

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

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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DHG MANAGEMENT COMPANY, LLC,

Plaintiff,

- v -

FRENCH PARTNERS LLC, NEW YORK FRENCH
BUILDING CO-INVESTORS, LLC, N/K/A NEW YORK
FRENCH SOUNDVIEW LLC,

Defendant.

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INDEX NO. 654319/2020

MOTION DATE 10/21/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

In this action seeking damages for breach of a commercial lease, the defendant landlord moves, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1), a defense founded upon documentary evidence, and CPLR 3211(a)(7), failure to state a cause of action. The plaintiff tenant opposes the motion. The motion is granted in part.

The plaintiff asserts two causes of action, breach of contract and conversion. First, it alleges that the defendant breached the parties' lease in that it denied the plaintiff 24-hour, seven-day per week access to the leased premises for several months during the COVID-19 health emergency and government mandated closures. The plaintiff seeks \$1,000,000.00 in damages for that breach, and the return of the rent it paid for April, May and June of 2020. As a second cause of action, the plaintiff argues that the defendant converted the \$931,595.00 security deposit and seeks its return.

In support of the motion, the defendant alleges that the plaintiff was served with a Notice to Cure on August 5, 2020, which stated that the plaintiff was in breach of the lease by failing to pay \$739,585.77 in accrued rent and additional rent. According to the defendant, after crediting the security deposit, as of September 1, 2020, the plaintiff would have a balance due of

\$177,181.67. The documentary evidence on which the defendant relies is the subject lease, which, the defendant opines, only prohibits limits on access that are within the landlord's control, Governor Cuomo's Executive Order 202.8 from March 7, 2020, which required the closure of non-essential businesses, and the three rent checks for April, May and June, which the defendant claims were paid voluntarily and without any reservation of rights. The defendant also maintains that the plaintiff had full access to the premises throughout this period, which is all that is required of the landlord under the lease.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id.* at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d at 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014).

Given the very liberal standard for pleading, the court finds that the plaintiff sufficiently alleges a breach of contract cause of action. That is, the complaint alleges (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). The documentary evidence proffered by the defendant in support of the motion does not "conclusively dispose of the plaintiff's claim" (Fortis Financial Services, LLC v Fimat Futures USA, *supra* at 383), and thus does not warrant dismissal pursuant to CPLR 3211(a)(1). In particular, while the Governor's Executive Order may support a defense, in part, to the alleged breach, it does not alone resolve the issue.

However, the conversion cause of action must be dismissed pursuant to CPLR 3211(a)(7). “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987). “A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” Id. at 389; see Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc., 85 AD3d 680 (1st Dept. 2011). There is no allegation of commingling of the security deposit with personal funds, which could give rise to a conversion claim. See LeRoy v Sayers. 217 AD2d 63 (1st Dept. 1995). Indeed, the plaintiff merely speculates that the defendant has misapplied or intends to misapply the security deposit to the overdue rent balance. In any event, any improperly retained funds could be factored into a damages calculation or settlement, if any.

Therefore, even though the complaint may not be the most artfully drafted pleading, the plaintiff’s breach of contract cause of action is not subject to dismissal at this juncture.

Accordingly, it is


ORDERED that the defendant’s motion to dismiss the complaint is granted to the extent that the second cause of action of the complaint, alleging conversion, is dismissed pursuant to CPLR 3211(a)(7), and the motion is otherwise denied, and it is further

ORDERED that the defendant shall file an answer to the remaining cause of action of the complaint within 30 days, and it is further

ORDERED that the parties shall jointly contact the court on or before December 18, 2020, to schedule a telephonic preliminary conference, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

 10/21/2020
 DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART