SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 10
NASSAU COUNTY

MARIS GORDON,

Plaintiff(s),

-against-

INDEX#16426/2004

RAYMOND ESHAGOFF and
SHEILA ESHAGOFF,

Defendant(s).

In this action, the plaintiff Maris Gordon ("Gordon"), the owner of residential property located at 6 Shore Drive, Kings Point, Nassau County, New York, seeks to recover damages from the defendants, Raymond Eshagoff and Sheila Eshagoff ("Eshagoff"), for the breach of a lease dated June 23, 2003. The term of the lease was for the period August 1, 2003 through July 31, 2006.

During the term of the lease, on June 30, 2004, the defendant Raymond Eshagoff wrote a letter to plaintiff informing the landlord that the defendants intended to vacate the subject premises on September 15, 2004. At trial, plaintiff testified that she immediately spoke with the defendant and advised him that the termination notice was not proper. By letter dated September 6, 2004, from plaintiff's husband, an attorney, the defendants were notified, inter alia, that the termination option required a 120-day notice, that the defendants were obligated to pay rent through October 31, 2004, and that there was a two-month cancellation fee. This letter went on that the defendants owed plaintiff the sum of $28,350, including September rent and a shortage of $450 for August rent. Defendants made no further payments to plaintiff.

At trial, Raymond Eshagoff testified that he agreed that he owed rent through October 31, 2004. He further conceded that the defendants did not provide notice of cancellation pursuant to the terms of the lease. He also testified that defendants were given the notice to cure as provided in the lease. The defendant explained his failure to make the required payment by stating that he was unsure that the security deposit would be returned.

Paragraph 3 of the lease states in pertinent part as follows:

> "Tenant shall have the option to cancel this lease by giving a 120-day notice to the landlord."

Pertinent to this litigation, also is the following provision in paragraph 20 of the lease:

> "In the event of default, by Tenant, of any obligation in this Lease which is not cured by Tenant within fifteen (15) days notice from Landlord, then in addition to forfeiture of the Security Deposit, Landlord may pursue any other remedy available at law, equity or otherwise."

In their answer to the complaint, the defendants set forth two counterclaims alleging damages to defendants arising from mold in the premises. These counterclaims were withdrawn at trial. The defendant Raymond Eshagoff testified that the premises were vacated because the defendants had purchased a house.

The affirmative defense stated by the defendants relevant to this decision is the second affirmative defense. That defense alleges that the plaintiff failed to mitigate damages.

The issues to be addressed are whether the defendants' failure to timely notify the plaintiff of their intent to terminate the lease is a material breach of the agreement and if the plaintiff failed to properly mitigate damages.

The plaintiff asks the Court to award damages for unpaid rent for the entire period of the lease as well as fifty dollars per day for all rents that are ten days late. Plaintiff also seeks forfeiture of the $18,000 security deposit paid by defendants.

The notice provided by defendants to plaintiff by their letter dated June 30, 2004, stated that they would vacate the premises on September 15, 2004. Rather than the required 120 days, this letter provided 75 days notice. The plaintiff's letter of September 6, 2004, provided the defendants with an opportunity to cure their default. They failed to do so. The plaintiff, by correspondence dated September 24, 2004, again offered defendants an opportunity to cure the breach of the lease. The defendants' actions were a material breach of the lease which permits plaintiff to recover damages pursuant to the lease.

In or about the end of September or beginning of October 2004, the plaintiff's mother, Sylvia Ross, occupied the premises. She has remained in the premises up to the present time. The plaintiff testified that the premises were listed with real estate agents for rental but were never rented. The defendants argue, as set forth in their affirmative defense, that the plaintiff had an obligation to relet the premises and by not doing so she is not entitled to collect rent.

This issue was addressed and decided by the Court of Appeals in *Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 637 NYS2d 964 [1995]. That case involved a similar issue in a lease of commercial property but relied upon the decision in *Becar v Flues*, 64 NY 518 [1876] which arose from the lease of residential property. Because it concerns a commercial property, the defendant argues that the principal set forth in *Holy Property, supra,* as relied upon by defendants are not binding. Furthermore, reliance upon those decisions pre-dating *Holy Property (supra)*, make them invalid authority as the Court of Appeals has ruled to the contrary. In *Holy Property, supra,* the defendant asserted at trial that

the plaintiff had failed to mitigate damages by deliberately failing to show or offer the premises to prospective replacement tenants. The Court distinguished leases from the general rule of contract that a party must seek to minimize damages. Citing *Becar (supra)*, the Court stated, "Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect full rent due under the lease." In *Whitehouse Estates Inc., v Post*, 173 Misc.2d 558, 662 NYS2d 982 [App. Term, 1st Dept., 1997], the Court explicitly held that the rule applied to residential as well as commercial leases. The defendants have cited no Appellate authority to the contrary. Therefore, the plaintiff is entitled to collect rent for the full term of the lease. From September 2004 through July 2006, this amount is ten months at $9,450 from September 2004 through July 2005, and 12 months at $9,925.50 for the final year of the lease. This total is $213,606.

The defendants shall also pay the plaintiff the conceded $450 deficiency for the August 2004 rent.

The plaintiff is not awarded a $50 per day late fee. This late payment charge as set forth in Paragraph 4 of the lease states that the plaintiff "may" impose such a fee. In neither the correspondence of September 6, 2004 nor September 24, 2004, did the plaintiff notify the defendants that she had elected to exercise this option.

Finally, the Court agrees with defendants' argument that to impose a forfeiture of the defendants' security deposit would be to impose an improper penalty. Therefore, the defendants are entitled to a credit of $18,000.

The plaintiff is awarded damages against the defendants in the amount of $196,056 without interest.

Plaintiff may submit Judgment on Notice against the defendants in the aforesaid amount.

The foregoing constitutes the Court's Decision and Order.

Dated: SEP 4 2007

J.S.C.

ENTERED

SEP 13 2007

NASSAU COUNTY

COUNTY CLERK'S OFFICE