DOCKET NO. HFH-CV24-6028812-S	:	SUPERIOR COURT
	:	
BLUE BACK CAPITAL PARTNERS, LLC	:	HOUSING SESSION AT HARTFORD
	:	
v.	:	
	:	
TP2B BAKERY, LLC	:	MARCH 7, 2024

MEMORANDUM OF LAW IN SUPPORT PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SECOND, THIRD, FOURTH, FIFTH, AND SIXTH SPECIAL DEFENSES

Pursuant to Connecticut Practice Book ("Practice Book") § 10-39 and for the reasons discussed below, Blue Back Capital Partners, LLC (the "Plaintiff") respectfully moves this Court to strike as legally insufficient the Second, Third, Fourth, Fifth and Sixth special defenses asserted in the *Answer and Special Defenses* dated March 4, 2024 [Entry No. 104.00] (the "Answer") filed by TP2B Bakery, LLC ("TP2B" or the "Defendant").

In support of its motion to strike, Plaintiff respectfully submits this Memorandum of Law.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This matter concerns a summary process action sounding in three counts that the Plaintiff, as landlord, initiated against the Defendant, as tenant, for nonpayment of rent when due for a commercial property, violation of its lease, and right or privilege to occupy premises terminated. (See generally Entry No. 100.31, Complaint.)

i. The Lease

The Plaintiff and the Defendant were parties to that certain Lease dated April 12, 2023 (the "Lease"), pursuant to which the Plaintiff rented to the Defendant that certain Store No. C10,

located at 69 Memorial Road, West Hartford, Connecticut 06107, which is in and part of the development commonly known as "Blue Black Square", as more specifically set forth in the Lease (the "Premises"). (Id., ¶ 5.) The term of the Lease was for a period of ten (10) years from and including the Commencement Date.[1] (Id., ¶ 7.) Pursuant to Article II of the Lease, The Defendant was required to pay Rental, as defined in Section 2.01 of the Lease, starting on the Rental Commencement Date. (Id., ¶ 8.) The "Rental Commencement Date" as defined in Item (1) of the Lease Data Sheet was October 1, 2023. (Id., ¶ 9.)

ii. Requirement to Pay Rental, the Defendant's Default, the Default Notice, the Termination Notice, and the Notice to Quit

Pursuant to Section 19.01(a)(i) of the Lease, if the Defendant failed to pay Rental (or any part thereof) or any other charges required under the Lease within a ten (10) day period after the Plaintiff gives written notice to the Defendant specifying the Defendant's failure to do so, such failure shall be deemed a "Default", and the Plaintiff may, at its option, immediately terminate the Lease and the Defendant's right to possession of the Premises by giving the Defendant a written notice that the Lease is terminated. (Id., ¶ 10.)

The Defendant failed to pay Rental due under the Lease for the month of November 2023. (Id., ¶ 11.) By letter dated November 28, 2023 (the "Default Notice"), the Plaintiff provided the Defendant notice of continuing defaults under the Lease. (Id., ¶ 13.) The Default Notice specified the Defendant's failure to pay Rental due under the Lease and made demand that the Defendant cure the payment default. (Id., ¶ 14.) The Defendant failed to fully and timely cure the payment default within ten (10) days of receiving the Default Notice. (Id., ¶ 15.)

By letter dated January 8, 2024 (the "Termination Notice"), the Plaintiff gave the Defendant written notice that the Defendant failed to timely and fully: (i) cure the payment

[1] All capitalized terms not defined herein shall have the meaning ascribed to them in the Complaint (defined below).

default addressed in the Notice of Default, and (ii) pay Rental and charges that came due under the Lease on December 1, 2023, and January 1, 2024. (Id., ¶ 16.) The Termination Notice also gave written notice to the Defendant terminating the Lease, effective January 19, 2024. (Id.) The Lease terminated January 19, 2024. (Id., ¶ 17.)

On January 23, 2024, Plaintiff served the Defendant with a notice to quit possession of the Premises no later than February 2, 2024 (the "Notice to Quit"), due to the following: (1) violation of the lease; (2) nonpayment of rent when due for commercial property; and (3) originally having had a right of privilege to occupy such premises but such right or privilege has terminated. (Id., ¶ 18.)

iii. The Defendant's Failure to Open the Premises for Business

Pursuant to Section 7.02 of the Lease, the Defendant agreed "to initially open for business on the Rental Commencement Date and to continuously operate in all of the Premises during the entire Term on and after the Rental Commencement Date. . . ." (Id., ¶ 22.) The Defendant failed to initially open for business on or before October 1, 2023, the Rental Commencement Date. (Id., ¶ 23.) Pursuant to Section 19.01(a)(iii) of the Lease, any failure by the Defendant to move into the Premises and to initially open for business on or before the Rental Commencement Date shall be deemed a "Default" and in addition to or in lieu of other rights or remedies Plaintiff may have under the Lease or by law, Plaintiff may, at its option, immediately terminate the Lease and the Defendant's right to possession of the Premises by giving the Defendant a written notice that the Lease is terminated. (Id., ¶ 24.)

Any claim that the Defendant may have had that it was authorized to occupy the Premises is no longer valid, as such right or privilege was terminated by the Termination Notice and service of the Notice to Quit. (Id., ¶ 19.) Although the time designated for the Defendant to

vacate and quit possession of the Premises has lapsed, and the Defendant has no right to occupy the Premises, the Defendant continues to be in possession of the Premises and refuses to vacate the same. (Id., ¶¶ 20, 25, 26, 28, and 29.)

B. Procedural Background

On February 21, 2024, Plaintiff commenced this summary process action against the Defendant by filing its complaint (the "Complaint"). (Entry No. 100.31.) The Defendant filed its Answer on March 4, 2024, which asserts seven special defenses (the "Special Defenses"). (See Entry No. 104.00, Answer, Special Defenses.)

The First Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "The Notice to Quit is invalid due to its failure to specify what 'Rent' was allegedly not paid. The Notice to Quit did not properly set forth what is actually claimed to be due with requisite specificity. As a result of the defective and invalid Notice to Quit, this court lacks the requisite subject matter jurisdiction." (Answer, First Special Defense ¶ 1.)

The Second Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "Any alleged default has been cured and the Plaintiff's Claim should be barred by the Doctrine of Equitable Defense against Forfeiture." (Answer, Second Special Defense ¶ 2.)

The Third Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "The Plaintiff's Claim should be barred by the Doctrine of Waiver." (Answer, Third Special Defense ¶ 3.)

The Fourth Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "The Plaintiff's Claim should be barred by the Doctrine of Laches." (Answer, Fourth Special Defense ¶ 4.)

The Fifth Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "The Plaintiff's Claim should be barred by the Doctrine of Estoppel." (Answer, Fifth Special Defense ¶ 5.)

The Sixth Special Defense does not identify which count(s) of the Complaint it challenges and states as follows: "The Plaintiff's Claim should be barred due to the Doctrine of Unclean Hands." (Answer, Sixth Special Defense ¶ 6.)

The Seventh Special Defense challenges the Second Count of the Complaint and states as follows: "Count Two (2) which is grounded in an alleged violation of lease is invalid due to the Plaintiff's failure to provide advance, written notice of such alleged lease violation (pertaining to the allegation that the Defendant failed to initially open for business on or before October 1, 2023)." (Answer, Seventh Special Defense ¶ 7.)

II. LEGAL ARGUMENT

A. Standard of Review Applicable to a Motion to Strike.

"The purpose of a motion to strike 'is to test the legal sufficiency of a pleading.'" Cadle Co. v. D'Addario, 131 Conn. App. 223, 230 (2011). As such, and pursuant to Practice Book § 10-39, a motion to strike is the proper vehicle for testing the legal sufficiency of any part of any answer to any complaint "including any special defenses contained therein." Practice Book § 10-39(a). "[A] motion to strike does not admit legal conclusions or the truth or accuracy of opinions stated in the pleading at which the motion is directed." Fairfield Lease Corp. v. Romano's Auto Service, 4 Conn. App. 495, 497 (1985) (internal quotation marks omitted). "A

motion to strike 'admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings.'" Faulkner v. United Techs. Corp., Sikorsky Aircraft Div., 240 Conn. 576, 588 (1997) (emphasis in original.) Where the provable facts underlying the allegations would not support a cause of action, the motion to strike must be granted. Ferryman v. Groton, 212 Conn. 138, 142 (1989); see also Santorso v. Bristol Hosp., 308 Conn. 338, 349 (2013) (citation, internal quotation marks, and alterations omitted) ("If facts provable in the [pleading] would support a cause of action, the motion to strike must be denied. A motion to strike is properly granted if the [pleading] alleges mere conclusions of law that are unsupported by the facts alleged.").

B. The Defendant's Second Special Defense is Legally Insufficient Because It is a Denial.

The Defendant's Second Special Defense presents alleged facts inconsistent with the Complaint and is, in essence, a denial. Consequently, the Second Special Defense is legally insufficient and should be stricken.

When special defenses are inconsistent with the allegations set forth in the complaint, it is appropriate to grant a motion to strike. See Jane Doe One v. Oliver, 46 Conn. Supp. 406, 409 (2000). It is also appropriate to grant a motion to strike when the special defense is, in essence, a denial. Id.; see also P&J, Inc. v. Denardis, No. CV064017838S, 2007 WL 3173953, at *4 (Conn. Super. Ct. Oct. 16, 2007) (holding that special defenses were "roundabout ways of denying the plaintiff's allegations and, as such, could have been (and in fact already were) asserted in the form of simple denials of certain paragraphs of the counts of the plaintiff's complaint.").

The Second Special Defense argues as follows: "[a]ny alleged default has been cured and the Plaintiff's Claim should be barred by the Doctrine of Equitable Defense Against Forfeiture."

See Answer, Second Special Defense ¶ 2. The alleged facts that the default was cured are inconsistent with the allegations in the Complaint.

The Complaint provides, in relevant part, as follows:

> 11. Tenant failed to pay Rental due under the Lease for the month of November 2023.
>
> * * *
>
> 13. By letter dated November 28, 2023 (the "Default Notice"), Plaintiff provided the Tenant notice of continuing defaults under the Lease. A true and correct copy of the Default Notice is attached hereto as Exhibit B.
>
> 14. The Default Notice specified Tenant's failure to pay Rental due under the Lease and made demand that the Tenant cure the payment default.
>
> 15. The Tenant failed to fully and timely cure the payment default within ten (10) days of receiving the Default Notice.
>
> 16. . . . Tenant failed to timely and fully: . . . (ii) pay Rental and charges that came due under the Lease on December 1, 2023, and January 1, 2024. . . .

See Complaint at ¶¶ 11, 13-16.

The Complaint, in each count, alleges that the Defendant failed to pay Rental for various months during the lease and failed to timely cure the default. See id. Because the alleged facts asserted in the Second Special Defense are inconsistent with the allegations in the Complaint, the Second Special Defense is inconsistent with the Plaintiff's prima facie case and is more properly presented as a general denial. Accordingly, the Second Special Defense must be stricken.[2]

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[2] The equitable defense against forfeiture has four factors that courts consider and weigh in considering such claims in the context of a summary process action: (1) whether the loss to be suffered by the tenant, if evicted, is disproportionate to the loss to the landlord if the tenant is not evicted, (2) whether the injury to the other party is reparable, (3) the reason for the nonpayment and the extent to which the tenant is "culpable", and (4) the extent to which the tenant has demonstrated good faith in curing the default. Kopcza v. Martin, No. HDSP-157895, 2011 WL 767809, at *4 (Conn. Super. Ct. Feb. 10, 2011). Even if the Court were to find that the Second Special Defense is not a denial, it should still strike the Second Special Defense on the basis that the Defendant has failed to allege any facts that would support application of the special defense of equitable defense against forfeiture by failing to allege: (1) that the loss to be suffered by the Defendant, if evicted, is disproportionate to the loss to the Plaintiff if the Defendant is not evicted, (2) that the injury to the Plaintiff is reparable, (3) the specific reason for the nonpayment by the Defendant and the extent to which the Defendant is culpable, and (4) the extent to which the Defendant has

C. The Defendant's Third, Fourth, Fifth and Sixth Special Defenses Are Legally Insufficient Because They Fail to Assert a Legally Sufficient Special Defense.

The Third, Fourth, Fifth, and Sixth Special Defenses each fail to assert a legally sufficient special defense. Accordingly, each must be stricken.

"As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." Mitchell v. Guardian Sys., Inc., 72 Conn. App. 158, 166 (2002). The Connecticut Supreme Court illustrated this concept by citing the following example:

> D is liable to P i[f] a, b, and c are true unless d is also true. If d contradicts a, b, or c, then evidence of d may be admitted under a *denial*. If, however the existence of d does independently destroy liability, then evidence independently destroys liability, then, evidence of d may be admitted only *under a special defense*.

Pawlinski v. Allstate Insurance Co., 165 Conn. 1, 7 (1973) (emphasis added) (quoting 1 Stephenson, op. cit., p. 521 § 127(c)). "The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway." Coughlin v. Anderson, 270 Conn. 487, 501 (2004) (citations omitted). "The burden of alleging recognizable special defenses rests on the defendant." City of Bridgeport v. C.R. Klewin Ne., LLC, 51 Conn. Supp. 1, 4 (2007).

The Third through Sixth Special Defenses fail to provide any factual allegations specific to the dispute. The Third through Sixth Special Defenses provide as follows:

> 3. The Plaintiff's Claim should be barred by the Doctrine of Waiver.
> 4. The Plaintiff's Claim should be barred by the Doctrine of Laches.
> 5. The Plaintiff's Claim should be barred by the Doctrine of Estoppel.
> 6. The Plaintiff's Claim should be barred due to the Doctrine of Unclean Hands.

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demonstrated good faith in curing the default. None of the four requisite allegations are present in the Second Special Defense, thus, if the Court determines not to strike the Second Special Defense on the basis that it is a denial, then it should strike it on the basis that the Defendant fails to allege any facts to support a claim for equitable forfeiture in the Second Special Defense.

See Answer, Special Defenses ¶¶ 3-6.

The Third Special Defense asserts waiver. Waiver is the intentional relinquishment of a known right or privilege. See Caciopoli v. Lebowitz, 131 Conn. App. 306, 317 (2011), aff'd, 309 Conn. 62 (2013). The Third Special Defense does not allege a single fact that would support a claim that Plaintiff intended to relinquish a known right or privilege. It does not allege any facts.

Examining the Fourth Special Defense asserting laches, laches consists of two elements. First, there must have been a delay that was inexcusable and, second, that delay must have prejudiced the defendant. See Burrier v. Burrier, 59 Conn. App. 593, 596 (2000). The Fourth Special Defense neither alleges facts reflecting an inexcusable delay by the Plaintiff nor that any such delay prejudiced the Defendant. Here again, the Defendant does not allege a single fact surrounding this special defense.

The Fifth Special Defense asserts estoppel. Estoppel requires alleging two essential elements: (1) the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and (2) the other party must change its position in reliance on those facts, thereby incurring some injury. Zarotney v. Lapointe, No. NBH-CV-22-6008187-S, 2022 WL 2884034, at *2 (Conn. Super. Ct. July 21, 2022) (internal citation omitted). Here again, the Defendant has failed to assert a single fact as part of this special defense to meet the requisite elements of estoppel.

Finally, the Sixth Special Defense asserts a claim of unclean hands. "The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in willful misconduct with regard to the matter in litigation." Town of Ridgefield v. Eppoliti Realty Co., 71 Conn. App. 321, 335 (2002), cert. denied, 261 Conn. 993 (2002). The Defendant has not

alleged conduct on the part of Plaintiff that is willful, intentional or tantamount to bad faith. Rather, the Defendant alleges no facts and makes a conclusory allegation of unclean hands.

The Third through Sixth Special Defenses are mere conclusions of law, devoid of applicable facts. They are not cognizable defenses. See Luis Felipe Pedreira Dutra Leite v. Katucha Ferro Dutra Leite, No. FST-CV-19-6040330-S, 2024 WL 578163, at *2 (Conn. Super. Ct. Feb. 7, 2024) ("[T]he total absence of any factual allegations specific to the dispute renders [the special defense] legally insufficient."); Bank of New York v. Saquinaula, CV085017454S, 2011 WL 3427192, at *3 (Conn. Super. Ct. July 14, 2011) (striking defenses and holding that "an assertion of legal conclusions unsupported by factual allegations is legally insufficient as a special defense"). Accordingly, each must be stricken as legally insufficient.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff submits that the Second, Third, Fourth, Fifth, and Sixth Special Defenses of the Answer are legally insufficient and respectfully requests that this Court strike each and for such other and further relief as is necessary, just, and proper.

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CERTIFICATION OF SERVICE

The undersigned counsel hereby certifies that on March 7, 2024, a copy of the foregoing was sent by electronic mail to counsel for TP2B Bakery, LLC.

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