SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** 47

Justice

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36 AND 37 REALTY, LLC,

Plaintiff,

- v -

BR 1147, LLC D/B/A CLEAN LAUNDRY, STEPHEN CHUN, ABC CORP.

Defendants.

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INDEX NO. 155940/2020

MOTION DATE 08/07/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for DISMISS DEFENSE.

In this action arising out of an alleged breach of a commercial lease, plaintiff-landlord 36 and 37 Realty LLC moves pursuant to CPLR § 3211 (a) (1) and (7) to dismiss defendants' BR 1147, LLC d/b/a Clean Laundry, Stephen Chun, and ABC Corp. affirmative defenses and counterclaims, and to strike their jury demand (motion seq no 003).

On a motion to dismiss pursuant to CPLR 3211 § (a) (7) for failure to state a cause of action, the pleading must be afforded a liberal construction and the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, a movant can submit documentary evidence in support of a CPLR § 3211 (a) (7) motion (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [2014], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "When documentary evidence is submitted by a [movant] the standard morphs from whether the [opposing party] has stated a cause of action to whether it has one" (*id.* [internal quotations and citations omitted]). Thus, if plaintiff's evidence conclusively establishes

that the defendants have no cause of action, dismissal is appropriate (*id.*). Similarly, "a motion pursuant to CPLR 3211 (a) (1) to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the [opposing party's] factual allegations" (*Stone v. Bloomberg LP*, 163 AD3d 1028, 1030-31 [2d Dept 2018]).

Initially, since defendants provide no opposition to plaintiff's motion to dismiss defendants' first affirmative defense of frustration of purpose, fifth affirmative defense of culpable conduct, seventh and tenth affirmative defenses based on unspecified executive orders, and eighth affirmative defense of breach of the covenant of quiet enjoyment these affirmative defenses will be deemed withdrawn. Accordingly, defendants' first, fifth, seventh, eighth, and tenth affirmative defenses will be dismissed.

Additionally, defendants' ninth affirmative defense of failure to state a cause of action for ejectment will be dismissed as moot since the tenant already vacated the premises. Accordingly, defendants' ninth affirmative defense will be dismissed.

As to defendants' second affirmative defense and first counterclaim for breach of contract, they must show that "(1) a contract exists; (2) [they] performed in accordance with the contract; (3) [plaintiff] breached its contractual obligations; and (4) [plaintiff's] breach resulted in damages" (*34-06 73 LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [internal citations omitted]). However, a tenant's "fail[ure] to perform under the lease by not paying the full amount of rent" merits dismissal of tenant's claim for breach of contract (*Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.*, 189 AD3d 496, 497 [1st Dept 2020]). Additionally, "the obligation to pay rent pursuant to a commercial lease is an independent covenant, and thus, cannot be relieved by allegations of a landlord's breach, absent an express provision to the

contrary" (*Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 [1st Dept 2011]). Here, paragraph 4 of the lease provides that:

> Tenant shall not be entitled to any set off or reduction of rent by reason of any failure of owner to comply with the covenants of this or any other article of this lease. Tenant agrees that Tenant's sole remedy at law in such instance will be by way of an action for damages for breach of contract

(Lease, NYSCEF Doc No 107, ¶ 4). Since the lease specifically provides that defendants may not set off or reduce rent payments even upon plaintiff's breach of the lease, and it is undisputed that defendants did in fact do so, defendants do not have a cognizable breach of contract claim. Accordingly, defendants' second affirmative defense and first counterclaim for breach of contract will be dismissed.

As to defendants' third affirmative defense that plaintiff is not entitled to rent for the balance of the lease because the lease does not have an acceleration clause, paragraph 18 of the lease provides that:

> Tenant shall . . . pay Owner as liquidated damages, for the failure of Tenant to observe and perform said Tenant covenants herein contained any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any of the rents collected on account of the subsequent lease or lessee of the demised premises for each month of the period which would have otherwise constituted the balance of the term of this lease

(NYSCEF Doc No 107, ¶ 18). Here, plaintiff breached the lease by failing to pay rent and pursuant to paragraph 18 owes liquidated damages equal to the rent for the balance of the lease term less any rent plaintiff received from a subsequent tenant through the expiration of the lease term (*id.*). Accordingly, defendants' third affirmative defense of balance of the rent will be dismissed.

As to defendants' fourth affirmative defense and third counterclaim of constructive eviction, "[i]n a commercial lease, a commercial tenant may waive the rights provided by Real Property Law § 227" (*Dance Magic Inc. v Pike Realty, Inc.*, 85 AD3d 1083, 1087 [2d Dept 2011]). "Where a commercial tenant has waived its rights under Real Property Law § 227, the tenant may not claim constructive eviction, but is limited to the remedies set forth in the lease" (*id.*). Here, defendants waived their rights pursuant to Real Property Law § 227 in paragraph 9 of the lease: "Tenant hereby waives the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof" (NYSCEF Doc No 107, ¶ 9). Accordingly, defendants' fourth affirmative defense of constructive eviction will be dismissed.

As to defendants' sixth affirmative defense and second counterclaim of unjust enrichment, where there is a valid contract or lease between the parties an unjust enrichment claim is precluded (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758-59 [2d Dept 2009] [internal quotations and citations omitted] ["As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter. Here, the existence of a valid and enforceable contract, the lease between the parties, precluded the plaintiff's claim alleging unjust enrichment."]). Here, there is a valid, binding lease that governs the relationship between the parties. Therefore, defendants do not have a cognizable claim for unjust enrichment. Accordingly, defendants' sixth affirmative defense and second counterclaim of unjust enrichment will be dismissed.

As to defendants' fourth counterclaim for negligence, a party cannot plead negligence premised on the same allegations as those underlying their breach of contract cause of action (*id.* at 758). Accordingly, defendants' fourth counterclaim for negligence will be dismissed.

As to defendants' fifth counterclaim for a rent abatement, paragraph 9 of the lease is a casualty clause that provides that in instances of damage caused by "fire or other casualty" tenant can pursue certain remedies, including various levels of a rent abatement depending on the damage (NYSCEF Doc No 107, ¶ 9). However, "New York courts, while not establishing a general definition of 'casualty,' have found the term applicable to singular events, such as fires, that cause physical damage in or to a property" (*Gap Inc. v Ponte Gadea New York LLC*, 524 F Supp 3d 224, 233 [SD NY 2021]), and "repeated leaks and flooding [are] not the type of causalities contemplated by paragraph 9 of the lease as excusing rent payments" (*Blue Water Realty*, 189 AD3d at 497). Here, defendants' answer alleges that the leaks were "continuous and persistent," and therefore, do not meet the definition of casualty to invoke the remedies provided for by paragraph 9 of the lease (NYSCEF Doc No 106, ¶ 16). Accordingly, defendants' fifth counterclaim for a rent abatement will be dismissed.

Sd to defendants' sixth counterclaim for tortious interference with a contract, defendants must show "(1) the existence of a valid contract . . . ; (2) [plaintiff's] knowledge of that contract; (3) [plaintiff's] intentional procuring of the breach of that contract; and (4) damages" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). "Specifically, [defendants] must allege that the contract would not have been breached 'but for' [plaintiff's] conduct" (*id.*). "Although on a motion to dismiss the allegations in a [pleading] should be construed liberally, to avoid dismissal of a tortious interference with contract claim [defendants] must support [their] claim with more than mere speculation" (*id.*). Here, while defendants allege the existence of a letter of intent to

assign their lease to Lawonda Billing and that plaintiff had knowledge of the letter, they do not explain how or why plaintiff was the "but for" cause of Billing backing out of the assignment besides the conclusory allegation that plaintiff "intentionally and improperly procured a breach of that letter of intent" (NYSCEF Doc No 106, ¶¶ 32-35, 63-64). Accordingly, defendants' sixth counterclaim for tortious interference with the contract will be dismissed.

As to defendants' seventh counterclaim for attorneys' fees and punitive damages under the New York City Non-Residential Tenant Harassment Law (NTHL), defendants allege in their answer that plaintiff violated the regulation by "changing the locks to the utility room and [through] repeated or extended interruptions of building services" (NYSCEF Doc No 106, ¶ 67). It is not clear what interruption of building services defendants refer to and though the regulation prohibits "changing the lock on [the] entrance door without supplying a key to the new lock to the commercial tenant," there is no provision relating to prohibiting a landlord from locking a utility room (NYC Admin Code § 22-902 [a] [7]). Accordingly, defendants' seventh counterclaim for damages under NTHL will be dismissed.

As to defendants' jury demand, paragraph 25 of the lease provides:

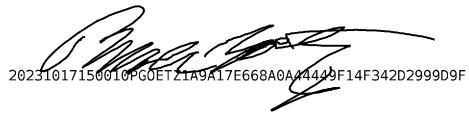
> It is mutually agreed by and between Owner and Tenant that the respective parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other (except for personal injury or property damage) on any matters whatsoever arising out of, or in any connected with, this Lease, the relationship of Owner and Tenant, Tenant's use of or occupancy of the demised premises, and any emergency statutory or any other statutory remedy

(NYSCEF Doc No 107, ¶ 25). Here, since defendants are not alleging personal injury or property damage the waiver provision controls and therefore, defendants cannot demand a jury trial. Accordingly, defendants' jury demand will be stricken.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' affirmative defenses, counterclaims, and strike the jury demand is granted and defendants' affirmative defenses and counterclaims are dismissed and the jury demand is stricken.



10/17/2023
DATE

PAUL A. GOETZ, J.S.C.

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