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

PRESENT: JUDITH J. GISCHE, J.S.C. Justice

PART 10

Index Number : 111860/2008

CONCISE MANAGEMENT

VS.

BEEKMAN INTERNATIONAL

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Stipulation resolves cross-motion - Motion & Chief submitted for consideration

FILED

AUG 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 7/28/09

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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Supreme Court of the State of New York
County of New York: IAS 10

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Concise Management, Inc.,

Plaintiff,

-against-

Beekman International Center, LLC.,

Defendants.

----------x

Decision/Order

Index#111860/2008
Seq. #001

PRESENT:
Hon. Judith J. Gische

Pursuant to CPLR §2219(a) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion, BSS affirm., KC affd., exhibits	1
Notice of Cross-Motion, TVL affirm., RMB affd., exhibits	2
BSS opp to x-motion and reply affirm	3
TVL reply affirm	4
Stipulation and Order dated May 21, 2009	5

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

Plaintiff brings this action for a return of security deposit monies in connection with the rental f a luxury residential property in Manhattan. Plaintiff also seeks to recover the attorneys fees it has and/or will expend in connection with its efforts to recover such deposit. Defendant has moved for summary judgment dismissing the complaint. It also seeks a money judgment for the legal fees it has incurred in connection with this action. Plaintiff has cross-moved for an order compelling defendant to comply with outstanding discovery requests and/or orders. It also opposes the motion for summary judgment.

By stipulation and order dated May 21, 2009, the parties resolved the issues raised by the cross-motion. Thus, the only issues for this court's consideration on this motion

are whether the defendant is entitled to summary judgment dismissing the complaint. Issue has been joined and the Note of Issue has not yet been filed. Accordingly, the request for summary judgment relief will be considered and decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

On or about February 10, 2006, plaintiff, as tenant, and defendant, as landlord, entered into a written lease for a residential townhouse located at 351 East 51st Street in Manhattan ("townhouse"). The lease was for a term commencing on March 1, 2006 and expiring on February 23, 2008. It called for monthly rent of $15,000 for the first year and $15,900 for the second year. It required, and plaintiff paid, an initial security deposit of $60,000. The lease was extended by written agreement through August 23, 2008 and the monthly rent remained at $15,900. The extension permitted the plaintiff to terminate the lease early on the 23rd of any given month. provided 30 days written notice was given to the landlord.

During the term of the lease, the townhouse was occupied by plaintiff's president, Rodney Bell, and his family, as a personal residence. On or about March 20, 2008, plaintiff notified defendant, in writing, that it was electing to terminate the lease on or before April 23, 2008. Plaintiff did vacate the townhouse in accordance with its notification to defendant.

Defendant thereafter notified plaintiff that plaintiff had damaged the townhouse over and above ordinary wear and tear. Defendant invited plaintiff to inspect the premises with its representative. Rodney Bell, thereafter, met with "Dominick"[1] and

[1]Plaintiff claims that Dominick was the superintendent of the building.

inspected the premises. Although defendant asserts on this motion that Mr. Bell acknowledged the damages during the inspection, Mr. Bell denies any such acknowledgment and claims, instead, that he vigorously disputed the claims. He also claims that Dominick acknowledged that certain damages, like the scratches in the kitchen sink, were ordinary wear and tear. Defendant has not produced an affidavit on this motion from Dominick or any other person claiming to be present during the inspection.

Subsequent to the inspection, on or about June 12, 2008, defendant sent a letter to plaintiff stating that it had deducted $57,735.30 from the security deposit for "damages and restoration charges caused by [plaintiff's] tenancy." It enclosed a check for $2,264.70 which defendant claimed was the return of the balance of the security deposit. The deductions were itemized as follows:

Re-Painting of Entire Apartment	$15,714.38
Replacement of Base Moldings	$ 2,500.00
Replacement of window Treatments	$ 7,446.45
Refinishing of Stairs	$ 3,797.15
Wood Floor Repairs that are Tenant's Responsibility	$ 7,377.32
Replacement of Sterling Silver Trim in Master Bathroom	$ 2,350.00
Replacement of Stainless Steel Kitchen Sink	$ 1,150.00
Estimated Electric Charges thru 5/31/08	$ 1,500.00
Additional One(1) Month's Rent for Delay Time	$ 15,900.00

By letter dated June 25, 2008, plaintiff had its attorney respond in writing. In a detailed letter plaintiff disputed each and every deduction made by defendant. Some of the deductions were disputed as not being authorized by the lease. Other items were factually disputed. The plaintiff did, however, cash the check that had been sent by defendant.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp ., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Defendant has not established a *prima facie* case for summary judgment. To the extent that defendant claims that plaintiff agreed to the itemization of damages during a walk through inspection, other than Ms. Camaccio's affidavit, there is no proof of such agreement. Ms. Camaccio, defendant's leasing administrator, was not even present during the inspection and cannot competently say what Mr. Bell agreed to during that meeting. Mr. Bell vehemently denies that there was any such agreement and there is no writing confirming any such agreement. Thus, defendant has not produced any evidence, in admissible form, to support its position that the deductions from the security deposit reflected some sort of agreement between the parties.

Nor can defendant claim that by cashing the check for $2,264.70 plaintiff waived any right it had to dispute the deductions made in the amount of $57,735.50. Because the returned portion of the security deposit indisputably was and remained plaintiff's property, there is no accord and satisfaction by the retention of that part of the monies. Merrill Lynch Realty v. Skinner, 63 NY2d 590 (1984); Haimowitz v. Lorintz, 13 Misc.2d 448 (AT 2nd dept. 1958).

Other aspects of this motion are mired in contract and factual disputes, which preclude summary judgment in defendant's favor.

There are factual disputes about the condition of the floors, stairs, kitchen sink and silver trim in the bathroom. There are factual disputes about who and what caused damages to the floors. There are factual disputes about whether the window treatments constitute a fixture, which once installed by plaintiff could not be removed at the end of the lease. Cosgrove v. Troescher, 62 AD 123 (1st dept. 1908).

There are other items of damages that defendant has not proven, as a matter of law, are deductible under the terms of the lease, including electric and rent charges for a time period after plaintiff had legally vacated the premises. Nor has defendant proven, as a matter of law, that it was not obligated to notify plaintiff if it wanted the custom painted walls restored. The specific requirement regarding restoration of the walls in the lease appears to have required such advance notification. Defendant's reliance on a more generalized provision in the rider that does not require advance notice does not appear to apply to the current situation. Bowmer v. Bowmer, 50 NY2d 288 (1980). Defendant's failure to prove that it is legally entitled to make these deductions under the terms of the lease, precludes summary judgment in its favor.

Defendant's requests that plaintiff's legal fee cause of action be dismissed and that, instead, it be granted legal fees is likewise denied. In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). In the case of residential leases, RPL § 234 provides that when, in any action or summary proceeding, an owner is permitted to recover legal fees from the tenant based upon the failure to perform any covenant or agreement of the lease, there is also an implied reciprocal obligation by the owner to pay the tenant's legal fees, if the tenant otherwise prevails in the dispute. Gottlieb v. Such, 293 AD2d 267 (1st dept. 2002). While the parties each concede that the lease provides for the payment of the defendant's legal fees, the issue of who is actually entitled to such fees must await the outcome of this action to determine who is the prevailing party. Nestor v. McDowell, 81 NY2d 410 (1993).

Conclusion

Accordingly, the defendant's motion for summary judgment is denied in its entirety. Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, NY
July 28, 2009

So Ordered:

J.G. J.S.C.