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

PRESENT: J. GISCHE Justice

PART 10

Index Number : 114902/2008
BAKER BROS, ADVISORS, LLC
VS
GALLOWAY CHAPLIN CAPITAL
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO. 114902-08

MOTION DATE 7/23/09

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with the accompanying memorandum decision.

FILED
JUL 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/23/09

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
----------X

BAKER BROS. ADVISORS, LLC ,

Plaintiff,

-against-

GALLOWAY CHAPLIN CAPITAL, SCOTT GALLOWAY, an Individual and R. IAN CHAPLIN, an Individual,

Defendants.

DECISION/ORDER
Index No.: 114902/08
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219[a], of the papers considered in the review of this (these) motion(s):

Papers	**NUMBERS**
Pltfs. not. motion [d]/mt], affd (JB) exhs.	1

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff, a residential tenant, moves for a default judgment, pursuant to CPLR §3215, on the first and second causes of action, as well as, default judgment on the issue of the Defendants' liability on the third, fourth and fifth causes of action and an inquest on damages. Defendants are Galloway Chaplin Capital (the "General Partnership"), owner/landlord of the premises at 210 Little Noyac Path, Water Mill, NY 11976, (the "Premises"), and R. Ian Chaplin ("Chaplin") and Scott Galloway ("Galloway"), who are partners of the General Partnership. This action is for: 1) a failure to return security deposit; 2) a conversion of said security deposit; 3) a breach of the warranty of habitability; 4) a breach of the covenant of quiet enjoyment; and 5) recovery of reasonable attorney's fees. Despite service of the motion, there is no opposition to it. Therefore the motion is considered on default.

Discussion

Jurisdiction

Plaintiff filed the Summons and Complaint on November 3, 2008. On January 22, 2009, Plaintiff served the General Partnership by personally delivering the Summons and Complaint to Chaplin, who is a Partner of the General Partnership. CPLR §310.

On December 10, 2008, Plaintiff personally delivered the Summons and Complaint to Chaplin at his place of residence. CPLR §308(a)(1). On January 21, 2009, Plaintiff mailed an additional copy of the Summons and Complaint to Chaplin thereby complying with the additional service requirements of CPLR §3215(g)(3)(i).

On January 23, 2009, Plaintiff served the Summons and Complaint to Galloway, by personally delivering the Summons and Complaint to the security/co-worker of Galloway, a person of suitable age and discretion, at Galloway's place of employment. CPLR §308(a)(2). The security/co-worker refused to disclose his name. Subsequently, on January 28, 2009, Plaintiff mailed an additional copy of the Summons and Complaint to Galloway thereby complying with the additional requirements of CPLR §3215(g)(3)(i). Despite such proof of service, none of the Defendants have appeared, or answered the complaint within the time provided under the CPLR, nor have they obtained an order from the Court extending their time to do so. Plaintiff has demonstrated that it served the Defendants and, accordingly, Defendants have defaulted in this action.

Underlying Causes of Action

Based on the Affidavit of Julian Baker, a Managing Member of Plaintiff and the Verified Complaint, as well as a copy of the Lease and copy of the security deposit

check, Plaintiff has established the following. The General Partnership and Plaintiff executed a residential Lease dated, March 8, 2007. The term of the Lease was from April 1, 2007 to March 31, 2008. Pursuant to the Lease, on March 7, 2007, Plaintiff paid a security deposit of $22,000. Furthermore, the Lease states that the Defendants would return to Plaintiff the security deposit, plus accrued interest, within 45 days of the termination of the Lease. Plaintiff occupied the Premises for the full term and paid rent as it became due.

Plaintiff's first cause of action is for Defendants' failure to return the security deposit. Plaintiff contends that the Defendants failed to return the security deposit balance of $20,631.92, plus interest from March 2, 2007 within 45 days after March 31, 2008. Plaintiff's claimed security deposit amount is based on the initial security deposit of $22,000.00 minus the following deductions that Plaintiff claims it owed to the landlord: 1) pool maintenance charges totaling $1,260.87; 2) algae guard charge totaling $58.33; and 3) heating charges totaling $48.88. Seventy-one days following March 31, 2008, Defendants mailed a check in the amount of $1,474.30 to Plaintiff, without providing paid receipts of any damages claimed by them. Therefore, Plaintiff seeks the remaining balance of the security deposit, in the sum of $19,157.62, plus interest from April 1, 2008.

Plaintiff's second cause of action is for commingling and conversion of the security deposit. Plaintiff contends that Defendants violated Section 7-103 of the General Obligations Law for failure to: notify Plaintiff of the name and address of the banking organization in which the security deposit was deposited; deposit the security

deposit in a banking institution having a place of business within the State of New York; and deposit the security deposit in a segregated interest bearing account.

Plaintiff's third cause of action is for a breach of the warranty of habitability. Plaintiff contends that the Premises were not fit for human habitation and for the uses reasonably intended by occupants because of the following conditions: the air conditioning system was not properly functioning; portions of the porch were dirty; the cushions were covered with mold and mildew; the deck around the pool had exposed nails injuring two of its guests; the pool heater did not work; and the Premises were otherwise in defective condition.

Plaintiff's fourth cause of action is for a breach of the covenant of quiet enjoyment. Plaintiff contends that workers hired by Defendants to perform work at the Premises left garbage, debris, tools and sandpaper throughout the Premises leaving it filthy at the end of the workday. Additionally, the bathrooms were left in unsanitary conditions.

Plaintiff's fifth cause of action is for punitive damages arising from Defendants' breach of the warranty of habitability.

Plaintiff's sixth cause of action is for reasonable attorneys' fees incurred in prosecuting this action.

Defendants' default in answering the Complaint constituted an admission of factual allegations therein [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)]. Thus, Plaintiff is entitled to a default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action [Feffer v. Malpeso, 210 AD2d 60 (1st Dept 1994)].

When a General Partnership exists, all partners are jointly and personally liable for all of the partnerships' debts and obligations to third parties. N.Y. Partnership Law §26. Galloway Chaplin Capital is a General Partnership and Chaplin and Galloway are its general partners. Therefore, if Plaintiff proves that a *prima facie* cause of action exists against the General Partnership, then Chaplin and Galloway are jointly and personally liable as well.

Plaintiff's first cause of action is for Defendants' failure to return the security deposit pursuant to the Lease. A tenant who has not defaulted is entitled to a return of security deposit upon expiration of the terms of the Lease. [Joseph v Solow Building Co., LLC, 284 AD2d 214 (1st Dept 2001)]. Additionally, the tenant is entitled to interest on a security deposit when the lease provides such. [People by Lefkowitz v. Booke, 58 AD2d 142 (1st Dept 19977)]. However, a Landlord can retain all or portions of the security deposit once a tenant vacates so as long as he or she provides the tenant with paid receipts of damages that did not result from normal wear and tear. [Rivertower Associates v. Chalfen, 153 AD2d 196 (1st Dept 1990)]. The above claims establish the *prima facie* elements of the first cause of action because Defendants failed to either return Plaintiff's security deposit or provide an itemized list of charges and receipts for damages to the Premises. Additionally, paragraph 4 of the Lease states that the Plaintiff is entitled to interest on the security deposit. Accordingly, Plaintiff is entitled to a default judgment on the first cause of action against the Defendants, joint and severally, for $19,157.62, plus interest from April 1, 2007.

Plaintiff's second cause of action is for commingling of funds. A landlord must provide complete information to their tenant regarding the account in which the security

deposit is held. Such account must be in a segregated interest bearing account. If a landlord fails to respond to commingling allegations, then an inference is made that the landlord violated Section 7-103 of the General Obligations Law. [Dan Klores Associates, Inc. v Abramoff, 288 AD2d 121 (1st Dept 2001); see also LeRoy v. Sayers, 217 AD2d 63 (1st Dept 1995)]. Plaintiff's above claims that Defendant never provided the proper bank account information that the security deposit was to be kept and Defendants' failure to respond to commingling allegations establish a *prima facie* claim for commingling of funds. Accordingly, Plaintiff is entitled to a default judgment on the second cause of action. Damages on this cause of action duplicate damages on the first cause of action. The Court, therefore, awards one money judgment for both causes of action.

Plaintiff's third cause of action is for a breach of the warranty of habitability. Such a breach occurs when: the premises so leased are unfit for human habitation; the premises are not fit for the uses reasonably intended; and when conditions exist that are dangerous, hazardous or detrimental to the life, health and safety of the tenants. (Solow v Wellner, 86 NY2d 582 (1995); See also RPL §235-b]. However, this Court found that the warranty does not make the landlord the guarantor of every amenity. [Park West Mgt. Corp. v. Mitchell, 47 NY2d 316 (1979)]. The warranty only protects tenants from conditions that materially affect the health and safety of tenants or materially deprives the tenants from essential functions, such as heat, water, electricity, and the maintaining of housing codes. [*Id.*].

Here, Plaintiff's claims that the air conditioning was not properly functioning, portions of the porch were dirty, the cushions had mold and mildew on them, the heater

of the pool malfunctioned and there were exposed nails near the pool deck. Plaintiff's claims do not rise to the level of a breach of the warranty of habitability because they fail to articulate a violation of an essential function. Plaintiff does not claim that it was without heat or water during the subject tenancy or that there existed any housing or sanitation violations at the Premises. Thus, the Court denies judgment for the third cause of action.

Plaintiff's fourth cause of action is for a breach of the covenant of quiet enjoyment. A tenant must prove that a breach of the covenant of quiet enjoyment occurs when, as a result of landlord's conduct, they are substantially or materially deprived of the beneficial use and enjoyment of the premises. [Jackson v. Westminster House Owners Inc., 24 AD3d (1st Dept 2005)]. "There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant." [Id.]. Plaintiff claims that the Defendants' hired workers failed to clean up the bathrooms, hallways and various rooms prior to the end of the workday. The claims, that the bathrooms, hallways and various rooms were dirty demonstrate a mere temporary inconvenience that does not demonstrate a material deprivation of Plaintiff's beneficial use and enjoyment of the Premises. Plaintiff remained at the Premises for the full term while being able to utilize the Premises for its intended purpose as a residential space. Therefore, Plaintiff has failed to demonstrate a *prima facie* cause of action and the Court denies judgment for the fourth cause of action.

Plaintiff's fifth cause of action is for punitive damages arising from the claimed Defendants' breach of the warranty of habitability. The Court did not find that a breach occurred. Thus, punitive damages will not be awarded.

Plaintiff's sixth cause of action is for attorneys' fees. As a general rule, absent any contractual agreement, statute or court rule, a litigant is responsible for their own attorneys' fees. [Dupuis v. 424 East 77th Owners Corp., 32 Ad3d 720 (1st Dept 2006)]. An exception to that rule is in "a case of a prevailing tenant, attorney's fees may be awarded pursuant to N.Y. Real Prop. Law § 234 where the lease specifically provides for the landlord's recovery of such fees." [Cier Industries Co. v. Hessen, 136 AD2d 145 (1st Dept 1988)]. Here, Plaintiff falls under the exception to the general rule where paragraph 9(b) of the Lease provides that landlord may recovery attorneys' fees. Therefore, Plaintiff is entitled to recover its legal fees. The claim for legal fees is hereby referred to a Special Referee to hear and determine the issue of reasonable attorneys' fees. Plaintiff is directed to serve this decision upon the Office of the Special Referee within 30 days to have the matter placed on the calendar.

Accordingly, Plaintiff's motion for entry of a default judgment on the first, second and sixth causes of action is hereby granted and the third, fourth and fifth causes of action are hereby severed and dismissed. The amount of damages on the sixth cause of action is referred for determination before a Special Referee.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Plaintiff in this action, for an entry of default judgment, against Defendants Galloway Chaplin Capital, R. Ian Chaplin, an Individual, and Scott Galloway, an individual, is hereby granted; and it is further

ORDERED that the Clerk shall enter a money judgment in the amount of $19,157.62, plus interest from April 1, 2007 in favor of Plaintiff in this action against all Defendants on the first and second causes of action; and it is further

ORDERED that the third, fourth and fifth causes of action are hereby severed and dismissed; and it further

ORDERED that the issue of reasonable legal fees shall be referred to a Special Referee for hearing and determination. Plaintiff shall serve a copy of this decision on the Office of Special Referee (Room 119 at 60 Centre Street) with the next 30 days so that the matter may be placed on Special Referee's calendar; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York So Ordered:

July 23, 2009

FILED

JUL 29 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. JUDITH J. GISCHE, J.S.C