SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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GHH ASSOCIATES LLC,
Plaintiff,

- v -

TRENCHANT FUNDS, USA LLC and HOLD BROTHERS CAPITAL, LLC,
Defendants.

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INDEX NO. 156936/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for **AMEND PLEADINGS/ SUMMARY JUDGMENT** .

In this action for damages based on breaches to a commercial lease, plaintiff moves, pursuant to CPLR 1018, 1021 and 3025(c), as well as, pursuant to Real Property Law § 223, for an order substituting GG Assets LLC, Gorjian Assets LLC, BBH Properties LLC and Joe H Properties LLC, as tenants-in-common as plaintiffs and owners *nunc pro tunc* and amending the complaint to reflect said substitution. Plaintiff also seeks an order, pursuant to CPLR 3212(b) and (e), granting summary judgment in favor of plaintiff and against defendants, with respect to its first, second, third and fourth causes of action; or, if summary judgment is not granted, pursuant to CPLR 3124, compelling defendants to comply with discovery. (NYSCEF Doc. No. 11, *notice of motion*). Defendants oppose the application.

The salient facts of this case are as follows. Plaintiff is the owner and landlord of Suite 1407 on the fourteenth floor in the building located at 10 West 46th Street, New York, New York 10016 ("premises"). Defendant TRENCHANT FUNDS, USA LLC ("Trenchant") was the tenant of the premises pursuant to a commercial lease and HOLD BROTHERS CAPITAL, LLC ("Hold Brothers") is alleged to have been "a permitted occupant and/or assignee of the lease." Plaintiff alleges that the lease expired on October 31, 2018, but defendants nevertheless remained in possession of the premises as "holdover" tenants, liable for rent and additional rent at the holdover rate pursuant to Article 58 of the lease. Defendants allegedly paid the holdover rent and additional rent from November 2019 through April 2020, and then ceased to remit payments to plaintiff.

Plaintiff served defendants with a ninety (90) day notice of termination of the month-to-month tenancy, dated November 26, 2019, terminating defendants' tenancy as of February 29, 2020, and advising defendants to vacate the premises on or before said date. Defendants, however, allegedly failed to vacate the premises pursuant to the notice, prompting plaintiff to commence an eviction proceeding in the Civil Court of New York, in an action styled *GHH*

Associates LLC v Trenchant Funds, USA, LLC, et. al., L&T Index No.: 54354/2020. The Civil Court proceeding was stayed pursuant to various executive orders due to the COVID-19 pandemic, and the proceeding was ultimately discontinued without prejudice (NYSCEF Doc. No. 24, *notice of discontinuance*).

Defendants vacated the premises on August 21, 2020, accruing the sum of $83,596.54 in charges including rent and additional rent, and defendants allegedly left behind garbage and personal property at the premises and failed to restore the premises, in violation of Article 22 of the lease.

As to that branch of the motion seeking an amendment, plaintiff submits the affidavit of Joe Hakimian ("Hakimian"), who attests, *inter alia*, that, pursuant to a bargain and sale deed, dated December 12, 2019, the premises were sold and plaintiff assigned all rights, title, and interest to the property and tenancies to GG Assets LLC, Gorjian Assets LLC, BBH Properties LLC and Joe H Properties LLC, as tenants in common (NYSCEF Doc. No. 12 ¶ 17, *Hakimian's affidavit*; 19, exhibit F, *deed*; 20, exhibit G, *assignment and assumption;* 21, *exhibit H, contract*).

In its memorandum of law, plaintiff contends that the court should enter an order amending the caption and complaint to substitute the tenants-in-common as plaintiffs and owners since a new owner succeeds to the rights and remedies possessed by the prior owner. Plaintiff also argues that it is entitled to summary judgment against Trenchant for unpaid rent and additional rent due through August 21, 2020 (first cause of action). To the extent defendants contend, as alleged in its answer, that it was plaintiff who breached the lease by limiting the building's hours and operations or depriving them of access for three weeks during the COVID-19 pandemic, plaintiff maintains that there is no proof substantiating these allegations. Assuming, *arguendo*, that any rules promulgated by the condominium pursuant to its by-laws, or any gubernatorial executive order may have affected defendant's access to the building, plaintiff maintains that pursuant to § 27 of the lease, this would not excuse the tenant from its obligation to pay rent/use and occupancy.

Plaintiff also argues that it is entitled to summary judgment on its second cause of action against Hold Brothers, in quantum meruit, for its use and occupation of the premises. Defendants allegedly represented to the Securities and Exchange Commission that they had agreed "to reasonably allocate expenses and liabilities of commonly used resources consisting of rent and occupancy." As such, plaintiff argues that Hold Brothers is also liable in quantum meruit in the sum of $84,644.19, with such liability being joint and several with Trenchant.

As for the third cause of action, plaintiff seeks summary judgment in the amount of $58,420.00 against defendants. It argues that, because of the condition in which defendant left the premises and their failure to timely vacate, plaintiff agreed to reduce the purchase price in its contract with the tenants in common by $100,000.00. Plaintiff drew down on the letter of credit in the amount of $41,580.00, leaving a remaining balance of $58,420.00, which it now seeks to recoup.

Plaintiff also claims that it is entitled to attorney's fees against Trenchant, pursuant to § 19 of the lease, and, thus, that summary judgment should be granted with respect to its fourth cause of action.

It also seeks dismissal of defendants' affirmative defenses, as well as Trenchant's counterclaim for breach of contract premised on their claim that plaintiff, *inter alia*, "improperly limit[ed] the building's hours and operations."

Defendants oppose the motion on several grounds. They contend that the motion is procedurally defective because it seeks summary judgment on a proposed amended complaint; it exceeds the word limit permitted by Uniform Rule 202.8-b(a); the application lacks a statement of material facts, as required by Uniform Rule 202.8-g(a); and plaintiff fails to identify the changes in the amended complaint.

Furthermore, defendants argue that plaintiff is not entitled to summary judgment on its first cause of action against Trenchant for breach of contract because plaintiff failed to perform under the lease, claiming that plaintiff "breached its obligations under the lease by closing the building at 3 P.M. on business days and limiting elevator service", thereby depriving Trenchant of the beneficial use and enjoyment of the premises for more than two months. Defendants submit an e-mail dated April 20, 2020, wherein Kevin Gorjian, on behalf of plaintiff, stated:

> "As you know, our lease is subordinate to the Condominium rules and regulations, we have no control on that. Apparently it was a condo board's decision to modify the hours, due to the current situation. I am sorry that it has caused an inconvenience to you, but there is nothing we can do." (NYSCEF Doc. No. 40, *Gorjian's e-mail*)

They further contend that plaintiff's argument regarding the limitation of building hours and services lack merit because ¶ 55 of the lease explicitly states that "Landlord warrants and represents that the [Condominium rules and regulations] *shall not limit or interfere with the Tenant's use of the demised premises* or add any costs or expenses to the Tenant's obligations under the Lease (emphasis added)." Moreover, they maintain that ¶ 27 is not applicable to the facts here insofar as plaintiff has failed to allege/establish that the limitations on building access were due to any of the causes set forth in that provision.

Defendants argue that plaintiff seeks summary judgment based on allegations not referenced in neither the complaint nor the proposed amended complaint. For instance, although plaintiff seeks to obtain $100,000.00 in damages, premised on an alleged reduction in the sale price of the premises, these allegations are not contained in the pleadings. According to defendants, plaintiff is not entitled to summary judgment on its third cause of action because it seeks consequential damages, which is not permitted by the lease since the lease identifies plaintiff's remedies in the event tenant holds over in possession; lost profit is not contemplated by the parties at the time of the lease; is not supported by ¶ 18 of the lease, as relied upon by plaintiff; and plaintiff fails to submit any proof, other than Hakimian's affidavit, regarding the reasoning for the reduction in sale price.

According to defendants, the quantum meruit claim fails because plaintiff does not allege, let alone establish, that Hold Brothers occupied the premises and thereby received any services and that it expected compensation from Hold Brothers. Even if plaintiff were able to establish a claim for quantum meruit, it has not established the value of the services allegedly provided to defendants.

They further contend that, contrary to plaintiff's contention, allegations in the answer that plaintiff limited access to the building and limited elevator services in the building support the affirmative defenses and counterclaim (NYSCEF Doc. No. 44, *memorandum of law in opposition*).

In reply, plaintiff argues that the procedural defects raised by defendants are either lacking in merit or should be disregarded. It further rejects the arguments raised in opposition to the motion as being without merit and it reasserts its entitlement to summary judgment on its causes of action (NYSCEF Doc. No. 46, *memorandum of law in reply*).

Turning first to that branch of the motion seeking to amend the complaint, "[l]eave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise" (*Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523, 523 [1st Dept 2019] [internal quotation marks and citations omitted]). Furthermore, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (CPLR 3025[b].) Here, plaintiff has sufficiently demonstrated the changes to the complaint, to wit, the substitution of the tenants-in-common for the plaintiff in this action, and defendants have failed to make a showing that said amendment is palpably insufficient or entirely devoid of merit. (see CPLR 1018; Real Property Law § 223; *First Am. Tit. Ins. Co. v Chavannes*, 176 AD3d 678, 680 [2d Dept 2019]; *Medallion Auto Inc. v Sanders*, 272 AD2d 85, 86 [1st Dept 2000].) Thus, that branch of the motion seeking to substitute the tenants in common as plaintiffs and to amend the caption accordingly is granted.

Turning next to that branch of the motion seeking summary judgment, this court shall first address the procedural defects raised thereto. While plaintiff acknowledges that it failed to comply with the word limit set forth in 22 NYCRR § 202.8-b, this court disregards the technical defect (see CPLR 2001). Moreover, plaintiff's failure to annex to the notice of motion a separate, short and concise statement of the material facts as to which the party contends there is no genuine issue to be tried, is not fatal to its motion. (see *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022].)

It is well-settled that, in a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

Addressing the first cause of action for breach of contract, this court finds, upon review of, among other things, the relevant provisions of the lease (¶¶ 1 and 37, 39, 42, 43, 58), plaintiff has established its *prima facie* entitlement to summary judgment against Trenchant in the amount of $83,596.64, as reflected in its ledger (NYSCEF Doc. No. 23, *ledger*), representing monies due through August 21, 2020. Liquidated damages in an amount two and one-half times the existing rent is not a penalty. (see *Seymour v Hovnanian*, 211 AD3d 549, 554 [1st Dept 2022]; *Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 211 AD3d 657, 658 [1st Dept 2022] [holdover rent at three times the monthly rent enforceable]; *Glaze Teriyaki LLC . MacArthur Props., LLC*, 206 AD3d 513, 513 [1st Dept 2022] [holdover rent set at 200 percent of base rent was enforceable].) Furthermore, this court rejects defendants' argument that its claim premised on constructive/actual eviction warrants denial of the motion. (See *Carlyle, LLC v Quik Park Beekman II, LLC*, 59 Misc3d 35, 38 [App Term 2018] [rejecting tenant's argument that a partial actual or constructive eviction bars the landlord from collecting the liquidated damages agreed to in the lease for their holding over beyond the expiration of the lease]; see *Parsons & Whittemore v 405 Lexington*, 299 AD2d 156, 157 [1st Dept 2002], *lv dismissed in part, denied in part*, 99 NY2d 650 [2003]). Allegations that plaintiff "improperly limit[ed] the building's hours and operations" do not absolve tenant of its obligation to pay rent (see lease ¶ 27). Thus, that branch of the motion seeking summary judgment on its first cause of action is granted.

A breach of contract claim against Hold Brothers does not lie,[1] and, although plaintiff attempts to seek damages from Hold Brothers based on quantum meruit, said relief is denied on this application. Generally, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510 [1st Dept 2015], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987].) That said, "in the landlord-tenant context, the occupant of premises is liable to the owner of the property for use and occupancy irrespective of the existence of a lease in the name of another entity: '[t]he obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant[,] [but] [r]ather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties'" (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d at 511, quoting *Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, 559-560 [2d Dept 1999] [internal quotation marks and citation omitted].) Here, however, plaintiff has failed to show that Hold Brothers was in possession of the premises such that a claim for quantum meruit should lie against it. With respect to Hold Brother's possession of the premises, Hakimian solely asserts that "Hold Brothers is an affiliate of Trenchant and was a permitted occupant and/or assignee of the Lease" and that, in a 2017 financial statement"[d]efendants represented to the Securities and Exchange Commission that they are parties to an expense sharing agreement wherein the parties agree to reasonably allocate expenses and liabilities of commonly used resources consisting of, for instance, rent and occupancy." This proof is insufficient to establish that Hold Brothers occupied

[1] Although the first cause of action sets forth a claim for breach of contract against Hold Brothers, the motion papers seek relief under the first cause of action solely as against Trenchant.

the premises during the holdover period in question. Moreover, in its verified petition in the Civil Court proceeding, plaintiff alleged that "*[u]pon information and belief*, Hold Brother Capital LLC, Hold Software.Com Inc., and XYZ Corp. (collectively, with Tenant, 'Respondents'), are undertenants of [t]enant are in possession of the [p]remise." (emphasis added) (NYSCEF Doc. No. 22, *petition*). Based on the foregoing, summary judgment against Hold Brothers based on quantum meruit is denied.

Turning next to the third cause of action, premised on damages resulting from the removal of defendants' property from the premises and restoration of the premises, this court notes that ¶ 58 of the lease, entitled "holdover", provides, in relevant part:

> "Tenant agrees it shall indemnify and save Landlord harmless against *all costs, claims, loss or liability resulting from delay by Tenant in surrendering the demised premises upon the expiration or sooner termination of the term of the Lease*, including, without limitation, any claims made by any succeeding tenant founded on such delay. The parties recognize and agree that the damage to Landlord resulting from any failure by Tenant to timely surrender the demised premises, may be substantial, may exceed the amount of monthly rent theretofore payable hereunder, and will be impossible of accurate measurement..." (emphasis added).

However, to the extent plaintiff now seeks to obtain $58,420.00 in damages based on its fourth cause of action, that branch of the motion is denied. In the fourth cause of action of plaintiffs' complaint, entitled "[d]amages for removal of garbage, personal property, and restoration", it asserts that defendants are "liable for the costs incurred or which shall be incurred by [p]laintiff in removing [d]efendants' garbage, personal property, and any alterations/fixtures, it abandoned in the [p]remises and for the restoration of the [p]remises." Plaintiff submits photographs that purportedly show the condition of the premises at the time defendants allegedly vacated the premises. Notwithstanding, the photographs are not time-stamped, and, aside from Hakimian's bald assertion that the photographs are "[t]rue copies of photographs of the [p]remises taken of the condition in which [d]efendants left the [p]remises", plaintiff fails to submit admissible proof to warrant summary judgment on this claim. Furthermore, plaintiff fails to allege in its fourth cause of action, as it attempts to argue now, that defendants are liable for $58,420.00, corresponding to a $100,000.00 reduction of the contract sale minus the $41,580.00 it drew from the line of credit. In any event, said claim is not established here. Thus, that branch of the motion is denied.

This court finds that plaintiff is entitled to attorney's fees pursuant to the lease (¶ 19). Defendants do not oppose that branch of the motion. However, damages shall be determined at the time of trial.

That branch of the motion seeking dismissal of the counterclaim is granted. To establish a breach of contract claim, its proponent must show "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].) In the instant case, plaintiff has established that Trenchant's tenancy was terminated as of February 29, 2020; thus, any claim premised on breach of contract commencing in April 2020 does not lie. Furthermore, the

affidavit of Hakimian establishes that plaintiff at no time limited the building's hours and operations or deprived defendants' access to the premises. Defendants' own proof in opposition, to wit, the e-mail from Gorjian, also corroborates plaintiff's position that it did not limit defendants' access to the building (NYSCEF Doc. No. 40). Furthermore, the limited access to the building alleged here does not rise to the level of partial actual eviction, especially since "[c]ourts have routinely found that disruption as a result of the COVID-19 pandemic cannot be used as defenses to claims for unpaid rent." (see *SRI Eleven 1407 Broadway Operator LLC v Infinity Equity Ventures LLC*, 2022 NY Slip Op 33142[U], **4 [Sup Ct, NY County 2022]; see also *Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, 206 AD3d 503, 504[1st Dept 2022].) Therefore, dismissal of the counterclaim for breach of contract is warranted.

Addressing that branch of the motion seeking dismissal of the affirmative defenses, this court notes that defendants only oppose dismissal of its third (estoppel); fifth (unclean hands); sixth (plaintiff's own conduct); seventh (breach of lease); ninth (constructive eviction); tenth (illegal lockout); eleventh (breach of the covenant of quiet enjoyment). Thus, the remaining defenses are hereby dismissed. (*Town of N. Elba v Grimditch*, 131 AD3d 150, 159 n 4 [3d Dept 2015] ["To the extent that defendants have not briefed any issues with respect to their remaining affirmative defenses and counterclaims, we deem any arguments related thereto to be abandoned"]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013] ["Further, the first, second, and fourth affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses"].) Furthermore, inasmuch as the remaining affirmative defenses are premised on allegations that defendants were partially/constructively evicted from the premises, which this court finds to be without merit, they are also dismissed. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion for an order substituting GG Assets LLC, Gorjian Assets LLC, BBH Properties LLC, and Joe H Properties LLC as plaintiffs and amending the complaint to reflect the same, is granted; and it is further

ORDERED that the Clerk of the Court shall amend the caption of this action as follows:

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GG Assets LLC, Gorjian Assets LLC,
BBH Properties LLC, and Joe H Properties LLC,
Plaintiffs, Index No. 156936/2020

v

Trenchant Funds, USA LLC,
and Hold Brothers Capital, LLC,
Defendants.
----------x
and it is further

ORDERED that that branch of the motion seeking summary judgment on its first cause of action for breach of contract against defendant TRENCHANT FUNDS, USA LLC, in the sum of $84,644.19, is granted, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that that branch of the motion seeking summary judgment on its second cause of action against Hold Brothers Capital LLC for its use and occupancy, in quantum meruit, is denied; and it is further

ORDERED that that branch of the motion seeking summary judgment against defendants on its third cause of action in the sum of $58,420.00 is denied; and it is further

ORDERED that that branch of the motion seeking attorney's fees against TRENCHANT FUNDS, USA LLC shall be determined at the time of trial; and it is further

ORDERED that that branch of the motion seeking dismissal of defendants' affirmative defenses and counterclaim is granted; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

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

ORDERED that the parties in this action are hereby directed to appear for a remote conference on June 28, 2023, details which shall be provided by the court no later than June 26, 2023.

May 18, 2023

HON. VERNA L. SAUNDERS, JSC

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