Pivarsky v Island Hills Golf Club, Inc.
2013 NY Slip Op 32662(U)
October 15, 2013
Supreme Court, Suffolk County
Docket Number: 12-34488
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 12-34488

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-18-13
MOTION DATE 2-15-13
ADJ. DATE 8-2-13
Mot. Seq. # 001 - MotD
002 - MD

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CLAIRE M. PIVARSKY, Individually and as Trustee under the Last Will and Testament of CLAIRE G. McGANN and CLAIRE M. PIVARSKY as Trustee under the Last Will and Testament of CARL R. PIVARSKY, SR.,

Plaintiffs,

- against -

ISLAND HILLS GOLF CLUB, INC.,

Defendant.

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Upon the following papers numbered 1 to 58 read on this motion for summary judgment and cross motion to vacate stay; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 38 - 41 ; Answering Affidavits and supporting papers 18 - 37 ; Replying Affidavits and supporting papers 44 - 53, 56 - 58; Other memoranda of law 16 - 17, 42 - 43, 54 - 55 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiffs 1) for an order pursuant to CPLR 3212 granting summary judgment in their favor as to liability and dismissing the defendant's counterclaims, and 2) for an order dismissing the six affirmative defenses contained in the defendant's answer, is granted to the extent of dismissing the defendant's fourth and fifth affirmative defenses, and is otherwise denied; and it is further

ORDERED that this cross motion by the defendant for an order vacating the automatic stay of disclosure which is in place pursuant to CPLR 3214 (b) or, in the alternative, denying the plaintiffs' motion for summary judgment with leave to renew and/or granting a continuance of the plaintiffs' motion to allow disclosure, is denied as academic.

This is an action to recover monies due pursuant to a written agreement between the parties granting the defendant Island Hills Golf Club, Inc. (IHGC) exclusive possession of a certain parcel of

10.16.13

land that it owns as tenant-in-common with the plaintiffs. It appears that said parcel has been operating as a golf course from as early as the 1920s (Golf Course). It is undisputed that, as of 1993, IHGC owned a 50% fee interest in the Golf Course, that the plaintiffs owned a 25% fee interest, and that three surviving heirs of Eugene J. McCann (collectively McCann) owned the remaining 25% fee interest. By a written agreement dated December 30, 1993, and entitled "Agreement of Lease," the plaintiffs and McCann demised their 50% interest to IHGC for a term commencing on January 1, 1994, and ending on December 31, 2013. Said agreement provided for, among other things, an annual net rental with increases for each subsequent year, late fee charges for the failure to pay rent in a timely manner, and the payment of reasonable attorney's fees should a default by IHGC result in litigation. By deed dated January 30, 2006, McCann transferred their collective 25% fee interest to IHGC, and the rent due under the agreement was reduced by one half. Currently, IHGC owns a 75% fee interest in the Golf Course, as tenant-in-common with the plaintiff, Claire M. Pivarsky, individually (Pivarsky), who owns a 6.25% fee interest, the plaintiff Claire M. Pivarsky, as Trustee under the Last Will and Testament of Claire G. McGann (McCann Trust), who owns a 12.5% fee interest, and the plaintiff Claire M. Pivarsky as Trustee under the Last Will and Testament of Carl R. Pivarsky, Sr. (Senior Trust), who owns a 6.25% fee interest (collectively the plaintiffs).

In their complaint, the plaintiffs allege in their first cause of action that IHGC has failed to pay rent since March 2011, that they are entitled to "breach of contract damages against defendant in the amount of $589,983.28 for rent and late fees," and in their second cause of action that they are entitled to reasonable attorney's fees as a result of IHGC's default. The plaintiffs now move for summary judgment in their favor as to liability, to dismiss the affirmative defenses and counterclaims set forth in IHGC's answer, and for an order setting this matter down for an immediate trial "on accruing damages" on their first cause of action for rent and late fees, and on the reasonable attorney's fees, costs and disbursements due on their second cause of action. In support of their motion, the plaintiffs submit, among other things, the pleadings, Pivarsky's affidavit, the Agreement of Lease, and a notice of offer dated February 11, 2008. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Before reaching the merits of the plaintiffs' motion, it is noted that IHGC contends that the motion is procedurally defective in that it was made before issue has been joined (CPLR 3212 [a]). Here, IHGC has served its answer with two counterclaims, and the plaintiffs have served their reply to those counterclaims. Thereafter, by pure coincidence, on the same day IHGC served an amended answer as of right with the same two counterclaims and the plaintiffs served the instant motion for summary judgment. By letter dated January 3, 2013, counsel for the plaintiffs advised counsel for IHGC that the plaintiffs "are electing to apply our motion for summary judgment towards [IHGC's] Amended Answer."

In its opposition to the motion, IHGC contends that the plaintiffs' motion is premature as issue has not been joined herein. The plaintiffs served a reply to the amended answer with counterclaims in their reply papers submitted in response to said opposition.

In its amended answer, IHGC sets forth six affirmative defenses respectively alleging that 1) the complaint fails to state a cause of action, 2) the agreement between the parties is not a lease, 3) that Pivarsky lacks standing to bring this action and that the absence of her son and Co-Trustee, Carl Pivarsky, Junior, constitutes "lack of a necessary party," 4) that REM's verification of the complaint is void for lack of authority, 5) that the complaint should be dismissed due to said invalid verification, and 6) that the provision for late charges in the agreement to lease are unconscionable. In its two counterclaims, IGHC alleges that the plaintiffs breached their fiduciary duty as co-tenants in the Golf Course, and that the plaintiffs' actions breached the implied covenant of good faith and fair dealing inherent in the Agreement to Lease.

The amended answer does not include any new causes of action, affirmative defenses, or counterclaims. The only substantive change in the amended answer is the inclusion of additional factual allegations in support of IHGC's second counterclaim. In addition, the parties have submitted a number of affidavits in support of their respective motions or in opposition to the motion of their adversary, they have fully briefed their respective legal positions herein, and the plaintiffs have submitted their reply to the amended answer in their reply papers herein. Accordingly, it is determined that the parties have chartered their own procedural course, that they have proceeded with the summary judgment motion as if issue has been joined, and that the instant motion is not premature (***Rhodes v Liberty Mut. Ins. Co.***, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]; ***Becher v Feller***, 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]; ***Ryan v Bettiol***, 211 AD2d 844, 620 NYS2d 625 [3d Dept 1995]; *see also* ***Roche v Claverack Coop. Ins. Co.***, 59 AD3d 914, 874 NYS2d 592 [3d Dept 2009]).

In her affidavit in support of the plaintiffs' motion for summary judgment[1], Pivarsky swears that, in 1993, the plaintiffs and McCann "leased their tenant-in-common rights" to IHGC in consideration of rent and additional rent, and gave IHGC exclusive use and occupancy of the Golf Course. She states that IHGC paid the rent due until March 2011, that it is in default of the lease, and that the plaintiffs are entitled to recover all overdue rent and compounded late fees of 5%. She indicates that, on October 12, 2012, the plaintiffs served IHGC with a notice to cure pursuant to Article 22 of the Agreement to Lease, that IHGC failed to cure its default, and that said notice is not relevant to this action for money damages, as said lease provision entitles the plaintiffs to terminate the Lease, which is not an issue herein. Pivarsky acknowledges that she is a Co-Trustee with her son, Carl R. Pivarsky, Junior, in the Senior Trust. Pivarsky further swears that Article 13 of the Agreement to Lease provides IHGC with a right of first refusal for any offer to purchase the plaintiffs' interests in the Golf Course, that she provided notice of such an offer to IHGC on February 11, 2008, and that IHGC never exercised that right. She states that IHGC's failure to exercise its right relieves her of any purported duty to act as a fiduciary relative to her co-tenant, IHGC.

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[1] It is deemed unnecessary to recite all of the undisputed facts set forth in the subject affidavit.

In opposition, IHGC submits, among other things, the affidavit of two of its current officers, various documents from a proceeding commenced by Pivarsky to remove her son as Co-Trustee of the Senior Trust, and a number of appraisals of the Golf Course completed over the years. In his affidavit, William B. Gradante (Gradante) swears that he is the current president of IHGC, that the subject parcel has been operated as a golf course since the 1920s, and that the appraisals in IHGC's possession establish that the offer made by a developer of residential properties, the nonparty R Squared IH, LLC, to purchase the Pivarsky and McCann Trust's interest in the Golf Course was improper and specious. He indicates that the plaintiffs knew or should have known that said developer's offer was made to impair IHGC's ability to maintain its membership roll and to generate revenue to pay its rental obligations, and that the plaintiffs' actions in accepting that offer were a breach of their fiduciary duties as tenants-in-common with IHGC, and a breach of the implied covenant of good faith and fair dealing in the Agreement to Lease (Lease)[2] the Golf Course. Gradante further swears that there are issues of fact regarding the actions of R Squared IH, LLC through its affiliate Rechler Equity Management (collectively REM), whether Pivarsky was manipulated into granting REM authority to act for the plaintiffs in a manner adverse to IHGC, and whether the prior appraisals of the Golf Course reveal that REM's offer was accepted by the plaintiffs in bad faith. Gradante points to the dispute between Pivarsky and her son as evidence that Pivarsky knew or should have known that REM's offer was intended to harm IHGC's operations sufficiently to cause a default under the Lease. He indicates that Pivarsky's proceeding to remove her son as a Co-Trustee was due to the latter's refusal to agree to sell the Senior Trust's interest in the Golf Course to REM based on his opinion that REM intended to "threaten" the existing tenancy-in-common of the parties. Gradante further testifies that the sale and purchase agreement entered into by the plaintiffs and REM in 2008 was crafted to harm IHGC by providing for annual extensions to 2014. He indicates that this provision was intended to place IHGC continued operations in question, and to permit the slow degradation of its membership and revenues. He states that after 2008 there has been a "negative net cash flow," and that "[e]quity membership has dwindled."

In his affidavit, Anthony S. Cassino (Cassino) swears that he is the presiding financial officer of IHGC, and that prior appraisals of the Golf Course raise questions as to the bona fides of the REM offer and the plaintiffs' notice of offer dated February 11, 2008, which purports to commence the period in which IHGC can exercise its right of first refusal. He states that, since said notice of offer, after decades of success, IHGC revenues are down $865,141, despite a reduction in operating expenses of $391,694. Cassino further swears that the price that REM has offered to pay Pivarsky and the McCann Trust[3] for their 18.75% interest in the Golf Course is not bona fide and is meant to eliminate IHGC's right of first refusal. He suggests that the affidavit of Carl R. Pivarsky, Junior, in the proceeding commenced by his mother reveals that REM's offer was intended to negatively affect IHGC's operations, revenues, and the

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[2] IHGC contends that the Agreement to Lease does not create a landlord/tenant relationship herein. Thus, it attempts to avoid the use of the term "lease" in its submission. Whether a landlord/tenant relationship exists as to certain issues herein has not been decided in the Court's determination of the instant motion. However, it will use the term "Lease" to indicate the agreement between the parties as a matter of convenience.

[3] It appears that the dispute between Pivarsky and her Co-Trustee, Carl Pivarsky, Junior, resulted in Pivarsky deciding to enter into a contract with REM individually and as Trustee of the McCann Trust only. The Senior Trust is not a party to that contract.

recruiting of new members.

Here, IHGC has raised issues of fact requiring a trial in this action as discussed immediately below. Said issues of fact include, but are not limited to, whether the plaintiffs knew or should have known that the terms of the REM offer were intended to harm their co-tenant, and whether the plaintiffs' actions were a breach of the implied covenant of good faith and fair dealing in the Lease. Accordingly, the plaintiffs' motion for summary judgment as to liability is denied.

The Court now turns to that branch of the plaintiffs' motion which seeks summary judgment dismissing the two counterclaims in IHGC's amended answer. Initially, it is noted that the plaintiffs have failed to establish that they are entitled to judgment as a matter of law as to said counterclaims. In its first counterclaim, IGHC alleges that the plaintiffs breached their fiduciary duty as co-tenants in the Golf Course. Generally, a tenant-in-common may unilaterally enter into a contract to convey his or her interest in real property (***1.2.3. Holding Corp. v Exeter Holding, Ltd.***, 72 AD3d 1040, 900 NYS2d 356 [2d Dept 2010]; ***SJSJ Southold Realty, LLC v Fraser***, 33 AD3d 784, 822 NYS2d 641 [2d Dept 2006]). However, it has been held that a cotenant-in-common is not permitted to make any assault, direct or indirect, upon the interest of a cotenant (***Fleischer v Terker***, 259 NY 60 [1932]; ***Matter of Krolick***, 9 Misc 3d 1115[A], 808 NYS2d 918 [Sur Ct, Nassau County 2005], and the courts have prohibited acts of a tenant-in-common which harm a cotenant (*see* ***Thayer v Leggett***, 229 NY 152 [1920]; ***Country Club Land Assn. v Lohbauer***, 187 NY 106 [1907]; ***Snyder v Puente De Brooklyn Realty Corp.***, 297 AD2d 432, 746 NYS2d 517 [3d Dept 2002]). In addition, it has been held that cotenants enjoy a confidential relationship with one another (***Markowitz v Markowitz***, 36 NYS2d 261 [Sup Ct, New York County 1942], *affd* 265 AD 993, 39 NYS2d 991 [1st Dept 1943]; ***Barclay v Barclay***, 155 NYS 221 (Sup Ct, New York County 1915], *affd* 171 AD 951, 156 NYS 1114 [1st Dept 1915], sufficient to establish a fiduciary duty on their part (***Snyder v Puente De Brooklyn Realty Corp.***, *supra*.) Here, there are issues of fact regarding the actions of the plaintiffs regarding the proposed sale of their interest in the Golf Course, and whether such actions were intended to, and did in fact, harm IHGC in an inappropriate manner.

In its second counterclaim, IHGC alleges that the plaintiffs' actions breached the implied covenant of good faith and fair dealing inherent in the Lease. It is well settled that a lease is a contract (***Jayne v Talisman Energy USA, Inc.***, 84 AD3d 1581, 923 NYS2d 271 [3d Dept 2011]; ***Genovese Drug Stores, Inc. v William Floyd Plaza, LLC***, 63 AD3d 1102, 883 NYS2d 86 [2d Dept 2009). Therefore, regarding its second counterclaim, IHGC's contention that the agreement between the parties is not a lease is academic. In addition, every contract implies good faith and fair dealing between the parties to it (***511 West 232nd Owners Corp. v Jennifer Realty Co.***, 98 NY2d 144, 746 NYS2d 131 [2002]; ***Dalton v Educational Testing Ser.***, 87 NY2d 384, 639 NYS2d 977 [1995]; ***Kalisch-Jarcho, Inc. v City of New York***, 58 NY2d 377, 461 NYS2d 746 [1983]). The implied covenant of good faith and fair dealing is breached when "a party to a contract 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" (***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [2d Dept1999]). A party need not allege fraud or misrepresentation, either factually or legally, to establish a claim for breach of the covenant of good faith (***Paru v Mutual of Am. Life Ins. Co.***, 52 AD3d 346, 863 NYS2d 151 [1st Dept 2008]). The determination whether a party acted in a manner so

as to breach the implied covenant of good faith and fair dealing is generally a question of fact (***Home & City Sav. Bank v Rose Assoc. I.***, 175 AD2d 386, 572 NYS2d 458 [3d Dept 1991]; ***Desco Vitro Glaze of Schenectady v Mechanical Const. Corp.***, 159 AD2d 760, 552 NYS2d 185 [3d Dept 1990]; ***Pernet v Peabody Eng'g Corp.***, 20 AD2d 781, 248 NYS2d 132 [1st Dept 1964]; ***Wallace v Merrill Lynch Capital Servs., Inc.***, 10 Misc 3d 1062[A], 814 NYS2d 566 [Sup Ct, New York County 2005]; *see also* ***R.W. Kern, Inc. v Circle Indus. Corp.***, 174 AD2d 515, 571 NYS2d 293 [1st Dept 1991]). Here, there are issues of fact regarding the actions of the plaintiffs regarding the proposed sale of their interest in the Golf Course, and whether such actions were in good faith.

The Court now turns to that branch of the plaintiffs' motion which seeks to dismiss the affirmative defenses set forth in IHGC's amended answer. "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211 [b]). In making such a motion, the movant bears the burden of demonstrating that a defense is not stated or is without merit as a matter of law (*see* ***South Point, Inc. v Redman***, 94 AD3d 1086, 943 NYS2d 543 [2d Dept 2012]; ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2d Dept 2008]; ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 824 NYS2d 177 [2d Dept 2006]; *cf.* ***Lucas v J&W Realty & Constr. Mgt., Inc.***, 97 AD3d 642, 949 NYS2d 391 [2d Dept 2012). In addition, the defendant is "entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. "If there is any doubt as to the availability of a defense, it should not be dismissed" (***Federici v Metropolis Night Club, Inc.***, 48 AD3d 741, 743, 853 NYS2d 160 [2d Dept 2008]; *see* ***Galasso, Langione & Botter, LLP v Liotti***, 81 AD3d 880, 917 NYS2d 664 [2d Dept 2011]; ***Amerada Hess Corp. v Town of Southold***, 39 AD3d 442, 833 NYS2d 232 [2d Dept 2007]; *see also* ***South Point, Inc. v Redman***, *supra*; ***Butler v Catinella***, *supra*).

The plaintiffs now move to dismiss the six affirmative defenses included in IHGC's amended answer.

First Affirmative Defense - Failure to State a Cause of Action

A plaintiff cannot move to dismiss the defense of failure to state a cause of action. "[N]o motion by the plaintiff lies under CPLR 3211(b) to strike the defense [of failure to state a cause of action], as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim" (***Mazzei v Kyriacou***, 98 AD3d 1088, 1089, 951 NYS2d 557 [2d Dept 2012], quoting ***Butler v Catinella***, *supra*; ***Salerno v Leica, Inc.***, 258 AD2d 896, 685 NYS2d 368 [4th Dept1999]; ***Riland v Todman & Co.***, 56 AD2d 350, 393 NYS2d 4 [1st Dept 1977]; *see* CPLR 3211 [a][7]). Accordingly, this branch of the plaintiffs' motion is denied.

Second Affirmative Defense - No Lease Exists and The Parties Do Not Have The Relationship of Landlord and Tenant

It is well settled that a tenant in common is not liable to a cotenant for rent or use and occupancy absent an agreement to that effect or an ouster (*see* ***Misk v Moss***, 41 AD3d 672, 839 NYS2d 143 [2d Dept 2007]; ***Degliuomini v Degliuomini***, 12 AD3d 634, 785 NYS2d 519 [2d Dept 2004]; ***Corsa v Biernacki***, 2 AD3d 388, 767 NYS2d 855 [2d Dept 2003]). It has been held that a cotenant liable for rent

by virtue of an agreement with, or lease from, a cotenant is not subject to a summary proceeding by its cotenant for holding over after the expiration of the term or for nonpayment as there is an absence of a landlord tenant relationship (*see* ***Valentine v Healey***, 178 NY 391 [1904]; ***Burchell v Burchell***, 96 Misc 600, 160 NYS 805 [Sup Ct, Kings County 1916], *affd* 179 AD 901, 165 NYS 1078 [2d Dept 1917]; ***Lee v Tabasko***, 28 Misc 3d 1210[A], 957 NYS2d 636 [Nassau Dist Ct 2010]; ***Henry v Green***, 126 Misc 2d 360, 481 NYS2d 940 [Mount Vernon City Ct 1984]).

The plaintiffs contend that the absence of a landlord tenant relationship is limited to those instances where a cotenant attempts to commence a summary proceeding against the cotenant in possession, and that there is such a relationship in this instance where the plaintiffs are seeking money damages only. The plaintiffs do not submit any authority for their position, nor do they set forth any factual basis for their contention or examples of areas of dispute between the parties that require a finding that such a relationship exists before a determination herein can be made. That is, the plaintiffs have failed to remove all doubt as to the availability of the defense. Thus, the plaintiffs have failed to meet their burden that the defense is not stated or without merit. Accordingly, this branch of the motion is denied.

Third Affirmative Defense - Lack of Standing and Authority and Necessary And Indispensable Party Missing

A reading of the pleading reveals that the gravamen of the subject defense is that Carl R. Pivarsky, Junior, a Co-Trustee of the plaintiff Senior Trust, is not named as a plaintiff herein, and that he is a "necessary and indispensable party," who has not given his consent to the commencement of this action. The implication, and IHGC's express contention in its opposition to the motion, is that the Senior Trust is not properly a party plaintiff herein. CPLR 1001 (a) provides that parties are necessary and should be joined in the action "if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action." Here, the plaintiffs have not established that the absence of Carl R. Pivarsky, Junior, as Co-Trustee of the Senior Trust, is not relevant and that it does not affect whether said trust has properly appeared herein. While the plaintiffs cite to authority that a single co-tenant can commence a summary proceeding to enforce a lease, they do not provide any authority to establish that it is not necessary that all parties to a contract be named in an action to enforce said contract. In addition, the plaintiffs do not contend that complete relief can be accorded, or that the Senior Trust will not be inequitably affected, by a judgment if it is determined that the Senior Trust is not a proper party plaintiff herein. Thus, the plaintiffs have failed to meet their burden that the defense is not stated or without merit. Accordingly, this branch of the motion is denied.

Fourth and Fifth Affirmative Defenses - Lack of Proper Appointment of Agent and Improper Verification Respectively

Despite the separate headings placed by IHGC on these affirmative defenses, a reading of the pleadings reveals that the gravamen of the defenses are that Carl R. Pivarsky, Junior, did not appoint REM as the agent for the Senior Trust, that REM verified the plaintiffs' complaint without authority, and that the complaint should be dismissed as it was not properly verified. It is determined that the issue of

REM's authority to verify the complaint is academic. CPLR 3022 provides that "[a] defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do." Taking IHGC's contention that REM did not have authority to verify the complaint as true for the sake of argument, the result does not warrant dismissal of the complaint. Initially, because there is no requirement that the complaint in a contract action be verified, and because IHGC could have merely treated the allegedly defectively verified pleading as an unverified one (CPLR 3022; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C3022:1). Next, because even if a verified pleading was required, IHGC failed to treat the complaint as a nullity and to give notice to counsel for the plaintiffs with due diligence (***Theodoridis v American Transit Ins. Co.***, 210 AD2d 397, 620 NYS2d 984 [2d Dept 1994]; ***Lentlie v Egan***, 94 AD2d 839, 463 NYS2d 542 [3d Dept 1983]; ***O'Neil v Kasler***, 53 AD2d 310, 385 NYS2d 684 [4th Dept 1977]). In fact, IHGC does not address the verification issue in its opposition to the motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]). Accordingly, the Fifth Affirmative Defense is dismissed.

Disregarding the plain meaning of the language set forth in its fourth affirmative defense, IHGC nonetheless contends in its opposition to the plaintiffs' motion to dismiss that REM did not have the authority to issue the Notice to Cure dated October 18, 2012, which advises IHGC that it is in default of its obligation to pay rent, and that, unless the default is cured within 20 days, the plaintiffs may elect to terminate the Lease. In considering a motion to dismiss, a court can review the factual foundation on which the defense depends (CPLR 3211 [b]; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C3211:39). Here, a review of the Lease reveals that the plaintiffs are not obligated to give IHGC notice to cure a default in its obligation to pay rent. Rather, a notice to cure is required for any default under the Lease before the plaintiffs are afforded the option to terminate said lease. Here, it undisputed that this is not an action to terminate the Lease. Therefore, whether or not REM had the authority to issue the notice to cure is academic. Accordingly, the Fourth Affirmative Defense is dismissed.

Sixth Affirmative Defense - Unconscionable Late Fee Charges

Paragraph 1.e of the Lease provides in pertinent part: "[I]n the event of a late payment of the payment of rent ... [IHGC] shall pay as liquidated damages, in addition to any other damages ... to which the [plaintiffs] may be entitled, ... five (5) cents on every dollar ($1.00) that is overdue ... and should such amounts remain unpaid during any succeeding months, said liquidated damages shall additionally be calculated for each and every such respective succeeding month." In their complaint the plaintiffs seek damages for unpaid rent and late fees from March 2011 to the November 9, 2012, the date of their complaint, which includes a compounding of the late fees due as set forth above.[4]

[4] In her affidavit, Pivarsky indicates that she has recalculated the damages "with the late fee due only for the month due, and have not 'compounded' it..." However, the complaint has not been amended, and it includes a demand for damages based on the compounded late fees.

In its sixth affirmative defense, IHGC alleges that, because the plaintiffs are seeking to simultaneously recover "both calculable damages and liquidated damages," the "need for liquidated damages is redundant and contrary to public policy..." IHGC further alleges that the co-tenancy relationship of the parties, and the singular purpose to which the Golf Course was to be used, created a disparity in bargaining power in favor of the plaintiffs, and that the provision as to late fees, and the compounding of late fees, is unconscionable.

Initially, it is determined that, where a commercial lease so provides, a lessor is permitted to recover late fees in addition to the rent due and owing (***K.I.D.E. Assocs. v Garage Estates Co.***, 280 AD2d 251, 720 NYS2d 114 [1st Dept 2001]; ***Olim Realty Corp. v Big John's Moving***, 250 AD2d 744, 673 NYS2d 439 [2d Dept 1998]; ***Weinberg Props. v Kenner***, 117 AD2d 529, 498 NYS2d 144 [1st Dept 1986]). In addition, late fees of four percent (***Goidel & Siegel, LLP v 122 East 42nd Street, LLC***, 2012 NY Slip Op 33099[U], 2012 WL 6839824 [Sup Ct, New York County 2012]), and five percent have been held to be reasonable (***K.I.D.E. Assocs. v Garage Estates Co.***, *supra*).[5] Nonetheless, the issue remains whether the imposition of late fees, whether assessed monthly or compounded, is unconscionable under the circumstances herein.

The concept of unconscionability has developed "so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power" (***Rowe v Great Atl. & Pac. Tea Co.***, 46 NY2d 62, 68, 412 NYS2d 827 [1978]). Generally, a determination of unconscionability requires a showing that the contract was both procedurally and substantively unconscionable when made (***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]; ***Gendot Assoc., Inc. v Kaufold***, 56 AD3d 421, 866 NYS2d 361 [2d Dept 2008]). However, it has been held that the elements of "procedural and substantive unconscionability operate on a "sliding scale"; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa" (***Emigrant Mortg. Co., Inc. v Fitzpatrick***, 95 AD3d 1169, 1170, 945 NYS2d 697 [2d Dept 2012], quoting ***State of New York v Wolowitz***, *supra*; *see also* ***Simar Holding Corp. v GSC***, 87 AD3d 688, 928 NYS2d 592 [2d Dept 2011]). Thus, in certain cases where a provision of the contract was particularly outrageous, the courts have found it unenforceable on the ground of substantive unconscionability alone (***Gillman v Chase Manhattan Bank, N.A.***, *supra*; ***Brower v Gateway 2000***, 246 AD2d 246, 676 NYS2d 569 [1st Dept 1998]; ***State of New York v Wolowitz***, *supra*).

Generally, whether a contract provision is unconscionable presents an issue of law for the court to decide (***Emigrant Mtge. Co., Inc. v Fitzpatrick***, *supra*; ***Simar Holding Corp. v GSC***, *supra*; ***State of New York v Wolowitz***, *supra*). However, where there is doubt as to whether a contract provision may be unconscionable, the parties are to be afforded an opportunity to present evidence (***Simar Holding Corp. v GSC***, *supra*; ***Gendot Assoc., Inc. v Kaufold***, *supra*; ***State of New York v Wolowitz***, *supra*). Here, the plaintiffs submit the affidavit of Thomas J. Stock, Esq. (Stock) in reply to IHGC's opposition to their motion to dismiss IHGC's affirmative defense of unconscionability. In his affidavit, Stock swears that he represented various members of the McCann family, and that he has "first-hand knowledge of many

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[5] In its memorandum of law, IHGC additionally argues that the plaintiffs' attempt to recover liquidated damages "contradicts" their attempt to recover compensatory damages, as compensatory damages are readily ascertainable. The contention is without merit under the circumstances herein.

of the prior negotiations involving the plaintiffs." He includes, as an exhibit to his affidavit, a copy of a lease between the parties or their predecessors dated September 12, 1952, which gave IHGC exclusive use and possession of the Golf Course, after an extension as of right, from January 1, 1953 to December 31, 1993. He states that IHGC was represented by counsel during the negotiations of the 1993 lease, and that several drafts of the Lease were exchanged between respective counsel prior to its execution on December 30, 1993. Based on the written changes made by counsel for IHGC during those negotiations, he indicates that its is absurd for IHGC to contend that the agreement is not a lease, and that the claim that there was a disparity in bargaining power at the time is "disingenuous."

Here, the plaintiffs have failed to meet their burden that the defense is not stated or without merit. A review of the 1952 lease reveals that it did not provide for the imposition of late fees in the event that rent was not paid in a timely manner. Stock fails to set forth any information regarding the nature of the negotiations in 1993, the discussions regarding the subject provision, or the discussions regarding the use of the property if the co-tenants failed to reach agreement on a new lease. In addition, based on the plaintiffs notice to cure dated October 18, 2012, the plaintiffs' demanded payment of compounded late fees of $192,616.64 on rent arrears of $377,766.64, which is an increase of 50.9% in the amount allegedly due the plaintiffs. It has been held that a lease provision which permitted late charges of more that 25% is unenforceable (*see eg.* ***Sandra's Jewel Box v 401 Hotel***, 273 AD2d 1, 708 NYS2d 113 [1st Dept 2000]). As noted above, generally, a determination of unconscionability involves a review of the agreement when made (***Gillman v Chase Manhattan Bank, N.A.***, ***supra***; ***Gendot Assoc., Inc. v Kaufold***, *supra*). Although not determinative, the plaintiffs have not adequately addressed the effect of the subject provision either at present or at the time the Lease was negotiated.

Considering the relationship between the parties, the long-standing use of the property as a golf course, the lack of specific information as to the substance of the negotiations of the 1993 lease, and the resultant imposition of late fees in the context of a co-tenancy, it cannot be said that the defense of unconscionability is without merit as a matter of law. Accordingly, the plaintiffs' motion to dismiss the sixth affirmative defense is denied.

IHGC's Cross Motion To Vacate the Stay of Disclosure or Deny the Plaintiffs' Motion To Permit Disclosure.

The subject cross motion is deemed academic as the automatic stay of disclosure pursuant to CPLR 3214 (b) ends with the Courts determination herein. In addition, the request for a continuance of the plaintiffs' motion to permit IHGC to obtain disclosure necessary to justify its opposition thereto is deemed moot. Accordingly, the cross motion is denied.

Dated: Oct. 15, 2013

W. Edward Ashley
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**