SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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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
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Motion Sequence #001

Index No. 654319/2020

AFFIRMATION IN SUPPORT

Renee Digrugilliers, an attorney licensed to practice in the Courts of the State of New York, affirms and states under the penalties of perjury.

1. Affiant is a Member of Horing Welikson Rosen & Digrugilliers PC, and as such is fully familiar with the facts of this matter.

2. Affiant makes this affirmation in support of the underlying motion seeking the dismissal of the Summons and Complaint on the basis that the Complaint fails to state a cause of action for damages based upon Defendant's alleged breach of an "express warranty" of the Lease (First Cause of Action) and documentary evidence, presented herein, will establish a complete defense to Plaintiff's Second Cause of Action for conversion.

PROCEDURAL AND FACTUAL HISTORY

3. Defendants are the owners/lessors of the building known as 551 Fifth Avenue located in the County of New York, City and State of New York (hereafter the "building").

4. Plaintiff occupies Suites 900, 1000 and 2700 of the building (hereafter the "subject premises"), pursuant to a written lease agreement dated the 31st day of July, 2007 (hereafter the "Lease), a copy of which is annexed hereto as **Exhibit A**.

5. Paragraph 2 of the Lease specifies the use of the subject premises as "general offices."

6. Paragraph 37 of the Rider to Lease sets forth the agreed upon rent to be paid for the subject premises, in addition to which, Plaintiff is also obligated to pay, as additional rent, real estate taxes (Paragraph 38 of the Rider to Lease); electric charges (Paragraph 39 of the Rider to Lease); cleaning charges (Paragraph 40 of the Rider to Lease); 27th floor operating payments (Paragraph 62[E][i] of the Rider to Lease); and the deferred rent provided for in the First Amendment to Lease dated February 16, 2020).

7. On February 16, 2010, Defendants agreed to defer a portion of Plaintiff's rent to be paid back in equal monthly installments of $2721.08 commencing January 1, 2011 through and including March, 2023, which installments would be deemed "additional rent" (**Exhibit B**).

8. Plaintiff paid rent due through June 30, 2020, without any reservation of rights (*see copies of checks for the months of April, May and June,2020 annexed hereto as* **Exhibit C**) and then ceased paying rent and/or additional rent as required by the terms of the Lease, as of July 1, 2020.

9. Allegedly, Plaintiff ceased to pay rent because it claimed that Defendants had breached Paragraph 66 of the Lease which provides that "Landlord agrees that Tenant shall have twenty-four (24) seven (7) day a week access to the Demised Premises."

10. In accordance with Paragraph 17(1) of the Lease, Defendants served upon Plaintiff a notice requiring them to cure the default in the payment of rent and additional which accrued as of August 1, 2020 in the sum of $739,585.77 by August 22, 2020 (**Exhibit D**).

11. Plaintiff failed to remit payment of $739,585.77 by August 22, 2020 as required by the default notice. As Plaintiff did not seek a stay of Defendants' enforcement of the Lease, Defendants thereafter, exercised their right under the terms of the Lease, and more particularly

Paragraphs 34 and 57(B), by withdrawing the security deposit and applying same to the rent and additional rent due through August and part of September, 2020.

12. Rather than remitting payment of the then outstanding balance of rent, Plaintiff commenced the instant action via service of a Summons and Complaint (**Exhibit E**).

13. As of September 1, 2020, Plaintiff is indebted to Defendants for all rent and additional rent which have become due pursuant to the terms of the Lease, which after application of the security deposit, leaves a balance due in the sum of $177,181.67 (**Exhibit F**).

ARGUMENT

POINT I

THE FIRST CAUSE OF ACTION FOR BREACH OF AN EXPRESS WARRANTY MUST BE DISMISSED AS DOCUMENTARY EVIDENCE ESTABLISHES A DEFENSE AS A MATTER OF LAW AND/OR FOR FAILURE TO STATE A CAUSE OF ACTION (CPLR §3211[a][1] and CPLR §3211[a][7]).

14. A motion to dismiss brought pursuant to CPLR §3211(a)(1) "may be granted where documentary evidence submitted, conclusively establishes a defense to the asserted claims as a matter of law" (*Goldman v Metropolitan Life Insurance Company, et al,* 5 NY3d 561, 807 NYS2d 583 [2005]). As is set forth in more detail below, the documentary evidence submitted in support of this motion in the form of the Lease entered into between the parties; checks paid by Plaintiff to the Defendants for rent; and the Executive Orders issued by Governor Cuomo as a result of the COVID-19 pandemic, will establish that those documents disprove essential allegations asserted in the complaint thereby requiring dismissal, "even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" (*Peter F. Gaito Architecture LLC v Simone Development Corp.,* 46 AD3d 530, 846 NYS2d 368 [2nd Dept 2007]).

15. On a motion to dismiss brought pursuant to CPLR §3211(a)(7), allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to being accepted as true and construed in the light most favorable to Plaintiffs (*MLF3 Airtan LLC v 2338 Second Avenue Mazal LLC,* 55 Misc3d 241, 45 NYS 3d 759 [Sup Ct NY Co. 2016]).

A. Plaintiff's claim for damages as a result of Defendants' breach of an alleged "express warranty" should be dismissed for failure to state a cause of action and based upon documentary evidence.

16. The Complaint asserts that Paragraph 66 of the Lease entered into between the parties, which states, "Landlord agrees that Tenant shall have twenty-four (24) hour seven (7) day a week access to the Demised Premises, is an "express warranty" (*see Complaint ¶1*) and, therefore, Defendants warranted "that *no one* shall impair Tenant's access" (*see Complaint ¶6)* and that the "Landlord granted a warranty even against third parties impairing Tenant's access, for any reason, . . .," including the government (*Complaint ¶8*).

17. Plaintiff goes on to allege, that as a result of Governor Cuomo's Executive Order (EO 202.8 *attached hereto as* **Exhibit G**) which forced all businesses to "reduce the in-person workforce at any work locations by 100%," Defendants have somehow breached the "express warranty" of 24-hour/7-day per week access to the subject premises as contained in Paragraph 66 of the Lease.

18. As stated by the Court of Appeals in the matter of *Farrell Lines Inc v City of New York,* 30 NY2d 76, 330 NYS2d 358 (1972), "a lease like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties . . . An agreement of lease possesses no peculiar sanctity requiring the application of rules of construction different from those applicable to an ordinary contract . . . rules of construction of contracts require, whenever

possible, that an agreement should be given a fair and reasonable interpretation . . ." (citations omitted). Plaintiff's interpretation of Paragraph 66 is neither fair nor reasonable.

19. Nothing set forth in Paragraph 66 indicates that the Defendants are guaranteeing anything other than what is in ***their*** control, ie. that ***they*** would not impede Plaintiff's access to the subject premises. To now interpret that paragraph to state that the Defendants can be found to have breached the terms of the Lease based upon an Executive Order which issued as a result of a state of emergency, would place an unreasonable and undue burden on Defendants.

20. The Complaint asserts bare legal conclusions and inherently incredible factual claims, wherein it alleges, that pursuant to Paragraph 66 of the Lease, Defendants "granted a warranty even against third parties impairing Tenant's access for any reason and that Paragraph 66 is a "warranty against all the world, ie., that no one shall impair Tenant's access." Nothing in the Lease supports such a warranty.

21. Further, as Plaintiff does not allege that Defendants denied Plaintiff access to the subject premises; nor limited Plaintiff's access to the subject premises; or otherwise interfered with Plaintiff's access to the subject premises at any time throughout the tenancy, including but not limited to during the pandemic, Plaintiff has acknowledged Defendants have provided unfettered access to the subject premises at all times in accordance with Paragraph 66 of the Lease, and, therefore, has failed to state a cause of action for breach of contract.

B. Plaintiff's claim for damages which includes reimbursement of rents already paid must be dismissed based on documentary evidence.

22. Plaintiff asserts in its First Cause of Action that it is seeking damages "in an amount in excess of $1 million." It would appear that included in this claim, is Plaintiff's request to "recoup" those sums paid by Plaintiff for rent due in the months of April, May and June, 2020

(*see Paragraph 15 of Complaint annexed hereto as Exhibit E*). As set forth below, there is no basis in fact or law for this claim.

23. As the Complaint is void of any allegation that when Plaintiff made the payments for April, May and June it notified Defendants it was reserving its right to, at a later date, dispute these monies were due and owing or that payment was made as a result of fraud or mistake of law or fact, Plaintiff has failed to set forth a cause of action for recoupment of these payments, and, therefore, its claim is barred under the *voluntary payment doctrine* (*See Dillon v U-A Columbia Cablevision of Westchester Inc.*, 100 NY2d 525, 760 NYS2d 726 [2003]). Further, the courts have held that the onus is on the party that receives what it believes is an improper demand for money to "take its position at the time of the demand and litigate the issue before, rather than after, payment is made" (*Beltway 7 & Properties Ltd v Blackrock Realty Advisers* Inc., 167 AD3d 100, 90 NYS3d 3 [1st Dept. 2018] *citing Gimbel Brothers v Brook Shopping Centers*, 118 AD2d 532, 499 NYS2d 435 [2nd Dept 1986]).

24. Here, the "unambiguous, authentic and undeniable documentary evidence," in the form of Plaintiff's checks, voluntarily tendered, without any reservation of rights (*see Exhibit C*), demonstrates, as a matter of law, that Plaintiff has failed to assert a cognizable cause of action for the recoupment of these funds (*see Fontanetta v Doe,*73 AD3d 78, 898 NYS2d 569 [2nd Dept 2010]). Therefore, any claim that these payments should be included in Plaintiff's claim for damages in its First Cause of Action, should be dismissed (*Leon v Martinez,* 84 NY2d 83, 614 NYS2d 972 [1994]).

POINT II

PLAINTIFF'S SECOND CAUSE OF ACTION SHOULD BE DISMISSED IN THAT DOCUMENTARY EVIDENCE CONCLUSIVELY ESTABLISHES A DEFENSE AS A MATTER OF LAW (CPLR §3211[A][1]).

25. Plaintiff's Second Cause of Action asserts a claim of conversion based upon Defendant's application of the security deposit to those rents and additional rents which Plaintiff failed to pay for the months of July and August, 2020. Clearly, Defendants simply exercised their contractual rights under the Lease upon Plaintiff's default thereunder.

26. As defined by the Court of Appeals in the matter of *Colavito v New York Organ Donor Network Inc.*, 8 NY3d 43, 827 NYS2d 96 (2006), "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*citation omitted*). The Court went on to identify the key elements of a cause of action for conversion as:

> (1) plaintiff's possessory right or interest in the property (*citations omitted*) and
>
> (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*citations omitted*).

27. Although Plaintiff does have a possessory interest in the security deposit, that interest, by the terms of the Lease, is relinquished in the event of default on the payment of rent.

28. Paragraph 57 (B) of the Lease unequivocally states:

> In the event Tenant defaults in respect to any of the terms, provisions, covenants and conditions of this Lease and such default continues beyond the expiration of any applicable notice and cure period, including, but not limited to, the payment of rent and additional rent, Landlord may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default . . .

29. Plaintiff acknowledges receipt of the August 5, 2020 Notice of Default (*see paragraph 16 of Complaint at Exhibit E*). Despite receipt of this notice, which clearly stated Defendants would apply the security deposit to the outstanding rent and additional rent as was its right pursuant to Paragraph 57(B) of the Lease (*see Exhibit D*), Plaintiff did not tender nor

attempt to tender any portion thereof nor did Plaintiff seek court intervention in the form of a stay. Therefore, Defendants' withdrawal of the security deposit and application of same to the then outstanding rent and additional rent, was not in "derogation of plaintiff's rights," rather, it was in strict compliance with Defendants' rights under the Lease.

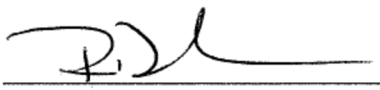
30. Based upon the foregoing and the documentary evidence submitted herein, ie. the Lease, which unambiguously contradicts Plaintiff's claim (*see Fontanetta v Doe*, *supra*), the Second Cause of Action asserted in the Complaint should be dismissed as a matter of law.

CONCLUSION

31. For the reasons set forth above, Plaintiff has failed to set forth a cause of action upon which relief can be based for breach of Lease as asserted in the First Cause of Action, which, therefore, should be dismissed. Likewise, the Second Cause of Action which asserts a claim of "conversion" should be dismissed as the documentary evidence produced by Defendants conclusively establishes a defense as a matter of law.

WHEREFORE, it is respectfully requested that the within motion be granted in its' entirety and for such other and further relief as to this Court may seem just and proper.

Dated: Nassau, New York
September 29, 2020



Renee Digrugilliers