

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

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THE STOP & SHOP SUPERMARKET  
COMPANY LLC,

Plaintiff,

INDEX No. 20774/06

MOTION DATE: Dec. 15, 2011  
Motion Sequence # 013

-against-

DEER CROSS SHOPPING, L.L.C.,

Defendant.

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DEER CROSS SHOPPING, L.L.C.,

Third-Party Plaintiff,

-against-

TOPS MARKETS, LLC,

Third-Party Defendant.

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The following papers read on this motion:

Notice of Motion..... X  
Affirmation in Opposition..... X  
Memorandum of Law..... XX

**THE STOP & SHOP SUPERMARKET COMPANY LLC    Index no. 20774/06**

Motion by defendant Deer Cross Shopping, LLC to define the issues for trial is **granted** to the extent indicated below. Motion by defendant to exclude certain evidence offered by plaintiff is **denied**.

This is an action for breach of lease. Plaintiff Stop & Shop Supermarket Company LLC leases a retail store in North Babylon from defendant Deer Cross Shopping LLC pursuant to a lease dated December 1, 1974. The lease provides that the landlord is responsible for structural repairs and the tenant is responsible for its proportionate share of common area maintenance expenses ("CAM").

In Index No. 20774/06, originally commenced in Suffolk County, Stop and Shop alleges that in 2005 it was billed for certain improper maintenance expenses, including painting the exterior of the building, installing a new concrete sidewalk and replacing a slab floor, electrical wiring for light poles, repair of the roof, and replacement of the cesspool. Plaintiff alleges that the total overcharges for 2005 were \$392,339.47. Additionally, plaintiff alleges that it was overcharged for \$50,367.41 in maintenance expenses in 2004.

In the above action, Deer Cross filed a third party complaint against third party defendant Tops Markets, LLC. Tops is the surviving entity after a merger and purports to be the successor-in-interest to the original tenant under the lease. Deer Cross requests a declaratory judgment as to whether Tops is obligated under the terms of the lease. In its second cause of action, Deer Cross seeks a declaration that if Tops is not obligated under the lease, then Deer Cross has the right to cancel the lease. In the third cause of action, Deer Cross seeks to recover the cost of repairing the septic system based upon Tops' alleged failure to install grease traps in the supermarket.

In Index No. 10244/09, Stop and Shop alleges that on December 12, 2002 it subleased the premises to Island Swimming Sales, Inc. Plaintiff alleges that the roof began to leak around August 30, 2005. Plaintiff further alleges that Deer Cross refused to repair the roof and Stop and Shop was required to repair it at a cost of between \$650,000 and \$700,000. Plaintiff asserts claims for breach of the lease, breach of the covenant of quiet enjoyment, breach of the implied covenant of good faith, and tortious interference with plaintiff's sublease.

In Index No. 12913/10, originally commenced in Kings County, Stop and Shop alleges that on September 7, 2005, Deer Cross sent Stop and Shop a notice that it had discovered an underground storage tank ("UST") near the southwest corner of the Stop and Shop space.

Deer Cross demanded that Stop and Shop register the UST with the Suffolk County Department of Health and the New York State Department of Environmental Conservation. Stop and Shop further alleges that it removed the UST at a cost of \$27,881.07. In that action, plaintiff seeks to recover the cost of removing the UST.

By order dated September 6, 2011, the court granted plaintiff Stop and Shop summary judgment as to liability on its claims for maintenance overcharges and reimbursement for the cost of roof repair.

In this in limine motion, defendant Deer Cross moves to define the issues for trial and to exclude certain notices offered by plaintiff as well as evidence of damages sustained prior to the expiration of the period provided by the lease for curing a default.

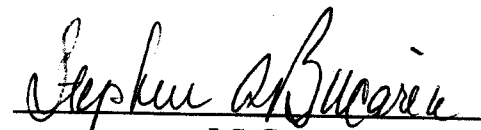
As indicated in the court's order of September 6, 2011, the issues for trial are the amount of plaintiff's damages for maintenance overcharges and the cost of roof repair as well as liability and damages with respect to plaintiff's claim based on removal of the underground storage tank. The court will also determine liability and damages with respect to defendant's claim for the cost of repairing the septic system. Finally, the court will issue a determination as to whether Tops is obligated under the lease as the successor in interest to the original tenant or whether the landlord is entitled to terminate the lease because the merger constituted a transfer of the tenant's interest without the landlord's consent (See Cellular Telephone Co. v 210 East 86<sup>th</sup> Street Corp., 44 AD3d 77 [1<sup>st</sup> Dept 2007]).

Because the purported notices and evidence of plaintiff's damages prior to the expiration of the cure period are relevant to the issues to be determined at trial, defendant's motion to exclude evidence is **denied**.

The court notes that plaintiff submits a memorandum of law, requesting that defendant be precluded from offering evidence that plaintiff allegedly caused defendant to incur costs to replace the premises' septic system and parking lot. Since plaintiff failed to submit a proper notice of motion, and was not assigned a motion sequence number, plaintiff does not have an in limine motion before the court. Nevertheless, because the issue of whether plaintiff caused defendant to incur costs repairing the septic is an issue for trial, had plaintiff properly filed a motion in limine, it would have been **denied**.

So ordered.

Dated FEB 09 2012

  
I.S.C.

**ENTERED**

FEB 14 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE