

**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,

INDEX NO. 654319/2020

MOTION DATE 01/06/2021

MOTION SEQ. NO. 002

- v -

FRENCH PARTNERS LLC, NEW YORK FRENCH
BUILDING CO-INVESTORS, LLC, n/k/a NEW YORK
FRENCH SOUNDVIEW LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for SUMMARY JUDGMENT.

In this action seeking damages for breach of a commercial lease, the defendant property owners move pursuant to CPLR 3212 for summary judgment (1) dismissing the plaintiff’s remaining cause of action, breach of contract, and (2) on their counterclaims for breach of contract, unjust enrichment, use & occupancy and attorney’s fees, as contained in the answer filed November 18, 2020. The plaintiff opposes the motion and cross-moves pursuant to CPLR 3102(d) for leave to file a late reply to the counterclaims.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law (see Alvarez v. Prospect

Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. *See* Winegrad v New York University Medical Center, *supra*; O'Halloran v City of New York, *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013).

This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). Contrary to the defendants’ contention, they have not met this burden. This court previously found that the breach of contract claim was sufficient to withstand the defendants’ motion to dismiss pursuant to CPLR 3211(a)(1) and (7), and the defendant relies essentially upon the same submissions on this summary judgment motion. Furthermore, no discovery has been conducted. *See* CPLR 3212(f). The parties dispute, *inter alia*, the amounts owed by the plaintiff for its full or partial use of the property, whether monies are currently being collected by the plaintiff for subletting the portion of the premises it has not vacated, and the access provided to the plaintiff and other tenants, all in the context of the various business closures and interruptions occasioned by the ongoing COVID-19 public health emergency and the Governor’s Executive Orders.

The plaintiff’s cross-motion for leave to file a late reply to the defendants’ counterclaims is granted. In making a determination under CPLR 3012(b), the court must take into account the excuse offered for the movant’s delay in responding, any possible prejudice to the defendants, the absence or presence of willfulness and the potential merits of its defense. *See* Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008); Sippin v Gallardo, 287 AD2d 703 (2nd Dept. 2001). Considering these factors, the relief is warranted.

Finally, the court notes that where, as here, a party seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. *See* Clark-Fitzpatrick, Inc. v

Long Is. R.R. Co., 70 NY2d 382 (1987); JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). The plaintiff's conversion cause of action was dismissed under a similar principle.

The parties have not demonstrated entitlement to any other relief requested.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment and other relief is denied in its entirety, and it is further

ORDERED that the plaintiff's cross-motion to file a late reply to the defendants' counterclaims is granted and the reply appended to the plaintiff's cross-motion is deemed timely served upon the defendants as of the date of this order, and it is further

ORDERED that the parties shall appear for a telephonic preliminary conference on January 29, 2021, at 12:30 p.m., as previously scheduled.

This constitutes the Decision and Order of the court.


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

1/28/2021
DATE

CHECK ONE:
MOTION:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER