. ¶ 39. Likewise, Plaintiff's anticipatory repudiation claim is based upon Defendant "notify[ing] Vladeck that Vladeck should not embark on the Tenant's Improvements and that Vladeck would have to vacate the premises within a year." *See* Am. Compl. ¶ 42.

Further, Defendant's failure to approve a sub-tenant also cannot support a good faith claim. A cause of action for breach of the implied covenant of good faith cannot be based upon a breach of an express contractual provision. *See Skillgames, LLC v. Brody*, 1 AD3d 247, 252, 767 N.Y.S.2d 418, 423 (1st Dep't 2003) (internal citation and quotation omitted) ("Implicit in every contract is a promise of good faith and fair dealing, which is breached when a party acts in a manner that, *although not expressly forbidden by any contractual provision*, would deprive the other party of the right to receive the benefits under their agreement.") (emphasis added).

Here, Article 26 of the Lease expressly forbids Defendant from unreasonably withholding or delaying consent for a subtenant. Plaintiff cannot sue for breach of an implied covenant when Article 26 expressly covers the conduct that Plaintiff complains about. Defendant's motion for summary judgment on Plaintiff's second cause of action is granted.

Anticipatory Repudiation

Defendant argues that it never made a definite and final communication of its intent to forgo performance. Defendant contends that it only told Plaintiff that it was discussing a "possible" hotel conversion and that it was "inadvisable" for Plaintiff to make any renovations. Plaintiff argues that repudiation is a factual determination and heavily dependent upon whether a breaching party's words or deeds are unequivocal.

A cause of action for anticipatory repudiation stands when there is a "definite and final communication of the intention to forego performance." *See Rachmani Corp. v. 9 E. 96th St. Apartment Corp.*, 211 AD2d 262, 267 (1st Dep't 1995). What constitutes "a [*12]definite and final communication" depends on the facts of each case. *See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 (1998).

Defendants have failed to show that they are entitled to judgment as matter of law. There is an issue of fact as to whether Defendant only "suggested" that Plaintiff stop its renovations or if Defendant unequivocally refuted its obligation to contribute towards the renovation. At her deposition, Anne Vladeck testified that Gural informed her "that they needed us out . . . [h]e said don't [use the tenant improvement money],

it's just going to throw money out." *See* Wang Affirm. Ex. 8, at 29-30 (Vladeck Dep.).

Vladeck's testimony creates an issue of fact. A reasonable juror could interpret the statement as a definite and final communication to forgo performance. Plaintiff has raised as issue of material fact requiring trial as to whether Defendant "definitively refused all future performance of its obligations under the lease." *See Jacobs Private Equity, LLC v. 450 Park LLC*, 22 AD3d 347, 347 (1st Dep't 2005).

Defendant's motion for summary judgment on the third cause of action for anticipatory repudiation is denied.

Striking of Rule 19-a Statements

Finally, the Court notes that each party seeks to strike the other's Rule 19-a Statement. Defendant contends that Plaintiff's Rule 19-a Statement relies on the video-taped deposition testimony of Arthur Cohen, who passed away before he had the full sixty days to verify his deposition transcript. In turn, Plaintiff seeks to strike Defendant's Rule 19-a Statement where it relies on Arthur Cohen's affidavit supporting summary judgment because it is inadmissible hearsay and directly contradicts his deposition testimony.

The only relevant inquiry on a motion for summary judgment is whether Plaintiff has "show[n] facts sufficient to require a trial of any issue of fact." *See* CPLR 3212(b). Regardless of whether the Court considers either or neither of the deposition or affidavit of Arthur Cohen, Plaintiff has raised issues of fact requiring trial, as highlighted above. Those factual issues are not dependent on the deposition or affirmation of Arthur Cohen.

Defendants also argues that Plaintiff's Rule 19-a Statement should be stricken because it contains argument and does not merely correspond to Defendant's own 19-a Statement. However, Rule 19-a provides Plaintiff with the ability to supplement its responsive statement. *See* NY Rules of Court § 202.70 (allowing non-movant to "if necessary, [add] . . . paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.").

Each parties' application to strike the other's 19-a Statement is denied.

Conclusion

Accordingly, it is hereby

ORDERED that the Court having determined that Defendant's counsel has engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrator as set forth above, Plaintiff's motion for sanctions is granted in part, in so far as costs and an attorneys' fees are hereby granted for making motion sequence 007 and for conducting the depositions of Gural, Cohen and Singer, as set for above, and is otherwise denied; and it is further

ORDERED that Plaintiff prepare an affirmation detailing the costs and expenses of filing its motion for sanctions and conducting the various depositions, and provide it to Defendant's counsel within 14 days of service of notice of entry of this decision and order. Within 30 days of service of notice of entry of this decision and order, Defendant's counsel may serve a copy of this decision and order with notice of entry on the Clerk of the Office of Special Referees (60 Centre Street, Room 119), who shall set the matter down for a hearing concerning the costs and attorneys' fees associated with Plaintiff's motion for sanctions. Failure to serve this decision and order on the Office of the Special Referee within 30 days of service of notice of entry shall result in a judgment in favor of Plaintiff in the amount set forth in its affirmation related to costs and attorneys' fees. Plaintiff's failure to serve a costs/fees affirmation on Defendant's counsel within 14 days of service of notice of entry of this decision and order will result in a waiver of recovering costs and fees by that party; and it is further

ORDERED that Defendant's motion for summary judgment is granted in part, in so far as the second cause of action for beach of the implied covenant of good faith and fair dealing is dismissed and the clerk is ordered to enter judgment and sever the remaining causes of action accordingly, and is otherwise denied; and it is further

ORDERED that all counsel are directed to appear for a pre-trial conference on June 2, 2015, at 10:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York

March *4*, 2015

ENTER:

/s/

_____

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: All facts in this section are undisputed, unless otherwise noted.

Footnote 2:The Court notes that this is the second time during this action that Defendant's counsel has been sanctioned. *See Vladeck, Waldman, Elias & Engelhard, P.C. v. Paramount Leasehold, L.P.*, No. 653416/2011, 2013 WL 6037313, at *7-8 (Sup. Ct. NY County Nov. 12, 2013) (NYSCEF Doc. No. 87). The instant motion for sanctions was brought and considered on independent grounds.

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