SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 100506/2008

200 EAST 87TH STREET ASSOCIATES, L.P.

VS.

SHEN, IRENE

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 100506-08

MOTION DATE

MOTION SEQ. NO. # 001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F	1,2
Answering Affidavits — Exhibits A-J	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 23, 2009

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 1

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200 EAST 87TH STREET ASSOCIATES, L.P.

Plaintiff,

Index No. 100506/08

-against-

Decision & Order

IRENE SHEN and FRANK SHEN,

Defendants.

MARTIN SHULMAN, J.:

Plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment on its complaint and dismissing defendants' counterclaims, as well as an order granting a hearing to determine attorney's fees upon the granting of summary judgment to plaintiff. Defendants oppose the motion, claiming that plaintiff has not met its burden to establish entitlement to summary judgment as a matter of law, and furthermore that defendants have established the existence of questions of fact which can only be resolved by a jury.

In July 2006 plaintiff, as net lessee, and the defendants, as tenants, entered into a written lease agreement for an apartment in the building located at 200 East 87th Street in Manhattan (the "premises") for a one-year term commencing on August 1, 2006 and expiring on July 31, 2007. On or about March 30, 2007, defendants vacated the premises and surrendered the keys. Upon vacatur of the premises, defendants signed a "Notice of Move-Out" (the "Move Out Notice"; See Exh. E, Plaintiffs' Aff.). The Move Out Notice states: "Delivery of the keys to an agent or employee shall not operate as a termination of the Lease or a surrender of the Demised Premises."

The complaint (Exh. C to motion) asserts two causes of action. The first cause of action alleges breach of the lease and seeks rent arrears for the period commencing January 1, 2007 through July 31 2007, at a monthly rate of $4,950.00. The total amount requested in the motion is $33,635.71, after deductions for both a credit due to the re-letting of the premises as of July 16, 2007 and by applying defendants' security deposit to the outstanding arrears. The second cause of action is for the recovery of attorney's fees, costs, and disbursements pursuant to the terms of the lease agreement to be determined by a hearing at the conclusion of this action, but in an amount not less than $10,000.

Defendants' answer asserts ten affirmative defenses and five counterclaims against plaintiffs. The relevant affirmative defenses[1] include:

- the complaint fails to state a cause of action upon which relief can be granted (CPLR 3211);
- personal jurisdiction over the defendants is lacking in that service on the defendants was not completed in proper compliance with the CPLR
- defendants attempted to pay plaintiffs the allegedly owed rent, but plaintiff refused to accept same;
- plaintiff violated the lease agreement by virtue of filing frivolous actions against the defendants, which were ultimately discontinued;
- plaintiff is barred from recovery under the doctrine of "unclean hands" based upon its commencement of allegedly frivolous actions;
- plaintiff's own culpable conduct brought about plaintiff's alleged damages without any culpable conduct on the part of defendants;
- the parties signed a release upon defendants' vacatur of the premises.

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[1] In this motion, plaintiff acknowledges that application of defendants' security deposit to the outstanding arrears is proper (ninth affirmative defense).

Defendants' five counterclaims are as follows:

- this lawsuit and other legal proceedings plaintiff commenced are "frivolous" and defendants have been forced to retain counsel to defend against such actions;
- plaintiffs' alleged "harassment" of defendants resulted in damages in the amount of $15,000.00 for moving expenses;
- fraud;
- damages in the amount of $7,000.00 for real estate broker's commissions paid by defendants as a result of plaintiff's actions; and
- breach of the implied warranties of habitability and quiet enjoyment as a result of plaintiff's frivolous actions.

Defendants argue that, to the extent plaintiff seeks summary judgment on its two causes of action, the motion must be denied because plaintiff has not met its burden of proving that no triable issue of fact exists. Specifically, defendants contend that plaintiff's reliance upon paragraph 19 of the lease is misplaced because that provision is only applicable if the owner terminated the lease as a result of the tenant's default. Here, defendant's argue that the Move Out Notice itself acknowledges that the lease was not terminated and the motion concedes that defendants' vacatur was voluntary. Defendants further argue that a question of fact remains as to whether a Notice of Termination plaintiffs served upon defendants (Exh. D, Aff. of Opp.) was thereafter rescinded and whether or not the defendants were constructively evicted. According to defendants, all of these allegations create a question of fact as to whether or not there was a breach of the lease agreement entitling plaintiff to the relief sought in the complaint.

In its reply affirmation, plaintiff denies that any prior proceedings against defendants were frivolous and points to the provisions of the lease explicitly stating that in the event of a move-out and/or surrender of the premises, the tenant remains obligated to the pay the rent. Plaintiff alleges that defendants' counterclaim involving the breach of the covenant of quiet enjoyment is without merit as a matter of law, as is defendants' assertion of constructive eviction. In support, plaintiff notes that the only proceeding filed against defendants before they vacated the premises was a holdover petition filed in the Housing Part of the New York County Civil Court in February 2007 (See Defendants' Aff. in Opp., Exh. F) based on plaintiffs' alleged failure to comply with their previously executed Affidavit of Cure.[2] Plaintiff subsequently discontinued the holdover proceeding (See Exh. G, Defendants' Aff. in Opp.) and immediately commenced a nonpayment proceeding (See Exh. H, Defendants' Aff. in Opp.). However, the original nonpayment petition named the wrong plaintiff and was not pursued.

Summary Judgment Standard

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35

[2] The holdover proceeding was predicated on defendants' alleged harboring of a dog on the premises, which would constitute a violation of the terms of the lease. Plaintiffs served a Notice to Cure on defendants in December 2006 (See Exh. A, Defendants' Aff. in Opp.). In response, defendants executed an Affidavit of Cure (See Exh. C, Defendants' Aff. in Opp.) in January 2007, claiming to have permanently removed the dog. Upon information and belief, a dog continued to remain on the premises, thus plaintiffs served a Notice of Termination in January 2007 (Exh. D, Defendants' Aff. in Opp.). The parties dispute whether or not a dog continued to be harbored on the premises.

N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). As set forth in *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553, 465 N.Y.S.2d 230, 232 (2nd Dept., 1983):

> "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted].

First Cause of Action

Here, plaintiff establishes its *prima facie* case with respect to defendants' obligation to pay rent and additional rent through the end of the lease term. Paragraph 1 of the lease expressly provides:

> If Tenant moves out of the Apartment before the scheduled expiration of the Term, this Lease shall not be deemed to be terminated and Tenant shall remain responsible for all of its obligations under this Lease, including the payment of rent . . .

As such, defendants' reliance upon paragraph 19 of the lease is unavailing. Further, defendants do not dispute that they did not pay rent for the period January 2007 through July 2007. As more fully set forth below, none of defendants' defenses or counterclaims sufficiently raises any issue of fact which would overcome plaintiff's entitlement to judgment on its *prima facie* case. As such, summary judgment is granted as to liability on the first cause of action.

Second Cause of Action

Plaintiff's motion must be denied as to the second cause of action for attorney's fees. Attorney's fees are incidents of litigation which may not be recovered unless authorized by agreement between the parties, statute or court rule. *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366 (1989). Here, plaintiff relies upon paragraph 21 of the lease, entitled "Costs and Expenses". Nowhere in this paragraph is the recovery of attorney's fees expressly authorized, nor does the court's review of the lease reveal any other lease provision providing for such an award. Accordingly, the portion of the motion seeking summary judgment on the second cause of action is denied, and the second cause of action is dismissed *sua sponte*.

Damages

In support of its request for judgment in the amount of $33,635.71, plaintiff submits an affidavit from plaintiff's collections manager together with a tenant ledger (Exh. F to motion). The tenant ledger seeks rent in the amount of $4,950 per month for the months of January through July 2007; late fees of $100 per month (authorized under paragraph 4 of the lease); legal fees totaling $5,040.50; $266.61 as "damages"; and $500 as a "lease termination fee"[3]. The tenant ledger also reflects the application of defendants' security deposit plus interest and a 16 day credit for the re-letting of the premises. As set forth above, the lease does not authorize recovery of legal fees and those amounts designated as such on the tenant ledger may not be recovered. Similarly, no supporting proof is submitted for the $266.61 "damages" charge or the $500 "lease termination fee". Accordingly, plaintiff is granted judgment on the first cause of action in the amount of $27,828.60, being those sums authorized by the lease, less the security and credit.

Defendants' Affirmative Defenses and Counterclaims

Upon plaintiff establishing its *prima facie* case, the burden of proof shifted to defendants to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman, supra*; *see also*, *DeSouter v. HRH Const. Corp.*, 216 A.D.2d 249, 628 N.Y.S.2d 691 (1st Dept., 1995); *Commissioners of State Ins. Fund v. Photocircuits Corp.*, 2 Misc.3d 300, 773 N.Y.S.2d 190 (Sup. NY 2003). Here, defendants do not even submit affidavits in response to plaintiff's motion or to support

[3] The court finds no lease provision authorizing recovery of a lease termination fee.

their defenses and counterclaims, relying instead upon their counsel's affirmation. "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action ... and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *Zuckerman*, 49 N.Y.2d at 560, 427 N.Y.S.2d at 596. *See also*, *Vermette v. Kenworth Trucking Co., a Div. of Paccar, Inc.*, 68 N.Y.2d 714, 506 N.Y.S.2d 313 (1986); *Marinelli v. Shifrin*, 260 A.D.2d 227, 228-229, 688 N.Y.S.2d 72, 73 (1st Dept., 1999)("It is well settled that 'the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts' [citation omitted] and, therefore, the affidavit of counsel is of no probative value in opposing a motion for summary judgment [citation omitted]"); *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553, 465 N.Y.S.2d 230, 232 (2nd Dept., 1983)(opposing affidavit by an attorney is insufficient as a matter of law).

Further, defendants' counterclaims are insufficient as a matter of law. As to the first, fourth and fifth counterclaims, all predicated on plaintiff's alleged frivolous commencement of legal proceedings, only one legal proceeding had been commenced at the time of defendants' vacatur. Defendants fail to establish that this act led to their constructive eviction from the premises or was a breach of the covenant of quiet enjoyment and warranty of habitability. As to the second counterclaim, no civil cause of action exists for harassment. *Jerulee Co. v. Sanchez*, 43 A.D.3d 328, 329, 841 N.Y.S.2d 242 (1st Dept. 2007). The third counterclaim for fraud is insufficient on its face since defendants fail to allege a misrepresentation or a material omission of fact which was false and known to be false by plaintiff, made for the purpose of inducing

defendants to rely upon it, justifiable reliance by defendants on the misrepresentation or material omission, and injury (see CPLR 3016[b]; *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76 [1996]). Accordingly, defendants' counterclaims must be dismissed.

For all of the foregoing reasons, it is hereby

ORDERED that the portion of plaintiff's motion seeking summary judgment on the first cause of action is granted and the Clerk is directed to enter judgment in favor of plaintiff 200 East 87th Street Associates, L.P. and against defendants Irene Shen and Frank Shen in the amount of $27,828,60, with statutory interest from January 14, 2008; and it is further

ORDERED that the portion of plaintiff's motion seeking summary judgment on the second cause of action is denied and the second cause of action is dismissed; and it is further

ORDERED that the portion of plaintiff's motion seeking dismissal of defendants' counterclaims is granted.

The Clerk is directed to enter judgment accordingly.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: March 23, 2009

Martin Shulman, J.S.C.