Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Argued - May 19, 2008

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2007-04833 DECISION & ORDER

30th Place Holdings, LLC, appellant,
v 474431 Associates, respondent.

(Index No. 13436/06)

Zane and Rudofsky, New York, N.Y. (James B. Zane and Edward S. Rudofsky of counsel), for appellant.

DLA Piper US, LLP, New York, N.Y. (Todd B. Marcus and Megan Shea Harwick of counsel), and Edward I. Sussman, New York, N.Y., for respondent (one brief filed).

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Kelly, J.), dated April 19, 2007, as granted those branches of the defendant's motion pursuant to CPLR 3211(a)(1) and (7) which were to dismiss the first cause of action to recover for overpayment of rent and the second cause of action to recover security deposit interest.

ORDERED that the order is affirmed insofar as appealed from, with costs.

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see Ruby Falls, Inc. v Ruby Falls Partners, LLC*, 39 AD3d 619). Here, the net lease submitted by the defendant seller in support of the motion included a provision that limited its liability. The provision stated that upon the sale of the subject property, the defendant seller would be "entirely freed and relieved of all existing and future covenants, obligations and liabilities." Since it was undisputed that the sale of the subject premises was final in May 2006, the documentary evidence

conclusively established a defense to the plaintiff buyer's claims to recover damages under the first and second causes of action, which were to recover for overpayment of rent and to recover security deposit interest, respectively, pursuant to the net lease (*see* CPLR 3211 [a]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Selinger Enterprises, Inc. v Cassuto*, 50 AD3d 766; *Sargent v New York Daily News L.P.*, 42 AD3d 491).

In light of the foregoing, the plaintiff's remaining contentions are academic.

MASTRO, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court