SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

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590 MADISON AVENUE, LLC,

Plaintiff,

- v -

CH SERVICES NY, LLC, CRESCENT HEIGHTS OF AMERICA, INC., CH SERVICE CO. HOLDINGS LLC,S KAHN CH INVESTMENTS, LLLP, GALBUT CH INVESTMENTS, LLLP, MENIN CH-BT CO. LLLP, XYZ CORP. LLC, JOHN DOE AS MEMBER OF CH SERVICES NY LLC, and JANE DOE AS MEMBER OF CH SERVICES NY LLC,

Defendants.

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INDEX NO. 656802/2020

MOTION DATE 04/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss the second, third, and fourth causes of action pursuant to CPLR 3211 is granted in part and denied in part, and plaintiff's cross motion for use and occupancy is denied, based upon the following memorandum decision.

Background

In this action for breach of a commercial lease, plaintiff 590 Madison Avenue, LLC ("plaintiff") asserts causes of action for: breach of contract against defendant CH Services NY, LLC ("tenant") (first cause of action); breach of contract against defendants CH Service Co. Holdings LLC ("Holdings"), S Kahn CH Investments, LLLP ("Khan"), Galbut CH Investments, LLLP ("Galbut"), and Menin CH-BT Co. LLP ("Menin," and collectively the "member

defendants"); ejectment against tenant and defendant Crescent Heights of America, Inc. ("Crescent Heights") (third cause of action), and attorney's fees against tenant and the member defendants. Defendants now move to dismiss the second and third causes of action in their entirety, and the fourth cause of action to the extent it is alleged against the member defendants, based on documentary evidence and for failure to state a cause of action pursuant CPLR 3211(a)(1) and (a)(7). Plaintiff cross-moves for use and pendente lite occupancy.

Tenant is a single member LLC, and Holdings is its sole member (NYSCEF Doc. No. 28). Khan, Galbut, and Menin are, in turn, members of Holdings. Pursuant to a lease dated August 10, 2011, and subsequently amended four times, tenant leased from plaintiff a portion of the twenty-sixth floor of the building located at 590 Madison Avenue, New York, New York (the "premises") (NYSCEF Doc. Nos. 13-17). The current term of the lease expires on December 31, 2027 (NYSCEF Doc. No. 27, ¶ 7). Relevant to the instant motion, the lease provides that, should the tenant be:

> "a partnership (including a limited liability partnership) or a limited liability company or a professional corporation (or is comprised of two (2) or more Persons, individually or as co-partners of a partnership (including a limited liability partnership), as members of a limited liability company or as shareholders of a professional corporation . . . (any such partnership, professional corporation and such Persons are referred to in this Article 29 as "Partnership Tenant") . . . the liability of each of the parties comprising Partnership Tenant shall be joint and several . . . [and] any bills, statements, notices, demands, requests or other communications given or rendered to Partnership Tenant or to any of such parties shall be binding upon Partnership Tenant and all such parties" (NYSCEF Doc. No. 13, Art. 29).

Further, and surviving the expiration of the lease, tenant agreed that, in the event that it failed to vacate the premises within 24 hours of the expiration of the lease, it would pay plaintiff the greater of 125% of the Fixed Rent and other amounts due for the last month of the term for the

first 30 days, and 200% of that amount monthly thereafter, or "the then fair market rental value of the premises" (*id.*, Art. 20).

By notices of default dated August 6, September 16, and November 5, 2020, plaintiff notified tenant that it was in default under the lease for failure to pay rent and failure to replenish its security deposit (NYSCEF Doc. No. 27, ¶¶ 45-49). After tenant failed to cure its default, plaintiff terminated the lease as of December 2, 2020 (NYSCEF Doc. No. 51).

Plaintiff commenced this action by filing a summons and complaint on December 7, 2020 (NYSCEF Doc. No. 1). Plaintiff then amended its complaint on January 8, 2021 (NYSCEF Doc. No. 12), and entered into stipulations of discontinuance with defendants Summerfield Capital Management and Nymeria Partners, who were subtenants in the premises (NYSCEF Doc Nos. 1, 19-20). Pursuant to a separate stipulation of settlement, Summerfield Capital Partners represented that it vacated the premises (NYSCEF Doc. No. 18). Remaining defendants herein appeared and now make the instant pre-answer motion to dismiss.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations

consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Breach of Contract (Second Cause of Action)

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). It is settled law that a court may interpret the unambiguous terms of a contract (*e.g. Maysek & Moran, Inc. v S.G. Warburg & Co.*, 284 AD2d 203, 204 [1st Dept 2001]). When doing so, a court should not read the contract in a way that renders any provision or clause meaningless (*e.g. Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]). The lease should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]).

Plaintiff attempts to hold the member defendants liable pursuant to Article 29 of the lease, which deals with a "Partnership Tenant." Specifically, the lease provides for joint and several liability of a tenant's members or constituent parts were that tenant is a partnership, limited liability partnership, limited liability company, or a professional corporation "*or* is comprised of two (2) or more persons" who are co-partners in a partnership or limited liability partnership, members of a limited liability company, or shareholders of a professional corporation (NYSCEF Doc. No. 13, Art. 29 [emphasis added]). Defendants assert that this provision does not apply to tenant because Holdings is tenant's only member, and therefore it is not "compromised of two or more persons." However, this reading of the lease ignores the disjunctive "or" between the first listing of potential Partnership Tenants and the second clause

referring to parties who are members, partners, or shareholders in one of the entities listed. The first clause of the provision applies where "tenant is a . . . limited liability company" without further specificity, and thus even a single member limited liability company such as tenant is included. Moreover, since no one disputes that Holdings is a member of tenant, Holdings is liable under the lease, and so much of the motion to dismiss as is to dismiss Holdings from this case must be denied.

Holdings' assertion that it is being improperly called to answer for tenant's debts solely by virtue of its membership status is unavailing. Plaintiff is plainly relying on a separate agreement under which tenant agreed that its member would be bound. Moreover, plaintiff alleges that tenant's members, whether solely Holdings or all the member defendants, authorized tenant to enter into the lease, and thus must be bound by Article 29 (NYSCEF Doc. No. 27). Delaware law, which governs the corporate structure and governance of tenant (Limited Liability Company Law § 801[a]), provides that the members of a limited liability company may "agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company," under the company's operating agreement or any other agreement (Del Code Ann TI 6 § 18-303; *see also Panasuk v. Viola Park Realty, LLC*, 41 A.D.3d 804, 805 [2d Dept 2007]). Defendants' reliance on *Kremer v Sinopia LLC* (104 AD3d 479, 480 [1st Dept 2013]) to the contrary is unavailing; in *Kremer*, the separate note which purported to bind the defendant's individual member along with defendant was never actually entered into. Defendants' invocation of the Statute of Frauds is similarly unavailing, as the lease is itself the instrument in writing that would satisfy the statutory requirements, provided that plaintiff's allegation is correct and that Holdings authorized the lease (General Obligations Law § 5-701).

A question remains as to whether Khan, Galbut, and Menin should be liable under this provision. These defendants assert that they are members of Holdings, and therefore not reached by Article 29. As proof, they submit tenant's amended and restated operating agreement, dated December 31, 2006, which provides that Holdings is tenant's sole member (NYSCEF Doc. No. 28, § 4). They also submit the affidavit of Pablo de Almargo, tenant's and Holdings' treasurer, who avers that Kahn, Galbut, and Menin are members of Holdings, and not tenant, and that a balance sheet provided to plaintiff when seeking a rent abatement that listed them as members of tenant was for accounting purposes only (NYSCEF Doc. No. 26, ¶¶ 4-7; NYSCEF Doc. No. 29). Affidavits that:

> "do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint, and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]).

Moreover, the conflict created by the defendants' documentary submissions cannot conclusively resolve the issue of Kahn, Galbut, and Menin's status and potential liability (*Leon*, 84 NY2d at 88 ["Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"]).

Ejectment (Third Cause of Action)

Plaintiff seeks a judgment of possession against tenant and Crescent Heights, arguing that the lease has been terminated and yet tenant and Crescent Heights are continuing to hold over in the premises. "Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant shall be made defendant in the action" (RPAPL 631). "If it is not so occupied, the action shall be brought against some person

exercising acts of ownership thereupon, or claiming title thereto or an interest therein, at the time of the commencement of the action" (*id.*).

> "In order to maintain a cause of action to recover possession of real property, [a] plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009]).

Here, neither party disputes that plaintiff is the record owner of the premises, or that, the lease having been terminated, plaintiff has a present or immediate right to possession. It is the third element which presents a question on this record, as the parties dispute whether or not tenant and Crescent Heights are still occupying the premises. Tenant asserts that, shortly after plaintiff terminated the lease, it vacated the premises, having previously informed plaintiff that anything left behind in the premises could be disposed (NYSCEF Doc. No. 28, ¶¶ 8-10; NYSCEF Doc. Nos. 40, 42). To bolster the complaint, plaintiff submits the affidavit of Jeffrey M. Sussman, Executive Vice President of plaintiff's managing agent, who asserts that tenant and Crescent Heights are in fact still occupying the premises because the name Crescent Heights is still on the door to the premises, furniture and other items were left behind, tenant has not turned over the keys to the premises or left it broom clean, and Crescent Heights continues to list the premises as its New York address on its website (NYSCEF Doc. No. 33, ¶¶ 11-15). Many of these alleged acts by tenant and Crescent Heights are in violation of the provisions of the lease governing how tenant is to vacate the premises, but such violations would only establish plaintiff's right to compensation under the lease.

The gravamen of a cause of action for ejectment is that someone without rights to possession is occupying the premises "to the exclusion of the plaintiffs" (*Merkos L'Inyonei*

Chinuch, Inc., 59 AD3d at 410). Plaintiff does not adequately allege that tenant and Crescent Heights are "exercising acts of ownership . . . [or] claiming title [or] an interest" in the premises (RPAPL 631), or in any way excluding plaintiff from the premises. To the extent that tenant abandoned furniture and other property in the premises, such is insufficient to create a holdover tenancy such that ejectment is warranted (*Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920, 922 [4th Dept 2003]). Moreover, plaintiff does not allege that tenant's abandoned furniture has prevented it from reletting the premises (*Building Serv. Local 32B-J Pension Fund v 101 L.P.*, 115 AD3d 469, 472 [1st Dept 2014] ["Here, in contrast, the landlord does not allege that the tenants left behind any property that prevented it from reletting the premises"]). Nor does tenant's alleged failure to turn over the keys constitute an exclusion of plaintiff from the premises (*Pezzo v 26 Seventh Ave. S., LLC*, 144 AD3d 778, 779 [2d Dept 2016]).

As plaintiff does not sufficiently allege that it is being excluded from the premises by tenant or Crescent Heights, it has failed to plead a cause of action for ejectment against those defendants.

Attorney's Fees (Fourth Cause of Action)

Plaintiff seeks to recover its attorney's fees, as provided by the lease. The member defendants argue that, because they are not bound by the lease, this claim must be dismissed against them pursuant to the general rule that a party may not recover its own attorney's fees absent a contract, statute, or court rule that allows such recovery (*e.g. Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 584 [2018]). As set forth above, however, the issue of whether the member defendants are bound by the lease is still undecided; indeed, the

Court has stated that Holdings, at least, is bound by Article 29 of the lease. Accordingly, dismissal of this cause of action would be premature at this stage.

Plaintiff's Cross-Motion for Use and Occupancy

Finally, plaintiff cross-moves for an award of use and occupancy during the pendency of this action. An award of use and occupancy "accommodates the competing interests of the parties in affording necessary and fair protection to both parties, to the tenant through possession, pending determination of the issue . . . and, at the same time, to the landlord by requiring the tenant to pay the landlord for use and occupancy" (*Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). Use and occupancy is meant to prevent a "manifestly unfair" outcome, specifically that a tenant "should be permitted to remain in possession of the subject premises without paying for their use" (*MMB Assoc. v Dayan*, 169 AD2d 422 [1st Dept 1991]). As set forth above, plaintiff has not sufficiently alleged that tenant is occupying the premises to the exclusion of plaintiff. Moreover, plaintiff is seeking the rent for the remainder of the lease term, subject to any potential reletting, as provided by the lease (NYSCEF Doc. No. 13, § 17.2). To award plaintiff use and occupancy under these circumstances would amount to an improper windfall (*see Radin v Arthur Holding Co., Inc.*, 149 AD2d 576 [2d Dept 1989] ["Under these circumstances, we agree with the Supreme Court that awarding the landlord damages for use and occupancy of the dental office would penalize the tenant Friedman, while creating a windfall for the landlord"]).

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent set forth herein and the third cause of action of the amended complaint is dismissed; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Crescent Heights of America, Inc., with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference via Microsoft Teams, on April 20, 2022, at 10:00 AM, to be arranged by the Court.

This constitutes the Decision and Order of the Court.

ENTER:

Louis L. Nock

3/10/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE