SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DHG MANAGEMENT COMPANY, LLC,

Plaintiff,

-against-

FRENCH PARTNERS LLC, and NEW YORK FRENCH BUILDING CO-INVESTORS, LLC [n/k/a New York French Soundview LLC], TENANTS-IN-COMMON,

Defendants.

Index No. _____

COMPLAINT

DHG MANAGEMENT COMPANY, LLC ("DHG" or "Tenant"), for its Complaint against FRENCH PARTNERS LLC, and NEW YORK FRENCH BUILDING CO-INVESTORS, LLC [n/k/a New York French Soundview LLC], as tenants-in-common ("Landlord"), alleges:

1. This is an action for damages, and related relief, by reason of Landlord's breach of its express warranty, that "Landlord agrees that Tenant shall have twenty-four (24) hour seven (7) day a week access to the Demised Premises" (Original Lease § 66 -- the "Express Warranty"), in view of the restrictions imposed by the New York City and/or State governments in reaction to the COVID-19 pandemic.

THE PARTIES

2. DHG Management Company, LLC is limited liability company formed under the laws of New York, with an office at 551 Fifth Avenue, New York, New York 10176 (the "Building"), and is authorized to do business in New York State. It is the tenant

under a lease first made as of July 31, 2007 (the "Original Lease"), as amended on February 16, 2010 (altogether, the "Lease"). DHG has been occupying the 10th floor for its own business, and has subleased (with Landlord's consent) floors 9 and 27.

3. French Partners LLC, upon information and belief, is a limited liability company formed under Delaware law, with an office c/o Jeffrey Management Corp., Seven Penn Plaza, 11th Floor, New York, New York 10001 ("JMC"), and holds a tenancy-in-common position in the Landlord.

4. New York French Building Co-Investors, LLC, upon information and belief, is a limited liability company formed under New York law, is now known as New York French Soundview LLC, has an office c/o JMC, and holds the remaining tenancy-in-common position in Landlord.

The Lease

5. The Lease, in § 66, contains an unusual express warranty, and states that:

> Landlord agrees that Tenant shall have twenty-four (24) hour seven (7) day a week access to the Demised Premises.

6. This is, by its terms, more than a promise by Landlord that it (-- Landlord) shall not, by its own actions, impair Tenant's access the Premises. Rather, this is a warranty 'against

the world,' i.e., that no one shall impair Tenant's access.[1]

7. Moreover, "access" should be construed pragmatically, to refer to Tenant's (and its subtenants') practical ability to use the Premises. As stated in Datatab, Inc. v. St. Paul Fire & Marine Ins. Co., 347 F.Supp. 36, 37 (S.D.N.Y. 1972):

> "access" does not refer to the ability of a person physically to enter the computer room on the fifth floor, but rather contemplates the ability to utilize the equipment normally in the operation of its business.

8. In view of Lease § 66, and the actual circumstances, Lease § 27 -- to which Landlord has pointed -- is irrelevant. Lease § 27 generally precludes a claim by the Tenant if that claim alleges that Landlord has breached a Landlord obligation to provide some service, where Landlord's failure to provide some such service is due to a 'force majeure' event.[2] As will be seen further herein,

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[1] A typical limited clause, by contrast, provides only as follows:

> Landlord shall provide access to the Premises on a seven day per week, twenty-four hour per day basis, subject to emergencies, Force Majeure Causes and Landlord's reasonable security measures for the Building.

[2] Thus, Lease § 27 provides:

> This Lease and the obligation of Tenant to pay rent hereunder and perform all of the other covenants and agreements hereunder on part of Tenant to be performed shall in no wise be affected, impaired or excused because Owner is unable to fulfill any of its obligations under this lease or to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make, or is delayed in supplying

however, Tenant's claim here is not that Landlord has breached a covenant that it (i.e., Landlord) shall not impair Tenant's 'access'; rather, the claim here is that in § 66 Landlord granted a warranty even against third parties impairing Tenant's access, for any reason; and the 'force majeure' clause in Lease § 27 does not apply to excuse such third-party (i.e., here, governmental) interference.

THE GOVERNMENTAL IMPAIRMENT

9. In March 2020, the coronavirus pandemic swept into the United States and into New York. On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order No. 202, declaring a State disaster emergency for the entire State of New York as a result of COVID-19.

10. On March 20, 2020, in response to the COVID-19 pandemic, New York State Governor Andrew M. Cuomo issued Executive Order No. 202.8 ("EO 202.8"), entitled "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency." EO 202.8, among other things, mandated that with respect to all "non-

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any equipment, fixtures, or other materials if Owner is prevented or delayed from so doing by reason of strike or labor troubles or any cause whatsoever including, but not limited to, government preemption or restrictions or by reason of any rule, order or regulation of any department or subdivision thereof of any government agency or by reason of the conditions which have been or are affected. either directly or indirectly, by war or other emergency.

essential businesses" in New York State, "each employer [in the state] shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m." (the "Workforce Reduction Order").

11. On April 26, 2020, Governor Cuomo announced a phased approach to reopening industries and businesses in the State, the City of New York, and specifically New York County. On June 22, 2020, New York County officially entered "Phase 2" of the staged reopening, at which time Tenant was permitted to access the Premises at 50% occupancy. The New York State Executive Orders allowing 50% occupancy also placed substantial other social distancing and hygiene restrictions on such access, including restrictions relating to physical distancing, gatherings in enclosed spaces, workplace activity, movement and commerce, the use of protective equipment, screening and testing, tracing and tracking of employee contacts, and the establishment of communications and safety plans.

THE IMPACT ON DHG AND ITS SUBTENANTS

12. Prior to March 20, 2020, approximately 90 persons worked each day in DHG's own space on the 10th Floor.

13. Since then, only one or two persons each day have been using that space.

14. In addition, the subtenant on the 9th Floor is in substantial rent default, and has asserted that that default is attributable to the government restrictions noted above.

15. Notwithstanding the foregoing, as part of an effort to negotiate with Landlord per a proposal made in June 2020, Tenant continued to pay its rent for April, May and June. Given Landlord's rejection of Tenant's proposal, Tenant is now seeking to recoup those payments, as part of its damages here.

LANDLORD'S THREAT LETTER

16. By letter dated August 5, 2020, Landlord threatened to draw-down Tenant's security deposit, on account of what Landlord claims is unpaid rent owed in the amount of $739,585.77. The deadline for that threatened draw-down has been extended to September 5, 2020. Tenant has notified Landlord that, however, if Landlord purports to draw upon Tenant's security, prior to a determination as to the amount of rent, if any, now owed by Tenant, i.e., net of Tenant's claim for breach of warranty under Lease § 66,[3] then Landlord may be deemed to have thereby converted the security deposit, such that, inter alia, Landlord will be deemed to have forfeited any and all right to such security deposit.[4]

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[3] See generally, e.g., Ally Gargano/MCA Advertising, Inc. v. Cooke Properties, Inc., 1989 WL 126066 (S.D.N.Y.) at *25.

[4] See, e.g., N.Y.Jur.2d, Landlord and Tenant, § 712.

Landlord has, however, not withdrawn its threat.

AS AND FOR
A FIRST CAUSE OF ACTION

17. By reason of the foregoing, the express warranty of Lease § 66 has been breached, causing damages to Tenant in an amount in excess of $1 million, and expected to increase over time, to be further determined by the Court.

AS AND FOR
A SECOND CAUSE OF ACTION

18. The foregoing allegations are realleged.

19. Tenant has deposited with Landlord a letter of credit in the amount of $931,595.00 as security.

20. Insofar as Landlord now purports to take any of that security, on account of the 'unpaid rent' as alleged in its August 5 threat letter, without a prior determination as to the (net) amount of any rent due, notwithstanding the breach of the Lease § 66 Express Warranty, and notwithstanding that Tenant is claiming damages therefor in excess of that amount, Landlord should be deemed to have converted that security, and the entire security deposit should be deemed forfeited, and returned to Tenant.

WHEREFORE, Landlord respectfully requests that a judgment be entered

a. awarding damages in favor of Tenant in the amount of at least $1 million as of the date hereof, to be determined by the

Court as of the date of trial;

b. insofar as Landlord takes any of the security deposit without justification, directing Landlord to forfeit and return the security deposit, in full, to Tenant, and

c. granting Tenant such other and further relief as may be just and proper.

Dated: New York, New York
September 9, 2020

HORWITZ & ZIM LAW GROUP, P.C.

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