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

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IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2022L010246
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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,	)	
KENNETH MAYLE, an individual,	)	
	)	
Plaintiffs,	)	**Case No. 2022 L 010246**
and	)	
	)	**Cal. I**
GP OPPORTUNITY FUND, LLC,	)	
an Illinois Limited Liability Company,	)	
	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S 2-615
MOTION TO DISMISS THIRD AMENDED COMPLAINT

NOW COME Plaintiffs, 30 DEGREE BY DESIGN, LLC, BRAD BEHMER, and KENNETH MAYLE, by and through their attorneys, WEISS ORTIZ P.C., and for Response to Defendant's 2-615 Motion to Dismiss Third Amended Complaint, respectfully state as follows:

INTRODUCTION

Defendant has filed a Section 5/2-615 Motion to Dismiss and many of the arguments set forth therein are not applicable to Plaintiffs' Third Amended Complaint. As the court is aware, in responding to a Sectio 5/2-615 Motion to Dismiss Plaintiff must simply satisfy the pleading requirements in their complaint by setting forth facts establishing the prima facie elements of each cause of action. Plaintiffs have done so. Moreover, Defendant rests on his Motion to Dismiss Plaintiffs Second Amended Complaint as and for his Motion to Dismiss Plaintiffs Third Amended Complaint, however many of those arguments have been cured by the filing of Plaintiffs Third Amended Complaint rendering Defendant's arguments moot. Accordingly, since Plaintiff has satisfied all their pleading requirements for all their causes of action, Defendant's Motion to Dismiss should be denied.

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STANDARD

"A cause of action should not be dismissed pursuant to §2-615 Motion unless it is clearly apparent *that no set of facts* can be proved that would entitle the petitioner to relief." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). Emphasis added. Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements which are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, PC*, 375 111. App. 3d 719, 724 (1st Dist. 2007). "*[N]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim which he is called upon to meet." Browning v. Heritage Ins. Co.,* 33 Ill. App. 3d 943, 946–47 (1975). Emphasis added. Pleadings shall be liberally construed with a view to doing substantial justice between the parties. 735 ILCS 5/2-603. Allegations in a complaint are construed in the light most favorable to the plaintiff. *See King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11–12 (2005). Conclusions of law will also be taken as true if properly supported by specific factual allegations. *See Jarvis v. South Oak Dodge*, 201 Ill. 2d 81, 86 (2002).

Plaintiffs "are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state *all elements* which are necessary to constitute each cause of action in their complaint." *See Visvardis v. Eric P. Ferleger, PC*, 375 111. App. 3d 719, 724 (1st Dist. 2007) (emphasis added).

ARGUMENT

RESPONSES TO ALLEGATIONS

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1. Plaintiffs filed a *Six* Count Complaint against GP Opportunity Fund, LLC ("GP") seeks compensatory and punitive damages as well as attorneys' fees and costs for: alleged breach of contract of Sections 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. However, this is not an argument sufficient to support a Motion to Dismiss.

2. Plaintiffs agree and Defendant has conceded that dismissal is improper under Section 2-615 where allegations, "when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Blumenthal v. Brewer, 2016 IL 119781, ¶*19. Moreover, Plaintiffs' Third Amended Complaint is sufficient to establish a cause of action upon which relief should be granted. *Visvardis v. Eric P. Ferleger, PC*, 375 111. App. 3d 719, 724 (1st Dist. 2007). "*[N]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim which he is called upon to meet." Browning v. Heritage Ins. Co.,* 33 Ill. App. 3d 943, 946–47 (1975). Emphasis added. Nothing in Defendant's motion argues otherwise.

3. Plaintiffs meet the requirement of section 735 ILCS 5/2-606. Plaintiffs are unsure what Defendant is referring to when it states that Plaintiffs failed to include a copy of the written instrument at issue. To wit, see Exhibit A of Plaintiffs' Third Amended Complaint which the contracts at issue, and is also attached hereto as **EXHBIT A** to this response for the Court's convenience. Plaintiffs entered into a written lease agreement with GP for the lease of industrial warehouse space at the Property. See also Plaintiffs allegation that "adequate and sufficient written request" was provided as to each of its claims, the written instrument. See the Third

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Amended Compl. ¶¶15-23. Because Plaintiffs Complaint conforms with the rule and Section 5/2-606, Defendant's Motion to Dismiss Count I must be denied.

4. Plaintiff adopts and incorporates its response to paragraph 3, *supra*, as and for their response to paragraph 4, as though fully set forth herein.

5. Plaintiffs deny Paragraph 5 of Defendant's Motion to Dismiss and further state that the allegations in ¶¶ 13-26 of the Third Amended Complaint sufficiently outline the various repairs that Defendant was responsible for and failed to make, including but not limited to, exterior damage and draining issues which have caused flooding. *Id.* at ¶ 16. Furthermore, since November 1, 2021, GP has failed to provide replacement lighting pursuant to paragraph 29B of the Lease. Plaintiffs have made adequate and sufficient written request for GP to provide replacement lighting pursuant to paragraphs 23 and 29B however, GP has failed to provide same. *Id.* at ¶ 17. *See also* Paragraph 13 of Plaintiff's Third Amended Complaint which states**:**

> Pursuant to Paragraph 9 of the Lease:
>
> Maintenance, Repairs and Replacements. Tenant and Landlord shall share in the maintenance of the premises. However if it is found that any damage is caused by Tenant and such damage is not covered by insurance carried by Tenant, the Tenant will be responsible for all replacements or repairs.
>
> A. Tenant. Tenant shall maintain repair or replace the interior space of the unit, including all plumbing fixtures, lighting fixtures, mezzanine furnace, mezzanine air conditioner, hot water heaters, wall surfaces, floors, garage door and any alterations, additions or improvements.
> B. Landlord. Landlord shall maintain, repair or replace, with exception to Tenant caused damages, the exterior of the premises, including roof, exterior walls, and access to utility services, water, gas and electricity."
>
> Additionally, pursuant to Paragraph 29B of Lease:
>
> Landlord will present the Tenant with replacement lighting no later than November 1, 2021.

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Id.

6. As to Count II, Plaintiff satisfies the elements for breach of the covenant of quiet enjoyment. A covenant of quiet enjoyment is implied in all lease agreements. *Illinois Blue Cross Association v. 666 North Lake Shore Drive Associates*, 100 Ill. App. 3d 647, 652, 427 N.E. 2d 270, 273 (1st Dist. 1981). Quiet enjoyment is the right to the undisturbed use and enjoyment of the property. A landlord may not interfere with the tenant's quiet enjoyment. Plaintiffs alleged that Defendants breached the Covenant of Quiet Enjoyment by refusing to make repairs to the roof, garage, and exterior of the property, which was clearly the responsibility of the Defendants under the language of the lease.

Specifically, allegation 46 of Plaintiff's Third Amended Complaint states:

> 46. GP's failure to provide and/or maintain and/or repair and/or replace mechanical systems including but not limited to heat, lighting, gas, electric, plumbing, drainage, smoke detectors, automatic extinguishment system/sprinkling system, ventilation as well as roof, exterior walls and exterior premises has interfered with Plaintiffs' implied right to quiet enjoyment.

Id. at 46.

Therefore, Plaintiffs maintain that Count II of their Third Amended Complaint should not be dismissed.

7. As to Count III, Plaintiff have likewise met the elements for a claim of unjust enrichment. To state a claim for unjust enrichment under Illinois law, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of that benefit violates fundamental principles of justice, equity, and good conscience. *See* Plaintiff's

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Amended Complaint at ¶ 52. Plaintiff has paid GP over $170,000.00 in prepaid rent and security deposits for a commercial space that was otherwise unrentable and uninhabitable. *Id*. at 53. As alleged, due to Defendants various breaches of the terms of the lease, the conditions affected Plaintiff's ability to work and use the space. *Id*. at 55. Therefore, Plaintiffs have sufficiently set forth facts to allege that Defendants have been unjustly enriched due to its failure to provide habitable space. Accordingly, Count III of the Complaint should not be dismissed.

8. As to Count IV, Plaintiffs; Complaint alleges that GP's failure to repair/maintain/replace the Property systems and structures have rendered the Property useless to Plaintiffs, or, Plaintiffs have been deprived in whole or in part of the possession and enjoyment thereof, resulting in constructive eviction. GP willfully refused to perform repairs or so negligently performed, that what it did was of no benefit in protecting Plaintiffs in the use and quiet enjoyment of the Property. As a result of the fire and damage to the premises, the Property cannot be utilized until extensive repairs are completed. Even before the fire caused damage to the Property, said Property could not be utilized for its intended purpose until extensive repairs were completed. *See* Plaintiff's Amended Complaint at ¶¶ 61-63. Therefore, Defendants constructively evicted Plaintiffs and interfered with their quiet enjoyment of the Property since the inception of the lease. Plaintiff's Complaint alleges sufficient facts to survive dismissal of Count IV of the Complaint and accordingly should not be dismissed.

9. Plaintiff adopts and incorporates its response to paragraph 8, *supra*, as and for their response to paragraph 9, as though fully set forth herein.

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10. Plaintiffs have stated a claim for negligence against Defendant GP Opportunity Fund, LLC in Count V. *See* Paragraphs 66-73 of its Third Amended Complaint. Plaintiff further states that Defendant knew about certain defects to the property since the inception of the Lease and continuously failed to make improvements that would have prevented or mitigated the damages to the Property caused by the fire. "To state a cause of action for negligence, a plaintiff must allege that (1) the defendant owed plaintiff a duty, (2) the defendant breached this duty, and (3) that this breach was the proximate cause of plaintiff's resulting injuries." Id. ¶ 45. Whether a duty exists under a particular set of circumstances is a question of law for the court to decide." *Hutson v. Pate*, 2022 IL App (4th) 210696, pg. 39. *Citing Choate v. Indiana Harbor Belt R.R. Co*., 2012 IL 112948, ¶ 22, 980 N.E.2d 58, 366 Ill. Dec. 258.

Additionally, under common law, a landlord is not liable for injury to the property of a tenant caused by defects in the demised premises absent an express warranty as to the condition of the premises or a covenant to repair. *Wanland v. Beavers*, 130 Ill. App. 3d 731, 732, 474 N.E.2d 1327, 1328 (1st Dist. 1985) *citing* 52 C.J.S. Landlord & Tenant sec. 423(3)(a) (1968).). However:

> "The general rules which shield a landlord from liability are not without exceptions. A landlord may be liable, even in the absence of control where (1) there was a latent defect existing at the date of the lease of the premises to the tenant, which defect was known to the landlord or could have been known by him in the exercise of reasonable care, and which defect could not have been discovered by a reasonable examination of the premises by the tenant; (2) there was a fraudulent concealment from the tenant by the landlord of a known, dangerous condition; (3) the thing which did the harm amounted in law to a nuisance; or (4) a promise to repair the premises made by the landlord to the tenant at the time of the leasing."

Renier v. Prauss, 2021 IL App (1st) 200138-U, ¶ 26. *Citing Woods v. Lawndale Theatre Corp*., 302 Ill. App. 570, 573-74, 24 N.E.2d 193 (1939).

Here, Defendant knew about certain defects to the property since the inception of the Lease and continuously failed to make improvements that would have prevented or mitigated the

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damages to the Property caused by the fire. GP knew of latent defects on the premises. For Example, GP knew that the lighting was defective at the time of the execution of the Lease and promised replacement lighting by November 1, 2021, pursuant to the lease, which it failed to do. Id. at ¶67. Furthermore, GP was issued various City ordinance violations over the course of the Lease which Defendants failed to correct and thus were on actual notice and knew of the defects on the property. Id. at ¶68. As such, Plaintiff's Count V alleging Negligence on the Part of GP Opportunity Fund should not be dismissed.

11. Defendant states that it has filed contemporaneously with the filing of their Motion to Dismiss of February 20, 2024, a separate memorandum of law and exhibits in support of the Motion, however, nothing was attached to the Motion, the Clerk's portal also does not show that a memorandum and or exhibits were filed. Plaintiff requested same on March 11, 2024, and none was received. Therefore, *no response* to the memorandum or exhibits has been made by Plaintiff.

WHEREFORE, Plaintiffs, 30 DEGREE BY DESIGN, LLC, BRAD BEHMER, and KENNETH MAYLE, respectfully request that Defendant's Section 5/2-615 Motion to Dismiss the Third Amended Complaint be denied and for any other relief this court deems equitable, including leave to file an amended complaint if the court should find Plaintiffs' Complaint is deficient in any regard.

Respectfully Submitted,

30 DEGREE BY DESIGN, LLC,
BRAD BEHMER, and
KENNETH MAYLE

By: /s/Adeena Weiss Ortiz
Attorney for Plaintiffs

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VERIFICATION

Under penalties as provided by law pursuant to Section 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to the matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

* * * * * FURTHER AFFIANT SAYETH NOT * * * * *

/s/ 30 DEGREE BY DESIGN, LLC,

/s/ BRAD BEHMER

/s/ KENNETH MAYLE

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