

**32 Sixth Ave. Co. LLC v Digitglobal  
Communications, Inc.**

2012 NY Slip Op 31699(U)

June 27, 2012

Supreme Court, New York County

Docket Number: 100327/12

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

32 SIXTH AVENUE COMPANY LLC,

Plaintiff,

-against-

DIGITGLOBAL COMMUNICATIONS, INC.,

Defendant.

INDEX NO. 100327/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 4

Answering Affidavits - Exhibits 2

Replying Affidavits 3

CROSS-MOTION:  YES  NO

**FILED**

JUN 29 2012

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6 / 27 / 12

Donna M. Mills  
J.S.C.

**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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32 SIXTH AVENUE COMPANY LLC,

INDEX NO.  
100327/12

Plaintiff,

- against -

DIGITGLOBAL COMMUNICATIONS, INC.,

Defendant.

DECISION/ORDER

**FILED**

JUN 29 2012

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DONNA M. MILLS, J:

NEW YORK  
COUNTY CLERK'S OFFICE

In this action for damages, defendant DigitGlobal Communications, Inc. ("Defendant"), moves for an order pursuant to CPLR 3211(a),(7), dismissing the second and third causes of action of the Verified Complaint of plaintiff 32 Sixth Avenue Company, LLC ("32 Sixth or Plaintiff"), for failure to state a claim upon which relief can be granted. Plaintiff cross moves for an order pursuant to CPLR 3025(b), to permit it to amend its Complaint in this action.

BACKGROUND

Plaintiff is the owner and landlord of the real property located at 32 Avenue of the Americas, New York, New York. Defendant was a licensee of a portion of the building pursuant to a license agreement dated June 1, 2003 entered into by and between Plaintiff, as Licensor and Defendant, as Licensee, for a term from June 1, 2003 through and including May 31, 2013.

It is undisputed that Defendant tendered the keys to plaintiff and vacated the premises on or about November 4, 2011, prior to the end of the term of the license. Plaintiff contends that it did not release defendant from its obligations under the License Agreement upon vacatur, and the License Agreement remained in full force and effect.

Plaintiff brought this action against the Defendant and the first cause of action alleges, that, by virtue of the Defendants conduct in vacating the premises before the end

of the lease term, Defendant breached the License Agreement by failing to pay license fees allegedly owed for the months of November 2011 through January 2012. The second cause of action for anticipatory breach alleges that, under the License Agreement, rent and additional rent becomes due and owing on the first day of each month, and that, in the aggregate, the rent that will become due and owing for the period of February 2012 through May 31, 2013 totals \$188,025.00. The third cause of action is for unjust enrichment. The fourth cause of action is for attorney's fees.

Defendant seeks dismissal of the second and third causes of action. Defendant argues that the third cause of action for unjust enrichment seeks identical damages to those alleged in the first cause of action for breach of contract. Additionally, Defendant contends that the second cause of action for anticipatory breach of contract does not allege a definite and final communication by the Defendant of its intention to forego its obligations under the agreement.

Plaintiff, in partial opposition to the motion concedes that the third cause of action alleging unjust enrichment is duplicative of its first cause of action alleging breach of contract. Plaintiff however, contends that it properly pleaded its cause of action for an anticipatory breach of contract. However, plaintiff cross-moves to amend the petition in the event this Court finds that the anticipatory breach of contract cause of action was not properly pled.

#### APPLICABLE LAW & DISCUSSION

Currently before this Court is defendant's pre-answer motion to dismiss the complaint for failure to state a cause of action ( see CPLR 3211[a][7] ). On the motion to dismiss for failure to state a cause of action, the Court must accept the allegations of the complaint as true and accord the plaintiff the benefit of every possible favorable inference ( see Leon v. Martinez, 84 N.Y.2d 83, 87 [1994] ). The Court then must determine whether

the facts as alleged by the plaintiff fit within any theory cognizable at law (see Leon, 84 N.Y.2d at 87–88; Morone v. Morone, 50 N.Y.2d 481, 484 [1980] ). In opposing such a motion, the plaintiff may rest upon the allegations made in the complaint, in which case the issue for the Court is whether, within its four corners, the complaint sets forth the elements of a viable cause of action. Alternatively, in opposing a motion to dismiss under CPLR 3211(a)(7), the plaintiff may submit affidavits and other materials to remedy defects in the complaint and preserve inartfully pleaded but potentially meritorious claims ( see Arrington v. New York Times Co., 55 N.Y.2d 433, 442 [1982], rearg. denied and dismissed 57 N.Y.2d 669, 674 [1982], cert denied 459 U.S. 1146 [1983]; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635 [1976] ). In that case, the plaintiff's additional submissions are likewise to "be given their most favorable intendment" ( see Arrington, 55 N.Y.2d at 442; see also Pharmhealth Infusion, Inc. v. Rohm Servs. Corp., 249 A.D.2d 950 [4th Dept 1998] ), and the Court is to focus on whether the pleader has a cause of action rather than on merely whether he has properly stated one (see Leon, 84 N.Y.2d at 88; Rovello, 40 N.Y.2d at 636). In that analysis, "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" ( Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 [1977] ).

As to the third cause of action, "[t]he doctrine of anticipatory breach is applicable to bilateral contracts which contemplate some future performance by the non-breaching party ( American List Corp. v. U.S News & World Report, Inc., 75 N.Y.2d 38, 44 [1989] ). Pursuant to this doctrine, a non-breaching party is entitled to treat the conduct of another as a complete anticipatory breach of the contract where prior to the time of performance the other party has unequivocally repudiated or renounced the contract ( *id.*). The non-breaching party need not tender performance or demonstrate its ability to perform, but

rather the doctrine relieves the non-breaching party of the obligation to perform and entitles that party to recover the value of the entire contract ( id.). In the instant case, upon examining the allegations of the complaint within its four corners, this Court determines that it does make out a valid claim for anticipatory breach of contract. The Court further concludes that the deficiencies in the complaint, if any, are rectified by a consideration of the materials submitted by plaintiff in opposition to the motion to dismiss. Specifically, Defendant's counsel's letter dated November 4, 2011 unequivocally informs Plaintiff that Defendant considered the License Agreement terminated and demanded its security deposit back. Therefore, the complaint properly states a claim for anticipatory breach.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the second cause of action is denied; and it is further

ORDERED that the defendant's motion to dismiss the third cause of action is granted; and it is further

ORDERED that the plaintiff's cross-motion to amend the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

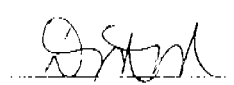
Dated: 6/27/12

**FILED**

JUN 29 2012

NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

**DONNA M. MILLS, J.S.C.**