Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA A. SATTERFIELD IA PART 19
Justice

GARY DORF,	Index Number 17757 2006
Plaintiff,	Motion Date April 18, 2007
- against -	
RONI AMRUSSI and RUTH AMRUSSI,	Motion Cal. Number 13
Defendants.	Motion Seq. No. 1

The following papers numbered 1 to 19 read on this motion by plaintiff Gary Dorf for an order striking the defendants' answer and granting summary judgment in his favor, and referring the matter to a special master or referee to determine the amount of damages for legal fees and costs. Defendants cross move in opposition and seek an order granting summary judgment (1) dismissing the first cause of action on the grounds of res judicata regarding the claims for double rent, legal fees, eviction costs, and dismissing the claim for liquidated damages of $10,000.00 for the alleged installation of two satellite dishes on the ground that it is an illegal penalty; (2) dismissing the second cause of action for unjust enrichment; and (3) dismissing the third cause of action for conversion.

	Papers Numbered
Notice of Motion--Affirmation-Affidavit - Exhibits(A-C).....	1-5
Notice of Cross Motion-Affirmation-Affidavits-Exhibits(A-J).....	6-11
Reply Affirmation - Affidavit- Exhibit(A-J)...	12-15
Reply Affirmation - Affidavit-Exhibits(A).....	16-19

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff Gary Dorf is the owner of a single family house located at 193-47 Salerno Avenue, Holliswood, New York. Plaintiff, a resident and domiciliary of California, leased the subject

premises to defendants Roni Amrussi and Ruth Amrussi, pursuant to a written agreement dated June 28, 2004 for the sum of $2,800.00 a month, with a security deposit of $7,000.00. The lease term commenced on July 1, 2004 and terminated on June 30, 2005. On June 27, 2005, plaintiff faxed a copy of a renewal lease to defendant Roni Amrussi at his office, and the fax cover sheet stated that two originals of the renewal lease were sent to him at his office for delivery on June 28, 2005. Defendants did not execute the renewal lease, and plaintiff commenced a holdover proceeding in Civil Court on July 5, 2005. Plaintiff, in the holdover petition dated July 1, 2005, requested possession of the premises, a warrant of eviction, fair use and occupancy, attorneys' fees, and costs and disbursements. Defendants were served with the notice of petition and the holdover petition, however, defaulted in appearing and an inquest was held on August 15, 2005, at which time plaintiff was granted possession of the premises and a warrant of eviction that was stayed for 10 days. The Hon. Bruce M. Kramer, in an order dated September 6, 2005, denied defendants' application to vacate the default, and stated that they had tendered checks for $2,800.00 each for the months of July, August and September. Further, the execution of the warrant of eviction was stayed to and including January 31, 2006, pending the payment of $2,870.00, plus $383.97 for a water bill by October 10, 2005, and the payment of $2,870.00 for each month for November, December and January. Judge Kramer stated that "this order is without prejudice to petitioner's claims for alleged damages to the premises." The Hon. James Grayshaw, in an order dated March 1, 2006, granted defendants' application to vacate the judgment and warrant of eviction only to the extent that execution of the warrant was stayed until March 31, 2006, provided that all "U & O (use and occupancy) is timely paid." Judge Grayshaw further stated that the "parties reserve all rights & defenses." Defendants surrendered the keys and vacated the premises no later than April 7, 2006.

Plaintiff commenced this action on August 11, 2006 and seeks to recover damages for breach of contract, unjust enrichment and conversion. Defendants served an answer and interposed nine affirmative defenses and a counterclaim for attorneys' fees.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form that demonstrates the absence of any material issues of fact (see Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Stahl v Stralberg, 287 AD2d 613 [2001]). The motion must be supported by an affidavit from a person with knowledge of the facts, setting forth all material facts (CPLR 3212[b]).

Here, the affidavit submitted by plaintiff is "verified" by his attorney, but is not notarized. Although an attorney may verify a pleading (CPLR 3020), no provision exists in the CPLR for verifying a client's affidavit. The affidavit submitted by plaintiff, thus is nothing more than an unsworn statement and does not satisfy the requirements of CPLR 3212(b). Furthermore, the affidavit submitted by plaintiff in his reply is insufficient to establish an entitlement to summary judgment on any of the causes of action, as he merely repeats his claims, while disputing defendants' cross motion. Finally, the documentary proof submitted by plaintiff is insufficient to establish a prima facie entitlement to summary judgment on these claims.

Turning now to defendants' cross motion, that branch of the cross motion which seeks to dismiss plaintiff's claims for "double rent" and "double" use and occupancy is granted. Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (see In re Hunter, 4 NY3d 260, 269-270 [2005]; O'Connell v Corcoran, 1 NY3d 179, 184-185 [2003]; Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 [1979]). Additionally, under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981], citing Matter of Reilly v Reid, 45 NY2d 24, 29-30 [1978]). "Res judicata is designed to provide finality in the resolution of disputes," recognizing that "considerations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation" (Reilly, 45 NY2d at 28).

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]; see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]; Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147 [1988]; Schwartz v Public Administrator of County of Bronx, 24 NY2d 65 [1969]). In order to invoke this doctrine, "[f]irst, the identical issue

necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination" (Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 [2001]; see Buechel v Bain, 97 NY2d 295 [2001], cert denied 535 US 1096 [2002]; Altegra Credit Co. v Chu, 29 AD3d 718 [2006]).

Applying these principles here, plaintiff is barred from seeking to recover "double rent" under the provisions of the lease, and is also barred from seeking to recover use and occupancy in an amount greater than that awarded by the Civil Court. Paragraph 50 of the rider to the lease provides that in the event the tenant did not vacate the premises at the end of the lease term, and did not exercise the option to renew set forth in paragraph 40, the tenant would remain as a month-to-month tenant, at a monthly rent of two times the monthly rent set forth in the lease. After the lease expired plaintiff did not elect to treat defendants as month-to-month tenants, and defendants did not tender rental payments in an amount that was equal to double the monthly rent. Rather, plaintiff immediately commenced a holdover proceeding, as opposed to a non-payment proceeding in Civil Court, Queens County, Landlord-Tenant part. The Civil Court awarded plaintiff reasonable use and occupancy, payable from the time the holdover proceeding was commenced through the expiration of the stay of eviction. The issuance of a warrant of eviction annulled the landlord-tenant relationship (RPAPL § 749). Contrary to plaintiff's assertions, the Civil Court's order of March 1, 2006 does not permit a claim for additional rent, as it did not reinstate the landlord-tenant relationship, so as to permit a claim for "double" or additional rent. In addition, as the Civil Court determined the amount of reasonable use and occupancy, plaintiff may not re-litigate that issue here. Plaintiff may only seek to recover use and occupancy in the sum of $2,870.00 per month for the months of February and March 2006. Plaintiffs may also seek reasonable use and occupancy for the period defendants may have remained in the property after March 31, 2006. The court notes that as defendants have submitted some evidence that use and occupancy may have been paid for the month of February 2006, a triable issue of fact exists as to the amount owed for use and occupancy for February and March 2006, and for any part of April 2006.

Plaintiff in his breach of contract cause of action seeks to recover legal fees and costs incurred in the Civil Court action. In the Civil Court action, the petition included a request for legal fees and costs. Thus, this issue was before the Civil Court and the fact that court therein did not address the issue, does not give rise to such a claim here. A landlord may not split causes of

action by bringing a holdover petition and thereafter bring a separate action for attorneys' fees due under the lease (see, 930 Fifth Corp. v King, 42 NY2d 886 [1977]). Therefore, that branch of defendants' cross motion which seeks to dismiss plaintiff's claims for attorney's fees and costs incurred in the holdover action is granted.

Paragraph 44 of the rider provided, in pertinent part, that the "[t]enant shall not install, or allowed to be installed, any antenna or 'dish tv' receiver mounted in a manner requiring placement upon or any mechanical fastening thru any portion of the roof. Both Landlord and Tenant stipulate to the sum of Five Thousand Dollars ($5000.00)as liquidated damages, to be immediately due and payable." Plaintiff alleges in his complaint that defendants installed two satellite dishes on the roof without his permission and in direct contradiction to paragraph 44 of the rider, and seeks to recover $10,000.00 as liquidated damages. Plaintiff further alleges that defendants were "required to refrain from installing roof antennas on the roof or be liable for roof repair in a pre-established sum for liquidated damages." Defendants assert that they only installed a single satellite dish, that plaintiff did not object, that it was removed when they vacated the premises, and that there was no damage to the roof.

The documentary evidence submitted establishes that plaintiff, in a letter dated November 15, 2004, notified defendants that he had observed two satellite on the roof of the house, that rather than being secured "to chimney with masonry straps or to the wood fascia boards, they were placed directly on the roof shingles and fastened to/thru the roof," and therefore the tenants were in default under the lease and demanded the payment of $10,000.00. In a letter dated June 21, 2005, plaintiff demanded, among other things, that the satellite dishes be removed from the roof so that his roofer could "inspect and repair the roof, as necessary."

It is well established that whether a clause "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances" (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 379 [2005]). The party who contests the liquidated damages clause must demonstrate either that "damages flowing from [the breach of paragraph 44 of the lease] were readily ascertainable at the time [the plaintiff and the defendant] entered into [the lease] or that [liquidated damages are] conspicuously disproportionate to these foreseeable losses" (id. at 380; see also Bates Adv. USA, Inc. v 498 Seventh, LLC, 7 NY3d 115, 120 [2006]; Jackson Hgts. Care Ctr., LLC v Bloch, 39 AD3d 477 [2007]).

Here, contrary to plaintiff's allegations, paragraph 44 of the rider did not require that defendants refrain from installing a roof antenna or obtain his consent prior to installing an antenna or satellite dish. There is no evidence, other than plaintiff's self-serving statements, that the satellite dish or dishes were installed in a manner contrary to that provided for in the lease agreement. Moreover, there is no evidence of actual damage or repairs to the roof as a result of the installation of the satellite dish or dishes. In the absence of proof of any actual damage to the roof, defendants have established that the damages fixed in the agreement are conspicuously disproportionate to the losses allegedly sustained, so that the liquidated damages clause constitutes an unenforceable penalty (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d at 380). Therefore, that branch of defendants' cross motion which seeks to dismiss plaintiff's claim for liquidated damages in the sum of $10,000.00 is granted.

That branch of defendants' cross motion which seeks to dismiss plaintiff's claim to recover $15,000.00 for damages to the premises, including furnishings and fixtures, is denied. The court finds that the parties' conflicting affidavits raise a triable issue of fact as to whether defendants damaged any of plaintiff's property, as well as the actual cost of repair or replacement of any such damaged items.

That branch of defendant's cross motion which seeks to dismiss plaintiff's claim to recover for taxes he paid for the period of July 1, 2005 through April 30, 2006, for water charges for the period ending April 2006, and for service charges pertaining to the landscaping and maintenance of the sprinkler system, is denied. Although the documentary evidence presented establishes that defendants made certain payments in 2005 and 2006 for water usage, they have failed to establish that they made all of the payments required under the terms of the contract.

With respect to defendants' request to dismiss plaintiff's second cause of action for unjust enrichment, it is well settled that the theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement (see Goldman v Metro. Life Ins. Co., 5 NY3d 561, 572 [2005]; State of New York v Barclays Bank of N.Y., 76 NY2d 533, 540 [1990]). To the extent that plaintiff seeks to recover use and occupancy for the period of July 2005 through March 31, 2006, in an amount greater than that already granted by the Civil Court, including "double rent," these claims have previously been determined by the Civil Court, and cannot be re-litigated here for the reasons stated above. To the extent that plaintiff seeks to recover the sum of $527.03 for water usage and landscaping services

which were incurred after the lease expired, plaintiff may maintain that portion of this cause of action. Therefore, that branch of defendants' cross motion which seeks to dismiss the second cause of action is granted solely to the extent that plaintiff's claims for rent or for use and occupancy in an amount greater than that previously granted by the Civil Court are dismissed.

Plaintiff's third cause of action alleges that defendants removed from the premises and converted to their own possession certain personal property belonging to him, which he identifies as "brass fireplace tool set, carbon monoxide detector, aluminum folding ladder, automatic garage door openers, house keys, assorted window furnishings, hardware, tools, kitchen utensils, hoses, drains and light fixtures, all of which have a replacement value of $1,500.00." Defendants assert that this cause of action should be dismissed, on the grounds that plaintiff failed to plead that any demand was made for the return of these items. It is undisputed that the subject premises at the time they were leased to defendants contained plaintiff's personal property. Although possession of these items were lawful during the period defendants occupied the premises, the alleged removal of these items upon their vacating the premises cannot be considered lawful. Therefore, as the alleged taking is unlawful, no demand is necessary and the complaint need not allege a demand (see 23 NY Jur2d Conversion, and Action for Recovery of Chattel § 81). That branch of defendants' motion which seeks to dismiss the third cause of action for conversion, therefore, is denied.

Defendants also seek leave to amend their answer in order to assert an affirmative defense of constructive eviction and counterclaims for breach of the warranty of habitability and for the return of the security deposit. Notwithstanding defendants' failure to request such relief in their notice of motion, the court will consider this request. The fact that defendants did not include the proposed amendments in their answer does not bar such an amendment (CPLR 3025[b]). Since plaintiff seeks to recover for unpaid use and occupancy and for the costs of unpaid water usage, landscaping and sprinkler maintenance, defendants may raise the proposed affirmative defense of constructive eviction, based upon the alleged failure to re-pave the driveway after the premises were connected to the sewer system, as well as the additional counterclaims for breach of the warranty of habitability, and for the return of the security deposit .

In view of the foregoing, plaintiff's motion to strike the defendant's answer and for summary judgment in his favor is denied. Defendants' cross motion for summary judgment is granted to the extent that plaintiff's claims for "double rent" and for additional

use and occupancy are dismissed; plaintiff's claim for legal fees and costs incurred in the Civil Court proceeding is dismissed; that branch of defendants' cross motion which seeks to dismiss the second cause of action for unjust enrichment is granted solely to the extent that plaintiff's claims for rent, or a greater amount of use and occupancy than previously granted by the Civil Court are dismissed. Defendants' request to dismiss the third cause of action for conversion is denied. Defendants' request for leave to serve the proposed amended answer is granted. Defendants shall serve their amended answer within 20 days after the service of this order, together with notice of entry.

Dated: July 9, 2007

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J.S.C.