SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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CORNER 49 LLC,

Plaintiff, Decision and order

- against - Index No. 509718/18

mot # 2

SANTANDER BANK, N.A.,

Defendant, December 11, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds it fails to state a cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On June 6, 2017 the plaintiff and defendant entered into a lease concerning property located at 4819-4825 13th Avenue in Kings County. Specifically, the defendant leased space from the plaintiff owner for ten years with the option to extend four consecutive five year terms. The lease provides that the net rentable area consists of "approximately 1,800 square feet of ground level retail space" (see, Lease §1.2). Upon inspection of the premises utilized by the defendant it was discovered the defendant in fact utilized approximately 2,360 square feet, far more than the 1,800 permitted by the lease. The defendant maintains the square footage used is proper since the lease itself contemplates such additional space. The plaintiff has instituted the instant lawsuit seeking to terminate the lease on

the grounds the defendant has utilized more space than permissible and has thus breached the lease. The defendant has moved seeking to dismiss the lawsuit on the grounds the action taken concerning the extra space was within the letter and spirit of the lease and consequently the lawsuit should be dismissed.

Conclusions of Law

It is well settled that a motion to dismiss, "[a] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The primary basis upon which the defendant seeks to dismiss the action rests upon the language of the lease which states the

leased area is "approximately" 1,800 feet. Thus, defendant argues "the lease expressly permits Santander to increase the Net Rental Area beyond the approximate figure described herein, compensate Plaintiff for the actual square footage occupied, and resolve any associated disputes" (see, Affirmation in Support of Motion to Dismiss, ¶114). Thus, no default occurred and consequently the lawsuit is improper. In Harpercollins Publisher LLC v. Arnell, 23 Misc3d 1117 (A), 886 NYS2d 71 [Supreme Court New York County 2009] a contract was entered into whereby the defendant was to "deliver to the Publisher by February 16, 2006 one copy of the complete manuscript for the Work suitable for a book consisting of approximately 80,000 words in length" (id). The defendant submitted a manuscript containing 25,000 words. The court noted that "while "approximately," by definition, allows for some flexibility in the number of words and pages of the manuscript, it is not reasonable to interpret it to mean that 25,000 words approximates 80,000 words" (id). Again, in First American Commercial Bancorp. Inc., v. Saatchi & Saatchi Rowland Inc., 55 AD3d 1264, 865 NYS2d 424 [4th Dept., 2008] the court held the word 'approximately' used to describe the bounds of a leased area was not ambiguous since "the use of the terms approximate or approximately "mean[s] only a negligible deviation"" (id). Further, in Cardoza v. Department of Employment and Training Board of Review, 669 A2d 1165 [Supreme Court of Rhode Island 1996] the court held that an employee who misstated time worked by 'approximately' five minutes was not misconduct since

such difference was 'negligible' (id).

Clearly, whether an approximate deviation is within the normal understanding of such deviation is a factual question and cannot be decided as a matter of law. Further, in this particular case there are other indicia the term 'approximately' might not imply such a fluid and broad expansion of rights. For example, the lease states that the lease term is "approximately ten lease years" (see, Lease §1.3). It cannot reasonable be argued that the lease term is more or less than ten years depending upon how much leeway the term 'approximately' was meant to convey.

Notwithstanding, the defendant further notes the lease itself contemplated use greater than 1,800 square feet. Indeed, Article 2.1 of the lease does set forth a lengthy procedure whereby any dispute concerning the actual amount of space leased is resolved. That provision provides that "within thirty days following the substantial completion of the demising walls of the Premises as part of Tenant's Work...Landlord and Tenant shall each have the right to cause its respective independent and reputable architect to remeasure the Net Rentable Area of the Premises" (id). Thus, the lease appears to contemplate scenarios whereby the defendant's rentable area is greater than 1,800 square feet. The amended complaint does not elaborate when the plaintiff discovered the defendant's utilization of additional space. The complaint states that "in or about August 2017, while

construction was progressing, Corner 49 discovered that Santander was taking far more than approximately 1,800 square feet it was entitled to occupy" (see, Amended Complaint, §14). Thus, while the lease does provide for the dispensation noted, there are questions whether the triggering events contained in the lease were followed. The parties have not argued that this issue was raised within thirty days of erecting demising walls. Therefore, while the defendant might be entitled to more space the procedures enumerated to obtain such extra space were not utilized.

Consequently, there are questions whether Article 2.1 of the lease was followed. Even if it can be argued the precise guidelines presented should not foreclose defendant's opportunity to obtain more space there are still significant questions whether the defendant's actual space exceeded what was reasonably contemplated by the partes. Thus, the motion seeking to dismiss the amended complaint is denied.

So ordered.

ENTER:

DATED: December 11, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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