# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. MARY V. ROSADO **PART** 33

*Justice*

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49 GROVE, LLC

Plaintiff,

- v -

49 GROVE REALTY LLC,

Defendant.

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**INDEX NO.** 158925/2021

**MOTION DATE** 01/25/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for DISMISS.

Upon the foregoing documents, Defendant 49 Grove Realty LLC's ("Landlord") motion to dismiss is granted in part and Plaintiff 49 Grove, LLC's ("Tenant") cross motion seeking to amend the Complaint is granted.

## I. Factual and Procedural Background

Tenant has brought this action seeking to recoup damages accrued following events from a fire that occurred on June 4, 2017, in its basement restaurant and bar (NYSCEF Doc. 2). Landlord has filed the instant pre-answer motion to dismiss seeking to dismiss the Complaint pursuant to CPLR 3211(a)(1), (5), and (7), a (NYSCEF Doc. 5). Tenant opposed and cross moved to amend the Complaint to fix the typographical error upon which Landlord's CPLR 3211(a)(1) argument relies (NYSCEF Doc. 16).

Tenant leased the basement of 49 Grove Street, New York, New York (the "Premises") from Landlord to operate a lounge bar and restaurant called the Corner Basement Restaurant (NYSCEF Doc. 7 at ¶ 5). On June 4, 2017, a fire occurred at the Premises (*id.* at ¶ 6). Allegedly,

the fire destroyed the Premises and Tenant was unable to operate its restaurant (NYSCEF Doc. 2 at ¶ 7).

Tenant alleges the fire was caused by Landlord's negligence (*id.* at ¶ 9) Tenant alleges that it waited over four (4) years to be allowed back into the premises but was prevented from using the Premises due to outstanding building violations (*id.* at ¶ 13). On July 14, 2021, after years of allegedly being told that Tenant could return to the Premises shortly, Tenant finally sent notice to Landlord that it was terminating the Lease (*id.* at ¶¶ 12 and 22). Tenant allegedly demanded the return of its $54,000.00 security deposit but Landlord allegedly failed to return the deposit (*id.* at ¶¶ 23-23).

Tenant's Complaint has six (6) causes of action alleging that (1) Landlord had a duty to exercise reasonable care in repairing and maintaining the Premises; (2) Landlord breached the covenant of quiet enjoyment (*id.* at ¶¶ 32-36); (3) money damages due to Landlord's failure to timely restore the Premises (*id.* at ¶¶ 37-43); (4) breach of the implied covenant of good faith and fair dealing (*id.* at ¶¶ 44-49) (5) lost profits due to Landlord's breach of its obligations under the Lease.; and (6) return of the security deposit and punitive damages (*id.* at ¶¶ 50-58).

## II. Discussion

### A. Statute of Limitations

A party moving to dismiss a claim as time barred under CPLR 3211(a)(5) "bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158 [1st Dept 2017], *quoting Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). To meet this burden, it is incumbent upon the moving party to demonstrate when the claim accrued (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). In response, the non-movant must show "whether the statute of limitations is inapplicable or whether

the action was commenced within the statutory period" and "must aver evidentiary facts establishing that the action was timely" (*MTGLQ Invs., LP v Wozencraft,* 172 AD3d 644, 645 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019]).

Pursuant to CPLR 203(a), a cause of action begins to accrue "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]). In applying the statute of limitations, a court "must look to the reality or essence of a claim rather than its form" (*Annunziata v Quest Diagnostics Inc.,* 127 AD3d 630, 631 [1st Dept 2015]).

Landlord argues that Tenant's Complaint is untimely as it alleges negligence and the statute of limitations for negligence is three years (CPLR 214; *see also Gerschel v Christensen*, 143 AD3d 555 [1st Dept 2016]). Tenant responds by arguing that the Complaint seeks breach of contract damages on its claim for property damage which allows for a six-year statute of limitations (CPLR 213; *Huynh v Greene, Brian and Stern Partnership*, 34 AD3d 363 [1st Dept 2006]).

The Court of Appeals has refused to apply a shortened negligence statute of limitations to a claim also seeking breach-of-contract damages on a claim for property damage (*Matter of Paver & Wildfoerster v Catholic High School Ass'n*, 38 NY2d 669, 676 [1976]). Moreover, the First Department has held that the six-year statute of limitations for breach of contract claims, not the three-year statute of limitations on negligence actions, applies for property damage sustained in a landlord-tenant context (*Novita LLC v 307 West Restaurant Corp.*, 35 AD3d 234 [1st Dept 2006]). It has also been held that alleged negligence by a tenant corporation in failing to take measures to remedy problems in a tenant's apartment constitutes a continuous or recurring wrong that tolls the three-year statute of limitations for negligence (*Gross v 420 East 72nd Street Tenants. Corp.*, 21 Misc. 3d 629, 634 [Sup Ct, New York County 2008]).

Although Plaintiff's first cause of action alleges negligence, the damage allegedly arose from the dereliction and breach of Landlord's duties outlined in the terms of the Lease. Therefore, this cause of action is embedded in the Landlord's breach of the Lease. As the relationship between the parties had its genesis in contract, and the events giving rise to this action directly implicate the landlord-tenant relationship, the six-year statute of limitations applies. However, even if the six-year statute of limitations does not apply and the three-year statute applies, the first cause of action alleges a continuous wrong in failing to restore the premises which tolls the three-year statute of limitations for negligence. Therefore, the first cause of action should not be dismissed.

The second cause of action alleges a breach of the covenant of quiet enjoyment expressed in the Lease. Although Landlord argues that the statute of limitations for constructive eviction is just one year from the date of eviction, Landlord never states when Tenant's claim for constructive eviction accrued. The burden is on Landlord, who is seeking to dismiss Tenant's claim based on a statute of limitations defense, to show when the constructive eviction claim accrued (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). Moreover, the alleged persistent failure to repair the premises and restore Tenant to proper possession constitutes a continuous wrong that tolled the statute of limitations (*King v 870 Riverside Drive Housing Development Fund Corp.*, 74 AD3d 494 [1st Dept 2010] [constructive eviction claim based on leaks causing extensive water damage, which continued and cooperative alleged failed to repair, was timely based on continuous wrong doctrine]). Because Landlord has not met its burden, and the continuous wrong doctrine applies to toll the statute of limitations, the second cause of action survives Landlord's motion to dismiss.

The third, fourth, and fifth causes of action, which seek economic damages due to Landlord's alleged failure to timely restore the premises in accordance with the terms of the Lease are also timely for the reasons stated above. Finally, the sixth cause of action, which seeks recovery

of a security deposit which allegedly has not been returned, clearly lies in the six-year breach of contract statute of limitations and is also therefore timely.

**B. Documentary Evidence and Tenant's Cross Motion**

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

A motion to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinksy v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]).

Landlord insists the Complaint should be dismissed because Tenant alleges the date of the fire was in December of 2017 when it was occurred on June 4, 2017. In response, Tenant seeks to amend the Complaint to change the date of the fire and asserts that the December of 2017 date was a mere typographical error. In New York, public policy favors resolving cases on their merits (*Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]). The Court will not dismiss the

entire Complaint based on a typographical error. Moreover, Landlord will not be prejudiced by Tenant amending the Complaint to contain the correct date of the fire. As such, the motion to dismiss based on documentary evidence is denied and the cross-motion to amend the Complaint is granted.

**C. Failure to State a Claim**

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Although Landlord asserts that Tenant has not pled the Complaint with sufficient particularity or specificity, the Court disagrees. The Complaint, which is fifty-five paragraphs long, sufficiently states a claim alleging breach of contract and the ensuing damages as a result of Landlord alleged failure to maintain and repair the Premises leased to Tenant. There are more than enough factual allegations contained in the Complaint to survive Landlord's motion to dismiss based on failure to state a claim. The Court and the parties both have sufficient notice of the transactions and occurrences giving rise to Tenant's claims.

**D. Punitive Damages**

As pronounced by the Court of Appeals, to survive a motion to dismiss, a plaintiff's claim for punitive damages must not only demonstrate egregious tortious conduct by which he was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally and was activated by evil or reprehensible motives (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 [1994]; *see also Phoenix Garden Restaurant, Inc. v Chu*, 245 AD2d 164, 166 [1st Dept 1997]).

Here, Tenant has not opposed Landlord's motion to dismiss the punitive damages claim. Moreover, the sixth cause of action related to the security deposit, which is the only cause of action upon which punitive damages are sought, has not pled any actions that are so egregious or indicate an evil or reprehensible motive to warrant punitive damages. Accordingly, the punitive damages claim should be dismissed.

Accordingly, it is hereby,

ORDERED that Defendant/Landlord's motion to dismiss is denied except to the extent that Tenant's claim for punitive damages is dismissed; and it is further

ORDERED that Plaintiff/Tenant's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the complaint in the form annexed to the moving papers, except that the claims for punitive damages are stricken, and the Amended Complaint shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that Plaintiff/Tenant is to upload a copy of the Amended Complaint with the punitive damages claims stricken to NYSCEF within ten (10) days of entry of this decision and order; and it is further

ORDERED that the Defendant/Landlord shall answer the amended complaint or otherwise respond thereto within twenty (20) days from entry of this decision and order.

This constitutes the decision and order of the Court.

9/26/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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| 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 |