Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, Y

FILED
2/20/2024 9:30 AM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2022L010246
Calendar, Y
26468162

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

30 DEGREE DESIGN, LLC, an Illinois limited liability company, BRAD BEHMER, an individual, and KENNETH MAYLE, an individual Plaintiffs, v. GP OPPORTUNITY FUND, LLC, an Illinois Limited Liability Company. Defendants.	)	No. 22 L 10246 Room 1906 Calendar I

GP OPPORTUNITY FUND, LLC'S 2-615 MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Now comes Defendant Counter-Plaintiff, GP OPPORTUNITY FUND, LLC, and moves this Honorable Court for entry of an Order dismissing Counts I, II, III, V, VI, and VII of Plaintiff's Second Amended Complaint with prejudice pursuant to 735 ILCS 2-615 and in support thereof states as follows:

1. 1. Plaintiffs' five-count Complaint against GP Opportunity Fund, LLC seeks compensatory and punitive damages as well as attorneys' fees and costs for: alleged breach of contract of 9B and 29B of the Lease Agreement (Count I), Plaintiffs Second Amended Complaint at ¶¶ 35-41; breach of implied covenant of Quiet Enjoyment (Count II), *Id.* at. ¶¶ 42-50; Unjust Enrichment (Count III), *Id.* at. ¶¶ 51-57; Constructive Eviction (Count IV), *Id.* at ¶¶ 58-64; and Negligence (Count V) . *Id.* at ¶¶ 65- 73.

2. Dismissal is proper under Section 2-615, where allegations, "when construed in a the

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light most favorable to the plaintiff, are [in]sufficient to establish a cause of action upon which relief may be granted." *Blumenthal v. Brewer, 2016 IL 119781,* ¶19. Such motions challenge the legal sufficiency of a pleading based on defects apparent on its face. *Id.*

3. If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible. 735 ILCS 5/2-606

4. As to Count I, Plaintiffs allegations in Paragraphs 15-23 of their Complaint each rely upon written instruments which were not included in the complaint or attached as exhibits as required under 735 ILCS 5/2-606. While Plaintiff's have amended their compliant to include the allegation that "adequate and sufficient written request" was provided as to each of its claims, the written instrument Plaintiffs reference is not included and the exhibits referenced are not related. *See.* Plaintiff's Third Amended Compl. ¶¶15-23. Because Plaintiff's claims under Count I are reliant on the written instruments referenced which are not included, Count I should be dismissed for failure to state a claim.

5. Further, Plaintiffs have not stated a cause of action for breach of Section 9B of the lease agreement because Section 9 indicates that the Plaintiffs are responsible for repair and/ or replacement of the items in the building that they allege Defendant breached the lease by failing to repair or maintain.

6. Count II of Plaintiffs complaint fails to state a claim for breach of the covenant of quiet enjoyment because it contains no allegations asserting that Defendant engaged in any intentional acts constituting interference with the quiet enjoyment of the property. "A breach

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of the covenant of quiet enjoyment requires an intentional interference with a tenant's full enjoyment and use of the leased premises which interference is unreasonable, unwarranted or unlawful." *Illinois. Blue Cross Association v. 666 North Lake Shore Drive Associates*, 100 Ill.App.3d 647, 652, 56 Ill.Dec. 190, 193, 427 N.E.2d 270, 273 (1st Dist.1981). Here, Plaintiffs assert that Defendant interfered with their quiet enjoyment by not making improvements to the roof, or repairing and maintaining the plumbing, garage door, lighting, and heating as requested. Plaintiffs ignore that each of the items they complain Defendant did not maintain, with the exception of the roof, were the specific responsibility of Plaintiffs to repair and maintain under Section 9A of the lease. Accordingly, Plaintiffs claim for breach of quiet enjoyment is insufficient on its face.

7. Count III should be dismissed because, Plaintiffs allege that Defendant has been unjustly enriched by retaining $170,000. Plaintiffs Third Amend. Compl. at 53. Plaintiffs further allege the $170,000 was initially tendered to him as prepaid rent from October 2021 through March 2023 ($128,700) and $42,900 in the form of a security deposit. *Id. at 11*. Plaintiffs further admit in their complaint that they retained possession of the property until it destroying it by fire on or around February 6, 2023. As Plaintiffs occupied the space for 17 out of the 18 months they prepaid rent. Moreover, Plaintiffs are contractually responsible for the fire damage caused to the unit which far exceeds the security deposit. Here, Defendant has suffered extensive losses as a result of Plaintiffs occupancy and there are no set of facts which would entitle Plaintiffs to relief for unjust enrichment. Accordingly, Plaintiffs Count III should be dismissed for failure to state a claim.

8. Count IV should be dismissed because Plaintiffs did not surrender or abandon the

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property as the parties are currently under court order to keep the property vacant and secure while the damages caused by Plaintiffs are repaired. ("Constructive eviction cannot exist where the tenant does not surrender the property," at least within a reasonable time), appeal denied, 121 Ill. 2d 586, 122 Ill.Dec. 446, 526 N.E.2d 839 (1988); see also Advertising Checking Bureau, Inc. v. Canal-Randolph Associates, 101 Ill.App.3d 140, 56 Ill.Dec. 634, 639, 427 N.E.2d 1039, 1044 (1st Dist.1981).

9. Further, Count IV should be dismissed for failure to state a claim because any restriction on accessing the property is pursuant to court order. Furthermore, Plaintiffs fail to allege when they were locked out or denied access to the unit. However, Plaintiffs do indicate that they were occupying the unit at the time when the 2-alarm fire destroyed the premises. As a result of the emergency closure order by the City of Chicago Department of Buildings Commissioner, and the Circuit Court of Cook County's order that the building be kept vacant and secure while repairs are completed neither party is permitted to access the property for any other purpose at this time. Accordingly, Plaintiffs allegations are insufficient on their face to state a claim for constructive eviction.

10. Lastly, Plaintiffs have failed to state a claim for negligence against Defendant GP Opportunity Fund, LLC in Count V, because they have not specified a duty on the behalf of Defendant, the breach of which was the proximate cause of their alleged damages. Plaintiffs wrongly assert that Defendants duty to mitigate its own damages, imposed upon it duty to safeguard Plaintiffs from damages they incurred as a result of their own actions. Further, Plaintiffs claims of negligence are legally insufficient because they have not alleged any facts to support a finding that Defendant proximately caused the damages asserted.

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11. Contemporaneously with the filing of this motion, Defendant is filing its separate memorandum of law and exhibits in support of the motion, which are incorporated by reference into this motion.

WHEREFORE, for the reasons set forth in more detail in its Memorandum of Law in Support of the Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, the Defendant respectfully request that the Court dismiss the Complaint with prejudice, and that Defendants be afforded such other and further relief as this Court deems proper.

Dated: October 23, 2023

Respectfully submitted,

GP OPPORTUNITY FUND, LLC

By: _____
One of its Attorneys

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COUNTY DEPARTMENT, LAW DIVISION

30 DEGREE DESIGN, LLC, an Illinois limited liability company, BRAD BEHMER, an individual, and KENNETH MAYLE, an individual	)	
	)	No. 22 L 102246
Plaintiffs,	)	
v.	)	
GP OPPORTUNITY FUND, LLC	)	
Defendants.	)	

NOTICE OF FILING

TO: WEISS ORTIZ P.C.
Attorney for Plaintiffs
1011 E. 31st Street
La Grange Park, Illinois 60526
Info@weissortizlaw.com
Firm No. 40058

PLEASE TAKE NOTICE that on February 20, 2024 there was filed with the Clerk of the Law Division of the Circuit Court of Cook County Defendant's 2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint a copy of which is included herewith and served upon you.

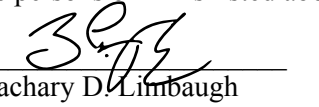
Respectfully submitted,

GP Opportunity Fund, LLC

By: 
One of its Attorneys

CERTIFICATE OF SERVICE

On February 20, 2024, I, Zachary D. Limbaugh, an attorney, caused to be served via email and US Mail the foregoing Notice of Filing/Notice of Motion to the persons or firms listed above:


Zachary D. Limbaugh

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