SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD **PART** IAS MOTION 49EFM

Justice

----------X

ZEE N KAY MANAGEMENT, LLC,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, LONG ISLAND RAIL ROAD COMPANY

Defendant.

----------X

INDEX NO. 657258/2019

MOTION DATE 07/28/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 38, 39, 40, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55 were read on this motion to/for DISMISS.

This action relates to certain buildings on the Lefferts Boulevard bridge in Kew Gardens, Queens (the Buildings). The Buildings are owned by the defendant Long Island Railroad Company (LIRR). Plaintiff Zee N Kay (ZNK) claims it entered into a license agreement with LIRR giving ZNK the right to manage and sub-license the shops in the Buildings and that LIRR was required to repair the exterior rear walls and undersides of the Buildings. Plaintiff alleges LIRR and defendant Metropolitan Transportation Authority (MTA) tried to force ZNK to make the required repair, instead and terminated ZNK's lease when ZNK refused to do so. ZNK asserts claims for breach of contract, negligence, fraud, and tortious interference with a contract.

Defendants filed an answer (NYSCEF Doc. No. 10) and subsequently an Amended Answer and Counterclaims (Counterclaims, NYSCEF Doc. No. 14), which included counterclaims by LIRR. Plaintiff now moves to dismiss the counterclaims. Accordingly, these facts are taken from the Amended Answer and Counterclaims and they are assumed to be true.

On March 12, 2010, ZNK and LIRR entered into an agreement by which the plaintiff was required to "manage, maintain and repair the Licensed Location" and would be "exclusively responsible for all repair and improvements to the Buildings" (Counterclaims, ¶ 192). Plaintiff failed to make required repairs. On September 13, 2018, LIRR provided ZNK with a Notice of Default listing monetary and non-monetary defaults, including defaults related to repairs. (*id.*, ¶¶

196-97). LIRR also asserts a second counterclaim for unpaid rent and additional rent incurred between August 2019 and November 2019 (*id.*, ¶¶ 207-09).

First Counterclaim- Breach of Contract, Failure to Make Repairs

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 [2d Dept 2010]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The first counterclaim fails, according to plaintiff, because LIRR has not alleged damages. While LIRR claims damages to be determined at trial, no facts support the existence of damages (Memo, NYSCEF Doc. No. 16 at 12). There are no allegations that LIRR or MTA made repairs or incurred costs fixing the Buildings. If the defendants rely on a possible intent to make future repairs, potential future expenses related to those future repairs cannot sustain a breach of contract claim (*id.* at 13, citing *Vista Food Exch., Inc. v BenefitMall*, --Misc 3d--, 2014 NY Slip Op 31491[U] [Sup Ct, NY County 2014]).

Defendants contend the first counterclaim should survive because they suffered injury as a result of ZNK's failure to make required repairs under the license (Opp, NYSCEF Doc. No. 45, at 4-5). ZNK's failure to make required repairs resulted in damage to the Buildings, and defendants are entitled to compensation for that injury, regardless of whether defendants then made the repairs (*id.* at 5). Defendants' failure to specify their damages or detail their proof is not fatal to the claim at this early stage (*id.* at 5-6).

ZNK replies that the defendants' position is based on cases involving a landlord-tenant relationship, which did not exist here, as this agreement explicitly disclaims a landlord-tenant

relationship (Reply, NYSCEF Doc. No. 54, at 1-3). Accordingly, defendants' damages for injury to the Buildings would be the actual cost to do the work plaintiff allegedly should have done (*id.* at 4). Defendants have not alleged the value of the Buildings decreased as a result of ZNK's alleged failures.

As far as plaintiff contends this counterclaim fails for lack of damages, plaintiff relies on *Vista Food Exch., Inc. v Benefitmall,* 2014 N.Y. Slip Op. 31491[U] [N.Y. Sup Ct, New York County 2014], *affd,* 2016 N.Y. Slip Op. 02923 [1st Dept 2016], which noted that an allegation of the possibility of future damages, there, the "prospect of possibly having to pay taxes twice," is insufficient to show damages. Here, defendants have alleged damage to the Buildings from ZNK's breach of its obligations to make repairs. While the amount of the damages, or the cost to repair the injury to the Buildings, may be uncertain, "when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damage which he has caused is uncertain" *Randall-Smith, Inc. v 43rd St. Estates Corp.*, 17 NY2d 99, 106 (1966) quoting *Wakeman v Wheeler & Wilson Mfg. Co.*, 101 NY 205, 209 (1886). Defendants have alleged an injury in the form of damage to the Buildings, although the amount of the injury is uncertain. Accordingly, this claim survives.

Second Counterclaim- Breach of Contract, Unpaid Compensation

ZNK seeks dismissal of the second counterclaim pursuant to CPLR 3211(a)(1), based on documentary evidence, or to limit that claim to the extent LIRR seeks more than $8,524.25.

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of the defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims

flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the proposed documentary evidence is the email chain between counsel regarding the security deposit check (Email Chain, NYSCEF Doc. No. 20).

ZNK argues the second claim fails, or should be limited, because most of the damages sought are set off by ZNK's security deposit of $46,779, and defendants have previously acknowledged the offset meant plaintiff owed only $9,576.19 (Memo at 13). Further, $1,051.94 should also be deducted from any claim, as the security deposit accumulated that much in interest while it was held by defendants *(id.)*. Plaintiff argues the second counterclaim is thus based on knowingly false and misleading allegations and asks the counterclaim be dismissed pursuant to 22 NYCRR 130-1.1(c). Alternatively, this court should deduct the amount of the security deposit and the interest from the amount sought by defendants.

Defendants contend that ZNK's security deposit has not been applied to amounts unpaid by plaintiff (*id.* at 7). They concede the bank holding ZNK's deposit sent the MTA a check for $46,799.00, but that check has not been deposited, so the funds remain in the bank (*id.*). Plaintiff presents no evidence that conclusively disposes of the claim by demonstrating the security deposit has been applied to amounts owed. Even if those monies had been deposited by the MTA, plaintiff admits there would still be an amount outstanding on the unpaid compensation. Further, defendants claim they are entitled to use the security deposit to offset their damages resulting from ZNK's failure to make repairs (*id.* at 8). As to the interest on the security deposit, New York law allows a landlord to keep up to 1% interest on a security deposit as an administrative fee (*id.* at 8-9).

It is undisputed that defendants have received a check for the amount of the security deposit. However, the Email Chain does not qualify as documentary evidence which conclusively establishes ZNK's defense as a matter of law. While one communication from defendants' attorney Ricardo Oquendo stated "we have reviewed the applicable tenant lease/sublicense and it does allow ZNK to offset rent arrears against their security deposit" (Email Chain at 5), the email chain does not dispositively resolve the question of how the security deposit funds were or should be applied. This portion of the motion is also denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss the counterclaims is DENIED.

12/22/2020
DATE

O. PETER SHERWOOD, J.S.C.

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