Eisner v Zaim
2024 NY Slip Op 31615(U)
May 7, 2024
Supreme Court, New York County
Docket Number: Index No. 656238/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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MARGARET EISNER, OREN EISNER, Plaintiffs,	**INDEX NO.**	656238/2020
- v -	**MOTION DATE**	N/A
BEYHAN ZAIM, Defendant.	**MOTION SEQ. NO.**	003
	DECISION + ORDER ON MOTION	

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiffs' motion for summary judgment is denied.

Background

In this action, plaintiffs seek to recover double the amount of their security deposit after vacating property owned by defendant in Manhattan. Plaintiffs claim that they moved in 2014 and signed various renewals that extended the lease until June 15, 2020. Plaintiffs allege that the lease converted into a month-to-month tenancy after that and they provided written notice of their vacatur on July 15, 2020 after paying the additional month's rent (June-July 2020).

They complain that they left the apartment in broom clean condition and even hired a professional cleaner when they moved out. Plaintiffs claim that defendant waited until October 2020 to deliver an itemized statement about the security deposit and defendant initially wanted to withhold $12,375 of the $18,600 deposit. They claim that defendant violated various laws imposed on landlords relating to security deposits and they are entitled to double damages

pursuant to General Obligations Law § 7-108(1-a)(e), a statute that requires landlord to provide a tenant an itemized statement "indicating the basis for the amount of the [security] deposit retained," all "within fourteen days after the tenant has vacated the premises."

In November 2020, defendant allegedly attempted to wire the security deposit back to plaintiff, with the intention of filing an action for damages later on. According to defendant, this wire failed because she did not receive necessary information from plaintiffs to complete the transaction. The parties were unable to come to a resolution on the security deposit, resulting in this action.

Plaintiffs now move for summary judgment on their first cause of action for violation of General Obligations Law § 7-108(1-a)(e) for failing to return the security deposit. Plaintiffs contend that there are no material issues of fact as defendant failed to provide the requisite itemized statement and deposit within fourteen days of plaintiffs' vacatur. Plaintiffs argue that they vacated on July 15, 2020, and they did not receive a statement until October 7, 2020. Plaintiffs further assert there is obvious willfulness to obstruct wiring the deposit because an affidavit by defendant's bank employee indicates that any attempt to wire the deposit was cancelled the same day it was sent. Moreover, defendant did not attempt to wire the deposit until November 12, 2020—well after the fourteen-day deadline. Plaintiffs assert that they still have not received the security deposit.

Plaintiffs also move for summary judgment dismissing defendant's affirmative defenses. They contend that defendant's claim of failure to state a cause of action and deficient service of process are meritless and waived, respectively. Plaintiffs argue that defendant's third affirmative defense, for unclean hands, is meritless because plaintiffs gave notice of vacatur of the premises and left a spare set of keys with the building's superintendent. Additionally, plaintiffs assert that

defendant's fourth affirmative defense alleging that plaintiffs intentionally prevented defendant from returning the security deposit is meritless because defendant knew plaintiffs' full legal names and plaintiffs have not taken any steps to block the return of the deposit. Plaintiffs argue that defendant's fifth and sixth affirmative defenses for lack of proof of willfulness and intentional holdover of the premises are meritless because plaintiffs' repeated demands for the deposit and defendant's refusal to return it demonstrate defendant's willfulness and the holdover defense should be dismissed because defendant accepted rent for the holdover month and admitted she did not know of plaintiffs' intention to leave. Plaintiffs further request that defendant's counterclaims be severed and dismissed as she is unable to show that the premises was not in broom clean condition and any damages constitute normal wear and tear.

In opposition, defendant contends that summary judgment is inappropriate because numerous issues of fact exist. Defendant argues that plaintiffs do not establish willfulness, as the record shows that defendant attempted to wire the security deposit to plaintiffs who would not provide proper account information. Defendant further asserts that plaintiffs' actions are in bad faith and should not be granted summary judgment for their own wrongdoing in refusing to accept the security deposit. Additionally, defendant argues that plaintiffs failed to vacate by the end of the lease and that their true surrender date is unclear because they notified defendant at least five days after they allegedly vacated the apartment and then they did not even return all keys. Defendant further contends that plaintiffs failed to properly notify defendant of their intent to vacate and therefore cannot invoke the statutory protections offered by the General Obligations Law. Finally, defendant argues there are significant issues of fact surrounding the condition of the apartment after plaintiffs vacated, for which defendant demonstrates that she incurred costs to restore.

No reply was submitted by plaintiffs.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court denies plaintiffs' motion. As an initial matter, the timing of the events surrounding this controversy must be put into perspective; all this happened during the height of the COVID-19 pandemic. The lease ended on June 15, 2020 (NYSCEF Doc. No. 145), but

plaintiffs only notified defendant that they were vacating the premises on July 15, 2020 (NYSCEF Doc. No. 146 at 5). In this notification, plaintiffs state they "have been fully moved out of [the premises] since last week," (*id.*); that is far from a precise date. Besides, because they did not hand in all their keys, they cannot be said to have vacated as a matter of law and there is a question of fact as to when they finally handed in the keys. Defendant alleges that plaintiffs did not give back all their keys until August 28 (NYSCEF Doc. No. 161 at 12) and plaintiffs, on the other hand, insist they dropped off their last set of keys with the building superintendent on August 12 (NYSCEF Doc. No. 141 at 20).

Based on the record, plaintiffs officially vacated sometime between mid-July and the end of August. The lease is silent as to the correct way to deliver the keys and to surrender the apartment, and this Court cannot opine at what point – the delivery of all sets of keys or just one – is enough to consider the premises vacated (*see e.g., Connaught Tower Corp v Nager*, 59 AD3d 218, 873 NYS2d 553 [1st Dept 2009] [finding that delivery of the keys did not constitute surrender of premises as it did not follow the provisions of the lease]). Thus, this Court cannot award double the entire security deposit when there is no clear date on which plaintiffs left and when the rent obligation stopped. Clearly, the date of vacatur, which cannot be determined on these papers, is a material issue of fact.

Furthermore, plaintiffs claim that defendant is acting in bad faith and attempting to keep their security deposit merely because defendant has not wired the money; defendant claims she tried to wire it but did not have enough information, and plaintiffs failed to provide the necessary information. Defendant raised a triable issue of fact as to what happened when defendant attempted to wire the money to plaintiff and why this transaction failed. This Court cannot, on summary judgment, determine who is credible. Credibility is left for the trier of fact.

The record before this Court shows that during the initial stages of the pandemic, there was significant confusion and lack of communication. Unbeknownst to defendant, her building manager passed away months before these events transpired. Moreover, gaining access to apartment building for inspections was significantly more difficult while masking and social distancing protocols were still in effect. The parties were operating under unusual circumstances that delayed both the moveout and inspection process. In fact, during this time, statutory deadlines were tolled and extended pursuant to executive orders (*see Brash v Richards*, 195 AD3d 582, 149 NYS3d 560 [2nd Dept 2021] [finding that a series of COVID-19 executive orders tolled filing deadlines in New York]; *Murphy v Harris*, 210 AD3d 410, 177 NYS3d 559 [1st Dept 2022] [finding that statutory deadlines were tolled by executive orders issued during the COVID-19 pandemic]).

The deadline contained in the General Obligations Law is certainly within the purview of these aforementioned tolls as the executive orders explicitly tolled "specific time limit[s]" for "other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . any other statute, local law, ordinance . . . or regulation" (9 NYCRR 8.202.8). Tolling a time limit for taking a specific action under the General Obligations Law falls directly within the purpose of the executive orders. Requiring adherence to strict deadlines at the height of the pandemic runs counter to the reason for the tolling orders. And, it is clear to this Court that at the time this motion was submitted, defendant was willing to return the entire security deposit, but the plaintiffs want more. Whether they are entitled to more, or less because of the extra time they held on to the keys and alleged damage to the apartment, will be decided by the trier of fact.

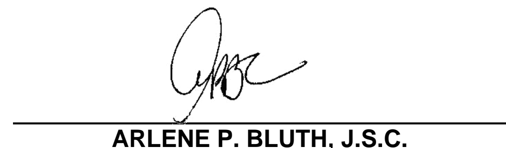
Given that plaintiffs were unable to meet their burden, defendant's affirmative defenses and counterclaims remain. There are multiple material issues of fact as to the parties' intentions

regarding the security deposit. Plaintiffs did not present evidence showing that defendant is willfully withholding their deposit as a matter of law. Moreover, plaintiffs insist that any damages asserted by defendant are normal wear and tear, but defendant included invoices for painting and pictures of property damage that could constitute more than just the ordinary wear and tear. As previously noted, this Court does not decide issues of credibility and what constitutes the extent of defendant's damages shall be decided by the trier of fact.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment and dismissal of defendant's counterclaims and affirmative defenses is denied; and it is further

ORDERED that the parties are directed to file a note of issue on or before May 24, 2024.



5/7/2024			ARLENE P. BLUTH, J.S.C.	
DATE				
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE