SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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H. ROSKE AND ASSOCIATES LLP

Plaintiff,

- v -

ESRT EMPIRE STATE BUILDING L.L.C.,

Defendant.

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INDEX NO. 655283/2024

MOTION DATE 12/16/2024

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, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant's motion is granted.

Background

This matter arises out of a dispute over a commercial lease for a space in the Empire State Building. Plaintiff is a law firm who in 2014 entered into a lease with Defendant for the unit in question. In 2022, and under a settlement agreement, the parties entered into an Amended Lease that had a five-year term, although Plaintiff alleges that this was a mistake, and the parties intended that the lease run for three years. Plaintiff alleges that there were multiple issues while occupying the space, including problems with the heating and cooling systems, water damage, and security. Defendant alleges that Plaintiff failed to make rent payments starting in April of 2024.

In June of 2024, Plaintiff sent Defendant a letter purporting to terminate the Amended Lease, explaining that they had merged with another law firm and were moving to another office location. It appears that Plaintiff continued to access the space, however, until September of 2024. In October of that year, Plaintiff filed the underlying proceeding, alleging a single cause of

action for breach of contract and negligence. In oral argument held on June 05, 2025, counsel for Plaintiff represented that they were dropping the negligence part of their complaint. Defendant brings the present motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 [2017].

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 [1994].

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 [1977].

Discussion

The elements of a claim for breach of contract are "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 A.D.3d 425, 426 [1st Dept. 2010]. Defendant moves to dismiss the complaint for failure to state a claim, arguing that Plaintiff has not alleged breach or damages. Defendant also argues that under the terms of the lease, Plaintiff is not entitled to a return of their security deposit, and that they are entitled to the fees and costs of defending this action. Plaintiff opposes. For the reasons that follow, the complaint is dismissed.

Plaintiff Has Not Properly Alleged a Breach

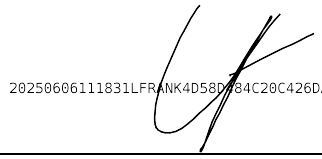
Defendant argues that Plaintiff's complaint does not identify any specific provision of the Amended Lease that Defendant is alleged to have breached, and that this lack is fatal to their claim. In reply, Plaintiff does not point to any provision in the Amended Lease but instead argues that their claim for breach of contract should be construed in the context of an alleged constructive eviction. A necessary element of a claim for constructive eviction is a showing that the tenant abandoned the premises. *20 Broad St. Owner LLC v. Sonder USA, Inc.*, 230 A.D.3d 1048, 1049 [1st Dept. 2024]. But here, by Plaintiff's own admission in both the pleadings and a letter sent to Defendant, they left the premises as a result of a merger with another law firm with a different office location. Plaintiff has not alleged a claim of constructive eviction.

As addressed above, Plaintiff also does not point to any specific provision of the Amended Lease that they allege Defendant breached. A failure to allege "in nonconclusory language" the "specific provisions of the contract upon which liability is predicated" constitutes grounds for dismissal. *Sud v. Sud*, 211 A.D.2d 423, 424 [1st Dept. 1995]. Furthermore, Plaintiff did not include a copy of the Amended Lease, only an edited selection of what it considered to be "relevant provisions." Failure to include the purportedly breached agreement can also be

grounds for dismissal. *Kent v. 534 E. 11th St.*, 80 A.D.3d 106, 108 [1st Dept. 2010]. Defendant has submitted a full copy of the Amended Lease, however, and there are several relevant provisions that conclusively defeat Plaintiff's vague claims for breach of contract. For instance, Plaintiff alleges that they hired a contractor to do repair work, and that Defendant did not reimburse them. But the Amended Lease states that the repair work in question was the responsibility of the Landlord, and there is nothing requiring Defendant to reimburse work that Plaintiff elected to take on themselves. The email correspondence on this matter that Plaintiff relies on clearly states that Plaintiff would be required to submit a signed agreement to change the terms of the lease before Defendant would consent to reimburse instead of handling the repairs themselves, and Plaintiff does not allege that they complied with this requirement. Plaintiff's breach of contract claim fails in several respects to state a viable cause of action. Accordingly, it is hereby

ADJUDGED that defendant's motion is granted; and it is further

ORDERED that the complaint is dismissed.



6/6/2025
DATE

LYLE E. FRANK, J.S.C.

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