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INDEX NO.27061-2007

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002MD

Present:
Hon. SANDRA L. SGROI

PRELIMINARY CONFERENCE 10/23/08

Adj. Date: 6-19-08
Return Date: 4-3-08

STEVEN OSTAD,
Plaintiff,

-against-

FRANK SWANN, BESSIE SWANN, LORNA DAVIS, KENNETH DAVIS, IT'S A FAMILY AFFAIR, LLC AND "JOHN DOE #1" through "JOHN DOE #5", the last five names being fictitious and unknown to the Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any having or claiming an interest in, possession of, or lien upon the premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 28 read on this Motion: Notice of Motion and supporting papers 1-14; Affidavit in opposition and supporting papers 15-23; Affirmation in Reply and supporting papers 26-28; Exhibit 24-25; it is,

ORDERED that the motion of the Plaintiff for partial summary judgment is denied; and it is further

ORDERED that the parties are directed to complete discovery on all outstanding issues including damages; and it is further

ORDERED that this case is scheduled for a ***preliminary conference on October 23, 2008 at 9:30 a.m.*** at the Supreme Court Courthouse in Central Islip, New York in Courtroom S23 at which time all outstanding discovery will be scheduled at a Preliminary Conference.

The parties herein entered into a lease agreement, termed a "booking agreement", which is dated April 30, 2007. The premises is described as Tanglewood Trail, Hampton Bays, New York 11949 and it was leased by the Defendants to Steven Ostad, the Plaintiff, as a summer rental for approximately three months from May 25, 2007 to September 4, 2007, for a term rental in the sum of $68,000.00 with a security deposit of $6,500.00. The owners of this real property live out of state and they hired a management company to prepare the lease and rental agreement with the Plaintiff. While the Plaintiff was the only person who signed the lease, the agreement specified that eight people, including the Plaintiff, could occupy the premises. No other persons were permitted to occupy the house under the written terms of the lease without the express permission of the Landlord. The only people permitted to reside in the premises during the rental period were the Plaintiff Steven Ostad, and Charles Heitner, Drew Martin a/k/a Dean Martin, Cary London, Mark Lapidus, Ian Kessler, (first name illegible) Greene, and Jonathan Schwartz. The agreement states:

> **The accommodation may only be sub-let, shared or assigned by you with our express agreement, other wise only by persons detailed on the booking form are permitted to stay in the home. The maximum occupancy is 12 and is determined by the authorities within strict guidelines for fire safety. Please note that contravention of the above will render your booking void and all monies will be forfeited.** (Plaintiff's and Defendants' Exhibit "A")

This clause in the agreement is in bold letters and is highlighted. According to the booking agreement, described herein by both parties herein as a lease, if the premises were sublet, shared or the lease assigned, the lease would become void and the tenant would forfeit all monies paid (Plaintiff's Exhibit "A", ¶ 8).

Pursuant to the terms of the lease, the management company had the right to enter the premises at any time (Plaintiff's Exhibit "A", ¶ 4).

The Defendants allege that the Plaintiff voided the lease because the premises were sublet to a third party. According to the Defendant Bessie Swann, during the term of the lease someone by the name of James Choung advertised the premises for rent on the internet on the sites known as Craigslist.com and VRBO.com. VRBO stands for Vacation Rentals by Owner. It is further alleged that Catherine Carroll-Spadt entered into a rental agreement with Drew "Dean" Martin to rent the premises rented from the Defendants by Ostad for four days for the sum of $3,000.00. A copy of that agreement between Drew or Dean Martin and Catherine Carroll-Spadt is attached to the Defendants' answering papers as Defendants'

Exhibit "B".

It is alleged that Catherine Carroll-Spadt and her husband Carl Spadt stayed at the rental premises from August 6, 2007 to August 9, 2007, paying the sum of $3,000.00, and thereafter according to the Defendant Bessie Swann, Catherine Carroll-Spadt contacted her to tell her about her stay at the house. After Bessie Swann learned about the alleged illegal rental, she sent a letter dated August 10, 2007, to the Plaintiff terminating the lease agreement pursuant to Paragraph 8 of the agreement (see Defendants' Exhibit "C"). The lease agreement provides that if the premises is sublet without the permission of the owners, the lease is voided and the tenant will forfeit all monies paid under the agreement. Immediately after the Defendants became aware of the sublet, they exercised their rights under the lease to terminate the Plaintiff's tenancy.

It appears that the locks at the premises on Tanglewood Trail in Hampton Bays were changed by the Defendants or their representatives on August 9, 2007, possibly prior to the time that the letter terminating the lease was sent to the Plaintiff. It is undisputed that Catherine Carroll-Spadt and her husband Carl Spadt were not permitted to reside on the premises under the terms of the booking agreement, these individuals did stay, after payment of monetary consideration, at the premises pursuant to a written sublet and neither the Defendants nor their representatives ever gave permission for individuals to sublet the premises.

In addition to the issue of the illegal sublet, and prior to terminating the lease, representatives of the Defendant entered the premises in July of 2007, to do an inspection and found evidence that there were people smoking in the house and they observed a cigarette burn in the living room rug and burns on the hard wood floors of the house. It also is alleged that there was drug paraphernalia in the house including discarded nitrous oxide canisters and evidence of marijuana and cocaine use. Further, although the house was rented furnished with beds, additional beds were found in the house during the inspection providing further evidence that more people than were permitted under the written rental agreement were staying on the property.

The Plaintiff has not alleged that any of his personal property was destroyed by the eviction and Bessie Swann alleges that all of the personal property in the house that did not belong to the lessors were inventoried and locked in a safe place in the house after the eviction. The Plaintiff made arrangements to pick up all of their personal property in September of 2007.

The Plaintiff has not submitted an affidavit responding to these specific factual allegations of illegal use by Bessie Swann and instead his attorney seeks to rely upon ***RPAPL*** § 853 on this motion for summary judgment. ***RPAPL*** § 853 states that:

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by ***putting him in fear of personal violence or by unlawful means***, he is entitled to recover treble damages in an action therefor against the wrong-doer. (emphasis provided by the Court).

Prior to 1981, the term "unlawful means" was not in the statute and this section only covered eviction by "fear of personal violence". The term "unlawful means" is not further defined by the statute.

According to Professor John J. Meehan in the 1993 supplementary Practice Commentary to ***RPAPL*** § 853in McKinneys:

> ***RPAPL*** 853 and its predecessor, New York's forcible and detainer statute, were enacted to discourage undue intimidation and violence in the ejection of persons from real property by providing for treble damages under certain circumstances, but not to prohibit resort to summary ouster.

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue (see, ***Alvarez v Prospect Hospital,*** 68 NY2d 320, 508 NYS2d 923; ***Bennett v Knipfing,*** 262 AD2d 260, 692 NYS2d 403). The Court will not determine issues of credibility or the probability of success on the merits on a motion for summary judgment, and issue finding rather than issue determination is the key to summary judgment (***Grahm v Columbia-Presbyterian Medical Center,*** 185 AD2d 753, 588 NYS2d 2). If material facts are in dispute or if different inferences may reasonably be drawn from the facts or testimony, a motion for summary judgment must be denied (see, ***Gusek v Compass Transp. Corp.,*** 266 AD2d 923, 697 NYS2d 886; ***McShane v Foster,*** 235 AD2d 462, 652 NYS2d 1004; ***Morris v Lenox Hill Hosp.,*** 232 AD2d 184, 647 NYS2d 753, *aff'd* 90 NY2d 953, 665 NYS2d 399). The decision to grant or deny summary judgment is based on the facts in the entire record and not simply the pleadings (see , ***McIntyre v State,*** 142 AD2d 856, 530 NYS2d 898), and these facts must be analyzed in a light most favorable to a non-moving party, here the Defendants (***Jastrzebski v North Shore School District,*** 223 AD2d 677, 637 NYS2d 439). Discovery has not yet even commenced in this matter and that renders the alleged facts somewhat suspect including the time line involved with the actual eviction (see generally, ***Morales v. Coram Materials Corp.***, 51 A.D.3d 86, 853 N.Y.S.2d 611).

According to the Defendants, they terminated the lease with the Plaintiff by a letter dated August 10, 2007, pursuant to the explicit terms in the written agreement and therefore the Plaintiff was no longer entitled to possession of the real property. In order for the Plaintiff to recover under***RPAPL*** § 853 , he must show that he had actual possession of the premises pursuant to a valid lease, he had not abandoned the premises, and he was "put out of real property in*** (an) unlawful manner" (***RPAPL*** § 853; see, ***Gold v. Schuster***, 264 A.D.2d 547, 550, 694 N.Y.S.2d 646; see generally ***90 New York Jurisprudence 2d***, Real Property Possessory Actions § 431). At this point in time, in light of the alleged drug use on the premises during the time that the Plaintiff had possession of the property and the alleged illegal sub-rental to Catherine Carroll-Spadt, there is a question of fact as to whether Ostad had a valid lease at the time that he was evicted by the Defendants, although the Court is cognizant that he gained control of the property pursuant to a valid lease (see generally, ***RPAPL*** § 715).

A transient on the property, as opposed to a tenant in possession, is"one who has a home elsewhere, and is staying at the hotel for a short period in connection with a trip away from home." (see, ***Mann v. 125 E. 50th Street Corp.***, 124 Misc. 2d 115, 475 N.Y.S.2d 777, order aff'd, 126 Misc. 2d 1016, 488 N.Y.S.2d 1021). The Court herein is not stating that the Plaintiff was a "transient" and is not entitled to the protection of the ***RPAPL.*** Generally, a tenant is one who has exclusive legal possession of the entire premises, subject to reserved rights, and is responsible for the care and possession of the premises (see, ***Sherman v. Iroquois Hotel & Apartment Co.,*** 42 Misc. 217, 85 N.Y.S. 365). The Defendants have not alleged that this summer

rental was not a tenancy and have used the term "lease" repeatedly to describe the booking agreement with the Plaintiff. A review of both the lease and the actual relationship between the parties requires this Court to find that Ostad was a tenant of the Defendants and that a tenancy did exist prior to the time that it was terminated by the letter sent by the Defendants.

The Court, in rendering this decision, has considered the unusual character of the lease agreed to by the parties which was only for a period of time of approximately three months and was clearly commercial in nature because it contemplated seven other unrelated individuals residing on the premises with Ostad. This lease had characteristics of a rental at a hotel or motel, but it nevertheless established a tenancy as opposed to a license to reside on the premises or a contract for boarding at the premises. The tenancy herein was not a periodic tenancy but a tenancy for a fixed term even though that term was only for three months.

The Court notes that even if the Plaintiff was entitled to summary judgment, an award of treble damages under ***RPAPL*** § 853 is discretionary with the Court (see, ***Freeman v. Muia***, 133 Misc. 2d 1097, 509 N.Y.S.2d 267). The Legislature, in enacting this amendment to ***RPAPL*** §853 in 1981, manifested an intent to provide broader and expanded coverage to permit recovery in cases where no force or threat thereof is employed but a lock-out or other wrongful eviction takes place (see, ***Maracina v. Shirrmeister***, 105 A.D.2d 672, 482 N.Y.S.2d 14; ***Carter v Andriani***, 84 AD2d 513, 443 N.Y.S.2d 157-see dissent).

Wrongful eviction is both a common law tort and a statutory cause of action in New York. Under common law tort, the Court can award punitive damages to a Plaintiff and under ***RPAPL*** § 853, the Court can award treble damages even though it may decline to award common law punitive damages (see, ***Lyke v. Anderson***, 147 A.D.2d 18, 541 N.Y.S.2d 817; see also, ***Moran v. Orth***, 36 A.D.3d 771, 828 N.Y.S.2d 516). Wrongful eviction entitles the tenant to "such damages as are the natural consequence of the landlord's trespass or wrongful act." (***Fisher v. Queens Park Realty Corp.***, 41 A.D.2d 547, 549, 339 N.Y.S.2d 642).

It is still the law that although summary proceedings or actions to recover possession of real property provide alternative remedies for the recovery of possession of real property with legal process, the common law remedy of re-entry, where expressly reserved in a lease, has not been abrogated by the statute. It has been held that where the Landlord can peaceably re-enter the property without force, legal proceedings are not necessary (see, ***110-145 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.***, 265 A.D.2d 415, 696 N.Y.S.2d 490, *reversing* 177 Misc. 2d 555, 677 N.Y.S.2d 424; ***Visken v. Oriole Realty Corp.***, 305 A.D.2d 493, 759 N.Y.S.2d 523; ***Bozewicz v. Nash Metalware Co.***, 284 A.D.2d 288, 725 N.Y.S.2d 671). While this "booking agreement" provides for its termination upon the occurrence of certain events, it does not contain a clause concerning reentry of the premises by the Landlord.

The amount of damages that the Plaintiff may be entitled to if he is successful in this action is limited. In ***Long Island Airports Limousine Service Corp. v. Northwest Airlines***, (124 A.D.2d 711, 508 N.Y.S.2d 223), an Appellate Division, Second Department decision written by Justice Lazer after the amendment of ***RPAPL*** §853, the Court stated:

> The measure of compensatory damages for wrongful eviction is the value of the unexpired term of the lease over and above the rent the lessee must pay under its terms (see, ***Mack v***

Patchin, 42 NY 167; ***Mid-Hudson Recreational Centers v Fallon***, 96 AD2d 855; ***Kepo, Inc. v Romano***, 85 AD2d 621), together with any actual damages flowing directly from the wrongful eviction *(*see, ***Eten v Luyster***, 60 NY 252).

If the Plaintiff lost any personal property in the eviction, he would also be entitled to recover for that loss if he is successful in this action (see, ***In re Chavez***, 381 B.R. 582). The Plaintiff would not be entitled to lost profits because sublets of the premises were illegal. If the Plaintiff cannot prove any actual damages as a result of the eviction, he would be entitled to nominal damages in the amount of $1 (see, ***Sharper Props. Enters., Inc. v. Hubbard Sand & Gravel, Inc.***, 858 N.Y.S.2d 899, 2008 N.Y. App. Div. LEXIS 5594, 2008 NY Slip Op 5673, N.Y. App. Div. 2d Dep't 2008; ***Long Island Airports Limousine Service Corp. v. Northwest Airlines***, supra). The Court notes that even if it is determined that the Plaintiff is entitled to treble damages, it appears that the amount of monetary damages that would be awarded in this case is limited.

Since the Plaintiff has not established his right to continued possession under the lease and triable issues of fact exist as to whether the Defendants have used "unlawful means" in evicting the Plaintiff, the motion of the Plaintiff is denied.

Dated: 7/25/18

SANDRA L. SGROI, J. S. C.