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

DHG MANAGEMENT COMPANY LLC,	:	Index No: 654319/2020
Plaintiff,	:	**AFFIRMATION IN OPPOSITION**
-against-	:	
FRENCH PARTNERS LLC and NEW YORK FRENCH BUILDING CO-INVESTORS, LLC [n/k/a New York French Soundview LLC], TENANTS-IN COMMON,	:	
Defendants,	:	

ERIC M. ZIM, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following under penalty of perjury pursuant to CPLR §2106:

1. I am a member of Horwitz & Zim Law Group, P.C., attorneys for Plaintiff, DHG MANAGEMENT COMPANY LLC, and, as such, I am fully familiar with the facts and circumstances of this matter.

PRELIMINARY STATEMENT

2. I respectfully submit this Affirmation in opposition to the Motion to Dismiss brought by Defendants, FRENCH PARTNERS LLC and NEW YORK FRENCH BUILDING CO-INVESTORS, LLC [n/k/a New York French Soundview LLC], TENANTS-IN COMMON (collectively, "Defendants") seeking an Order to dismiss the Complaint in this action. *A copy of the Complaint is annexed to Defendants' moving papers as Exhibit E.*

3. This case involves a commercial lease ("Lease") entered into by and between Plaintiff, as Tenant, and Defendants, as Landlord, for office suites 900, 1000, and 2700 ("Demised Premises") located at the building known as 551 Fifth Avenue, New York, New York ("Building"). *A copy of the Lease is annexed to Defendants' moving papers as Exhibit A.*

4. More specifically, this action for damages, and related relief, arises out of Defendants-Landlord breach of the express warranty of §66 of the Lease ("Express Warranty"), "Landlord agrees that Tenant shall have twenty-four (24) hour seven (7) day a week access to the Demised Premises", as a result of the restrictions imposed by the New York City and/or New York State governments in response to the COVID-19 pandemic.

5. As more fully set forth below, Defendants' instant motion warrants being denied in its entirety.

ARGUMENT

POINT I

STANDARD FOR A MOTION TO DISMISS

6. It is well-settled that when "considering a motion to dismiss for failure to state a cause of action…the pleadings must be liberally construed…. The sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. Dinerman v. Jewish Board of Family & Children's Services, Inc., 55 A.D.3d 530, 865 N.Y.S.2d 133 (2nd Dept. 2008), quoting Gershon v. Goldberg,30 A.D.3d 372, 817 N.Y.S.2d 322 (2nd Dept. 2006). See also Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994)(the pleadings must be construed in the light most favorable to the plaintiff and the pleadings are afforded a liberal construction with all alleged facts accepted as true).

POINT II

DEFENDANTS HAVE NOT DEMONSTRATED BY DOCUMENTARY EVIDENCE OR OTHERWISE THAT THE FIRST CAUSE OF ACTION FOR BREACH OF AN EXPRESS WARRANTY REQUIRES DISMISSAL PER CPLR 3211(a)(1) and (7)

7. Without merit, Defendants claim that the first cause of action based upon Landlord's breach of the Express Warranty should be dismissed based upon documentary evidence as Defendants' argue that the Lease does not support Plaintiff's claim.

8. More specifically, Defendants argue that the Lease does not guarantee anything other than what is in their control and that they cannot be found to have breached the Express Warranty based upon an Executive Order issued as a result of a state of emergency as it would place an unreasonable and undue burden on Defendants (¶19 of Digrugilliers Affirmation dated 9/29/20, hereinafter "Digrugilliers Aff.").

9. Moreover, Defendants argue that "nothing in the Lease supports such a warranty" (¶20 of Digrugilliers Aff.), and thus, purport to rely upon the Lease to support their motion to dismiss.

10. However, Defendants reliance on the Lease as documentary evidence to support the instant motion is wholly misplaced. It is clear that Defendants are really just arguing that their interpretation of the Lease should be given weight and not that the Lease conclusively serves as documentary evidence to support their motion. Accordingly, the Lease, which is relied upon by Defendants as documentary evidence, simply does not establish a defense to the first cause of action as a matter of law to warrant dismissal of this action.

11. In an analogous case, City of New York v. Local 333, Marine Division, International Longshoremen's Association, 79 A.D.2d 410, 437 N.Y.S.2d 98 (1st Dept. 1981), the court considered a contract to provide towage services to New York City. As the result of a port-wide strike, which was beyond the defendant's control, the defendant did not render any towing services. The City sought summary judgment whereby it argued that the strike did not

excuse the defendant from performing under the contract. The First Department reversed Special Term's granting of summary judgment, finding:

> We think in the present case **an appraisal of all the circumstances requires a further exploration of the facts than has been possible on this motion for summary judgment made before disclosure** proceedings. We cannot say, as a matter of law, that in the case of this port-wide tugboat strike the parties reasonably expected that Moran would still perform or at least pay damages.
>
> …was this provision intended to apply to a strike which tied up all tugboat services in the port of New York?
>
> …The strike was a port-wide strike by all members of this port-wide union against all tugboat operators. There was apparently no practical way for Moran to arrange to furnish tugboat service….
>
> **We are unable to say on the present record, as a matter of law, that Moran was not excused from performance or liability by the strike**.

Id. at 413.

12. Likewise, here, as in Local 333, the Lease does not contain any express provision excusing Defendants from performance of the Express Warranty in the event of a pandemic, such as the current COVID-19 pandemic. Thus, as previously noted, the Lease does not provide documentary evidence to support Defendant's instant motion to dismiss. Instead, this case requires a factual inquiry as to whether the parties herein contemplated pandemic and government mandated shutdowns with respect to the Express Warranty.

13. Next, Defendants also erroneously argue that Plaintiff's claim to recoup the rent paid for April, May and June 2020 is barred by the voluntary payment doctrine (¶23 of Digrugilliers Aff.). More specifically, Defendants assert that the Complaint is void of any allegation that when Plaintiff made those rent payments it reserved its right to dispute that these monies were due and owing or that payment was made as a result of fraud, or mistake of law or

fact (Id.). As such, Defendants argue that Plaintiff has failed to state a cause of action as to its claim for these rent payments.

14. However, Defendants' reliance on the voluntary payment doctrine is wholly misplaced and inapplicable to the facts as alleged in the Complaint. In the caselaw relied upon by Defendants, it is clear that this doctrine only bars the recovery of payments made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law, even though there was an improper demand for such payment. Dillon v. U-A Columbia Cablevision of Westchester Inc., 100 N.Y.2d 525, 760 N.Y.S.2d 726 (2003); and Beltway 7 Properties, Ltd. v. Blackrock Realty Advisers, Inc., 167 A.D.3d 100, 90 N.Y.S.3d 3 (1st Dept. 2018) citing Gimbel Brothers v. Brook Shopping Centers, 118 A.D.2d 532, 499 N.Y.S.2d 435 (2nd Dept. 1986). Whereas, here, payment was not made in connection to any demand made by Defendants.

15. Instead, here, any obligation to pay rent arose from the Lease, and was thus based upon a contractual duty to do so, and not based upon any demand made by Defendants.

16. Thus, the applicable caselaw relevant to this matter holds that "when one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract." Markham Gardens L.P. v. 511 9th LLC, 38 Misc.3d 325, 954 N.Y.S.2d 811 (Sup. Ct. Nassau Co. 2012) citing Grace v. Nappa, 46 N.Y.2d 560, 415 N.Y.S.2d 793 (1979) and Unloading Corp. v. State of New York, 132 A.D.2d 543, 517 N.Y.S.2d 276 (2nd Dept. 1987).

17. Here, the Complaint clearly alleges that the Defendants-Landlord breached the Express Warranty (Complaint ¶¶1 and 17). Based upon this allegation, Plaintiff seeks to recoup the rent for April, May and June 2020 as it would be discharged from making these payments

based upon Defendants-Landlord breach. Accordingly, it is clear that Plaintiff has properly pled its claim, and thus, Defendants' motion to dismiss warrants being denied.

POINT III

DEFENDANTS HAVE FAILED TO DEMONSTRATE VIA DOCUMENTARY EVIDENCE THAT THE SECOND CAUSE OF ACTION FOR CONVERSION REQUIRES DISMISSAL PER CPLR 3211(a)(1)

18. Without merit, Defendants argue that the second cause of action for conversion based upon Defendants' application of the security deposit to the rent for the months of July and August 2020 should be dismissed based upon documentary evidence as per Defendants' reliance on the Lease.

19. It is clear that the Defendants' argument is flawed and its reliance on ¶57 of the Lease allowing the Landlord to draw down on the security deposit in the event of a Tenant default is misplaced (¶28 of Digrugilliers Aff.).

20. Once again, the Lease does not conclusively establish that Plaintiff, tenant, was in default allowing the Defendants-Landlord to draw down on the security deposit.

21. Here, the Complaint clearly alleges that "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, 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." (Complaint ¶16).

22. As noted above, if a party is in material breach of a contract, then the other party is excused from performing under the contract. Markham Gardens, supra.

23. Here, the Complaint clearly alleges that Defendants breached the Express Warranty. For purposes of a Motion to Dismiss, this allegation must be accepted as true. See Leon, supra. As such, Plaintiff would be relieved of its obligation to pay rent under the Lease, and thus, Defendants would have improperly drawn down on the security deposit and converted said funds.

24. Accordingly, it is clear that Plaintiff has properly pled its claim and that Defendants have not presented any documentary evidence to support their motion to dismiss, therefore, Defendants' motion to dismiss warrants being denied.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss in its entirety together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 12, 2020

Eric M. Zim