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

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

Dyckman

- v -

Krantz

INDEX NO. 601245/08

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the accompanying memorandum decision.

Settle Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/1/09

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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DYCKMAN AUTO SERVICES, INC.,

Plaintiff,

-against-

JONATHAN KRANTZ, JAMES KRANTZ, CAROLYN KRANTZ and NATALIE KRANTZ, Individually and as Trustees under the will of Paul Krantz, EKG-V LIMITED PARTNERSHIP, RUTH FLAXMAN and ANNE KRANTZ, Individually and as Partners d/b/a HENSHAW REALTY CO., HENSHAW REALTY LLC and ELY GARAGE, INC.,

Defendants.

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DECISION
Index No. 601245/08
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

This action arises out of a Lease agreement dated October 6, 1995, between plaintiff Dyckman Auto Services, Inc. ("Dyckman") as "Tenant" and defendant Henshaw Realty Co. as "Owner",[1] for the entire first floor of the building located at 284 Dyckman Street, New York, New York (the "Demised Premises") for a term of sixteen (16) years commencing on April 1, 2008, for the "[p]arking, washing and repair of automobiles." Jonathan Krantz executed the Lease on behalf of Henshaw Realty Co., and Robert Ull, President, executed the Lease on behalf of Dyckman.[2]

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[1] In or about December, 1998, title to the Building, including the demised premises, was transferred from Henshaw Realty Co. to Henshaw Realty LLC, which has also been named as a defendant herein.

[2] Robert Ull died on March 31, 2002. He is survived by his wife, Wendy Ull, and their children, Richard Ull and Jennifer Ull, all of whom now work in the business. Richard Ull was twenty years old and attending college when the Lease was originally signed. Sometime before his death, Robert Ull made Richard aware of the existence of the Lease in issue.

Paragraph 57 of the Rider to the Lease provides, in relevant part, as follows:

> The first month's rent [of $10,000.00] and the security [of $60,000.00] to be deposited hereunder shall be delivered to the Owner on or before April 1, 2007 [i.e., one year prior to the commencement of the Lease term]. This is a material and substantial obligation of this lease and in the event the said rent and deposit are not so delivered the Owner shall have the option of cancelling this lease by written notice sent by Certified Mail, Return Receipt Requested set forth in Article 51 hereof. The Owner shall, on or before March 15, 2007, notify the Tenant of the obligation contained in this Article [emphasis supplied]. Such notice shall be given as provided in Article 51 of this lease.

There is no dispute that the Owner failed to give Notice to plaintiff on or before March 15, 2007 of the early payment obligation, and that plaintiff failed to tender payment of the first month's rent and security deposit to the Owner on or before April 1, 2007.

Defendants contend that on or about August 14, 2007, defendant Jonathan Krantz sent a certified letter dated August 13, 2007 to Dyckman at 371 7th Avenue, the address set forth in the Lease, stating, in relevant part, as follows:

> In as much as you have failed to remit to us the required monies [i.e., the first month's rent and security deposit], in a timely manner, we are hereby exercising our option to terminate said lease.

The letter was returned to sender as 'Undeliverable'.

Krantz contends in his Affidavit that he also sent the August 13, 2007 letter to the address listed in the Lease for plaintiff's attorney, Herbert F. Fisher, Esq. of Fisher & Donovan, Esqs. However, the address listed in the lease is "405 Park Avenue". Although the certified mail receipt completed by the Sender indicates that the letter was sent to 405 Park Avenue, the envelope was actually addressed to 401 Park Avenue and was returned to sender, indicating "No Such Number", "Not Deliverable as Addressed", "Unable to forward."

On or about August 28, 2007, the letter was sent by certified mail to a different address, "129 W. 41st Street #5" which defendants apparently obtained from the Secretary of State. The letter was also returned, indicating "Moved Not Forwardable."[3]

Aware that the start date of the Lease was approaching, Richard Ull sent a letter dated February 12, 2008 to Krantz, stating as follows:

> Just wanted to drop you a note since we could not locate any working phone numbers. I do not know if you were aware but my father had passed a couple years back and it has come to our attention that our forward lease was starting in a couple of months. We would like to discuss that lease with you and any options. Please give me a call at ...

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[3] Copies of this correspondence were apparently furnished to plaintiff for the first time after this action was commenced.

Richard Ull claims that when he finally spoke to Mr. Krantz, Krantz told him "that he cancelled the Lease in accordance with one of its provisions" (i.e., paragraph 57). After reviewing the Lease provision, Mr. Ull told his mother, Wendy Ull, President of Dyckman, to immediately send checks for the first month's rent and security deposit to Mr. Krantz at Henshaw Realty Co.

Wendy Ull then sent a letter dated February 14, 2008 to Krantz via certified mail, return receipt requested, enclosing a $60,000.00 check made payable to Henshaw Realty Co. representing the security deposit and a $10,000.00 check representing the first month's rent due under the Lease. Ms. Ull stated in the letter, "Please be advised that this letter is sent without prejudice to any rights or remedies of Dyckman Auto Service, Inc. under the Lease."

Krantz sent a letter dated February 20, 2008 to Ms. Ull, stating, in relevant part, as follows:

> Pursuant to the terms of the lease dated October 1, 1995 (the "Lease"), the first months [sic.] rent and security were due on or before April 1, 2007. In as much as this did not happen, the Landlord exercised its option to cancel the Lease by appropriate written notice. Consequently, your checks are returned to you and enclosed herewith.

> Please be advised that this letter is being sent without prejudice to any rights or remedies Landlord may have under the Lease or by law or in equity.

Plaintiff contends that defendants, and specifically, defendant Jonathan Krantz, who plaintiff alleges was and still is, individually and as a trustee under the will of Paul Krantz, a partner in Henshaw Realty Co. and a member of Henshaw Realty LLC, have wrongfully refused to give possession of the premises to plaintiff, in accordance with the Lease.

Plaintiff's Verified Complaint seeks:

(a) a declaratory judgment adjudging, decreeing and declaring (i) that plaintiff is entitled to possession of the demised premises pursuant to the Lease; (ii) that the Lease is and remains in full force and effect; (iii) that defendants did not properly exercise an option to cancel the Lease; (iv) that defendants failed to notify plaintiff of the early payment obligation; and (v) that defendants are required to tender possession of the Demised Premises to plaintiff (first cause of action);

(b) to recover damages for breach of contract; specifically, plaintiff seeks to recover money damages for defendants' alleged wrongful refusal to give plaintiff possession of the premises and the resulting delay in tendering possession thereof (second cause of action); and

(c) a mandatory injunction affirmatively enjoining and directing defendants to give plaintiff immediate possession of the demised premises in accordance with the terms and conditions of the Lease (third cause of action).[4]

Defendants now move for an order:

(1) granting summary judgment dismissing the Complaint with prejudice, pursuant to CPLR § 3212, on the grounds, inter alia, that (i) the Owner exercised its option to cancel the Lease based on plaintiff's failure to deliver the first month's rent and security deposit on or before April 1, 2007, as required by paragraph 57 of the Lease Rider; (ii) the plain language of paragraph 57 attaches no penalty for the failure of the Landlord to send the notice, whereas the Landlord's option to cancel the Lease is conditioned solely upon plaintiff's failure to send the payments by a date certain; (iii) plaintiff waived the early payment notice; and (iv) sending the early payment notice would have been futile; or, in the alternative;

(2) dismissing plaintiff's Complaint with prejudice based on documentary evidence, pursuant to CPLR § 3211(a)(1); or, in the alternative;

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[4] According to plaintiff, the demised premises are currently occupied on a month-to-month basis by defendant Ely Garage, Inc. or another occupant.

(3) dismissing plaintiff's Complaint (and, specifically, the first and third causes of action) with prejudice for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), on the ground that there is no legally cognizable basis upon which this Court could grant either a declaratory judgment or mandatory injunction,[5] and dismissing the Complaint against the individual defendants for failure to state a cause of action.

Plaintiff opposes the motion and cross-moves for an order:

(1) pursuant to CPLR § 3212, granting plaintiff summary judgment on its first cause of action for a declaratory judgment and on its third cause of action for an injunction, and granting plaintiff summary judgment on its second cause of action for breach of contract as to liability and setting said matter down for an assessment of damages; or, in the alternative,

(2) in the event that this Court shall find any part of plaintiff's Complaint shall be dismissed, granting plaintiff leave to amend the Complaint.

Plaintiff argues that the early payment notice was a condition precedent under paragraph 57 to the Landlord's ability to enforce the early payment requirement and to exercise the option to cancel

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[5] Defendants do not dispute that said claims are pleaded with requisite sufficiency.

the Lease. *See, Grenadeir Parking Corp v Landmark Assoc.*, 283 AD2d 379 (1st Dep't 2001). Moreover, plaintiff argues that defendant's contention that there is no penalty for the Owner's failure to comply with that provision is without merit because such an interpretation would render the notice provision meaningless.

Defendants argue that plaintiffs waived the early payment notice provision set forth in paragraph 57 by tendering the security and first month's rent in February 2008 after speaking with Krantz and reviewing the Lease, i.e., after learning that it had not received the early payment notice.

Plaintiff, however, argues that the tendering of the two checks could not constitute any knowing waiver of its rights.

It is well settled that

> [c]ontractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned (citation omitted). Such abandonment "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (citations omitted). However, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection (citation omitted).

Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 104 (2006).

Based on the papers submitted and the oral argument held on the record on February 2, 2009, this Court finds that defendants have not demonstrated a clear manifestation of intent on the part of plaintiff in this case to relinquish its entitlement to any of its rights under the Lease.

Defendants next argue that sending the early payment notice would have been futile since all the letters sent to plaintiff in August 2007 were returned. *See, Gentile v Sang Y. Kim*, 101 AD2d 939, 940 (3rd Dep't 1984) in which the Court declined to require a party to "perform meaningless acts".

Plaintiff, on the other hand, argues that it is speculative to assume the notice would have been returned; it contends that the letter which was sent to Dyckman failed to comply with paragraph 51 of the Lease Rider which required the notice to be sent to Dyckman "c/o Robert Ull", and as noted above, the notice to plaintiff's attorney was mailed to the wrong address.

Defendants alternatively argue that plaintiff hindered the Landlord's ability to comply with the notice provision by failing to update its mailing address. *See, ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 (2006) which held that "'[a] party to a contract cannot rely on the failure of another to perform a

condition precedent where he has frustrated or prevented the occurrence of the condition' (citation omitted)."

Here, however, plaintiff cannot be found to have frustrated or prevented the Owner from sending the early payment notice to the correct addresses, since defendants concede that timely notice was never sent to any address.

In addition, plaintiff argues that even were this Court to determine that it technically defaulted in failing to send the early payments, equity should intervene to relieve plaintiff of its default in order to prevent a forfeiture of a valuable lease term. *See, Sy Jack Realty Co v Pergament Syosset Corp.*, 27 NY2d 449 (1970).

Here, there is no evidence that plaintiff's failure to timely make the payments was anything but an inadvertent error, and it appears that the Landlord has suffered no prejudice as a result of the delay. Moreover, plaintiff represents that it is ready, willing and able to take possession of the demised premises and to operate a parking garage at the premises, as was originally contemplated by the parties to the Lease. Accordingly, those portions of defendants' motion seeking to dismiss plaintiff's Complaint in its entirety must be denied.

In addition, this Court finds that plaintiff is entitled to summary judgment on the first and third causes of action, and on the issue of liability on its second cause of action.

The Complaint, however, contains no allegation of any illegal behavior or independent tortious conduct undertaken by any individual defendant to this action.

It is well settled that

> [a] "director of a corporation is not personally liable to one who has contracted the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken" (citation omitted). "(A) corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer *** (and did not commit) independent torts or predatory acts directed at another" (citation omitted).

Murtha v Yonkers Child Care Assoc., Inc., 45 NY2d 913, 915 (1978).

That portion of defendants' motion seeking to dismiss the Complaint against the individual defendants is, therefore, granted.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on September 30, 2009 at 10:00 a.m. to coordinate discovery on the issue of damages on the second cause of action.

Settle Order.

Dated: July /, 2009

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.