

**Sohmer v Butts**

2009 NY Slip Op 32459(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 105852/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 105852/2008

SOHMER, STEPHEN T.

VS.

BUTTS, ROBERT T.

SEQUENCE NUMBER : # 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 105852-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

         were read on this motion to/for         

PAPERS NUMBERED

1, 2

5, 6

3, 4

8

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits

Replying Affidavits

5/14/09 Stipulation

Cross-Motion:  Yes  No

interim order dated 4/3/09

Upon the foregoing papers, It is ordered that this motion

for summary judgment by defendants & cross-motion by plaintiff for summary judgment are decided in accordance with the attached memorandum decision

**FILED**  
OCT 26 2009

COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/19/09

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
STEPHEN T. SOHMER,

Plaintiff,

Index No.

-against-

105852/08

ROBERT T. BUTTS and EMILY BUTTS,

Motion Seq. 001

Defendants.

-----X  
DORIS LING-COHAN, J. :

This is a residential landlord-tenant dispute involving the interpretation of a lease drafted by plaintiff landlord. Defendants tenants move for partial summary judgment dismissing the complaint and severing their counterclaims.<sup>1</sup> Plaintiff landlord cross-moves for summary judgment on his claim for rent, penalties, interest and attorneys' fees.

In 2006, the parties entered into a three-year lease commencing March 1, 2006, for a townhouse located at 157 East 82<sup>nd</sup> Street, New York, New York. Based upon the express terms of such lease, defendants had an option to cancel, specifically, "the last year of the lease", which was to begin on March 1, 2008, or any portion thereof. [¶13, Exh. D, Notice of Motion].

On or about July 2007, during the second year of the lease, defendants gave plaintiff notice of their intent to vacate the subject premises on February 29, 2008 (at the expiration of the second year of the lease) and to cancel the third year of the lease. After providing plaintiff with such notice, defendants made the subject premises available to plaintiff's agent to show to

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<sup>1</sup> By stipulation dated May 14, 2009, the parties agreed, *inter alia*, as follows: Plaintiff shall retain \$270.94 from the security deposit and return \$20,729.06 to defendants, which resolves defendants' counterclaim for the return of their security deposit in the amount of \$21,000.00 and the portion of plaintiff's claim which seeks damages in the amount of \$11,862.94, for the alleged physical damage to the demised premises; therefore, the portions of the motion and cross motion with respect to such issues are deemed moot.

prospective buyers/tenants on approximately 50-60 occasions. [Exh. G, Notice of Motion]. Defendants did in fact vacate the subject premises on February 29, 2008, the day prior to the commencement of the third year of the lease.

In this action, plaintiff claims that defendants failed to cancel the lease in accordance with its terms and that he is owed rent from February 2008, until the date that the premises is leased to another tenant, with interest at the rate of 12%, late fees at \$700 per day and reimbursement of legal fees. Plaintiff also seeks a declaratory judgment that

“defendants’ right to cancel the [l]ease is limited specifically and may be invoked only by notice of two months served during the third term of the [l]ease and then only after February 29, 2008 and that defendants are liable for the rent due under the [l]ease for the balance of the unexpired term thereof until the [p]remises is re-rented”.

[¶32, Complaint, Notice of Motion, Exh. A].

By stipulation dated May 14, 2009, the parties agreed that there are no material issues of fact in this case requiring a trial and that the issues with respect to the within dispute are legal, and should be resolved by the court as a matter of law, upon the within submissions.<sup>2</sup> Thus, the facts asserted by the parties are deemed to be undisputed.

The legal issue for this court to determine is whether defendants effectively terminated the lease in accordance with its terms thereby relieving them of their monetary obligations for the third year of the lease.

Defendants seek summary judgment dismissing the complaint arguing that they do not owe plaintiff landlord any rent, penalties, interest or attorneys’ fees, since they vacated the

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<sup>2</sup> In addition to the stipulation, both sides have indicated in their submitted papers that the facts are undisputed and that only legal issues remain. [See Defendants’ Memorandum of law, at 1; Plaintiff’s Affidavit in Support of Cross-Motion, ¶4].

subject premises on February 28, 2009, with no rent owed, after providing plaintiff with sufficient notice of their intent to cancel the third year of the lease, in accordance with the terms of the lease. Defendants refer to various provisions of the parties' lease to support their position that the notice they supplied to plaintiff was proper, and that dismissal of this case is warranted.

Paragraph 7 of the lease provides: "[t]he term of the lease is for 3 years to commence at 12:00 noon on March 1, 2006." [Exh. D, Notice of Motion]. Paragraph 13 of the lease, provides, *inter alia*, as follows:

"[a]fter February 29, 2008, Tenant has the right to cancel the last year of lease after giving Landlord two month's notice. During these two months landlord's agent may enter and show the building to prospective tenants on 24 hours notice to tenant".

*Id.*

Defendants assert that the language of Paragraph 13, did not prevent them from giving plaintiff landlord more than 60 days notice that they would be cancelling the last year of the lease and moving out after the second year, as they in fact did. On or about July 2007, approximately six months prior to the end of the second year of their tenancy, defendants gave plaintiff notice of their intent to vacate the subject premises, after the completion of their second year in occupancy. Defendants argue that such notice, complied with the terms of the lease and that any ambiguity in the provisions of the lease, should be construed against plaintiff, the drafter of the lease.

Plaintiff opposes the motion and cross-moves for summary judgment on his claim for rent, penalties, interest and attorneys' fees, arguing that in attempting to terminate the lease prior to the expiration of three (3) years, defendants failed to comply with the terms of the lease, which are clear and unambiguous. Plaintiff maintains that defendants abandoned the premises

prematurely and without proper notice, in clear violation of the lease. In support, plaintiff makes reference to various provisions of the lease, including paragraph 13, detailed above.

Plaintiff also refers to paragraph 54 of the lease, which provides as follows:

“If Tenant moves out prior to 24 months residency or without 60 days prior notice during the third year of this lease, the Tenant will continue to pay rent monthly until notified by the Landlord that a new Tenant has leased the Premises.

Plaintiff refers to paragraph 63 of the lease, which states:

During the last 60 days of the lease or during the 60 day notice period should the Tenant opt for termination during the third year, the Landlord or Landlord’s agents will have the privilege of displaying the usual “FOR SALE” or “FOR RENT” signs.

Plaintiff summarizes that:

“the ‘deal’ embodied in the [l]ease...was for a three (3) year term with a guarantee of no cancellation for the first 26 months. Thus, under the [l]ease, only after February 29, 2008, after 24 months from [l]ease commencement, would [t]enant have the right to cancel the remainder of the term and then only on two (2) additional months’ notice. Notices to the [l]andlord were required to be sent to [the landlord] in California...”.

[Sohmer Affidavit in Support of Cross-Motion]. Plaintiff claims that in July 2007, when defendant Emily Butts advised plaintiff’s property manager that defendants would vacate the premises and terminate the lease at the expiration of the second year, plaintiff advised his property manager to begin looking for a new tenant and to advise defendants that the lease required them to pay rent through at least through April 2008, and then until a new tenant could be found to lease the premises. Plaintiff asserts that he never received formal written notice after February 29, 2008, of defendants’ intent to vacate the subject premises.

Plaintiff states that he has not received rent for February, March and April 2008. He states that he is also owed late charges in the sum of \$700 per diem, for every day the rent is in arrears past the due date and that attorneys' fees are due pursuant to paragraph 27 of the lease. Plaintiff asserts that pursuant to the terms of the lease, such late charges are considered additional rent, subject to interest at the rate of 12% per annum.

In reply, defendants argue that the proper interpretation of the lease is that their right to cancel the "last year of the lease", could only be exercised by giving at least 60 days notice, prior to February 29, 2008, with an effective date of vacatur, no earlier than February 29, 2008. Defendants also argue that plaintiff had actual notice of their intention to terminate the lease as of July 2007, effective March 1, 2008, and that the lease does not require any specific form of notice. Defendants further contend that a late fee of \$700 per day which plaintiff seeks, amounts to an extraordinary and unconscionable charge of 1,200 % per year in late fees.

"[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Signature Realty, Inc v Tallman*, 2 NY3d 810, 811 (2004). "A contract should be read as a whole and every part will be interpreted with reference to the whole; and, if possible, it will be so interpreted as to give effect to its general purpose." *Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 471 (1<sup>st</sup> Dept 2008). "In deciding whether an agreement is ambiguous, the court 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.'" *Nappy v Nappy*, 40 AD3d 825 (2d Dept 2007). It is well settled that, if there is any doubt or ambiguity in the language of an agreement, it "must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language". 67

*Wall St. Co. v. Franklin Nat. Bank*, 37 NY2d 245 (1975). Further, “no additional liability or requirement will be imposed upon a tenant by interpretation [of a lease] unless it is clearly within the provisions of the instrument under which it is claimed...”. *Id.* at 249 (citations omitted).

Applying such principles herein and upon review of the lease in its entirety, the court agrees with defendants’ interpretation of the lease, and that the notice supplied by defendants to plaintiff in July 2007, was sufficient to terminate the third year of the lease. As detailed below, such interpretation is consistent with the language of the lease and its general purpose. While the language of the lease drafted by plaintiff landlord could certainly have been written more clearly, especially paragraph 13 of such lease, its meaning can be gleaned with reference to the lease as a whole and as to other specific provisions.

Paragraph 13 of the lease, *expressly* and *unequivocally* provides defendants tenants with a “right to cancel the last year of the [l]ease”. (emphasis supplied). The phrase “[a]fter February 29, 2009”, simply identifies the earliest possible date that termination of the lease could be effective. Had the parties intended that defendants maintain only the right to cancel the last 10 months of the lease, the express term “year”, would presumably not have been specifically included.

Plaintiff’s argument that the right to cancel the last year did not arise until after the last year had begun so as to effectively allow cancellation of only the last ten (10) months of the last year, is fundamentally flawed, as it is contrary to the plain language of such provision, and defies logic. If the lease was intended only to allow cancellation of the last ten months of the lease, the plain language of the lease would not have included the specific reference to the tenants’ “right to cancel the last year of the [l]ease”, and instead would have indicated something to the effect that,

after the second year, the tenant can give sixty days notice to cancel the remaining portion of the final year. Plaintiff's interpretation would render the phrase "right to cancel the last year of the [l]ease", meaningless, which is contrary to the rules of contract construction. *See 67 Wall St. Co. v. Franklin Nat. Bank*, 37 NY 2d at 248 ("words are never to be construed as meaningless, if they can be made significant by any reasonable construction"). In fact, there were numerous alternative ways to accomplish plaintiff's allegedly intended meaning of paragraph 13, none of which were chosen in plaintiff's drafting of such provision. Thus, the court accepts defendants' interpretation of paragraph 13 to the extent that it means that defendant had a right to cancel the final twelve months of the lease, by giving at least sixty (60) days notice, effective no earlier than March 1, 2008.

Further, even if the language of paragraph 13 of the lease is considered to be ambiguous, which plaintiff argues that it is not (¶4, Affidavit in Support of Cross-Motion), it is well settled that any ambiguity as to its meaning is to be resolved in favor of defendants and against plaintiff, the drafter of the lease. *See 151 West Assoc. v. Printsiplies Fabric Corp.*, 61 NY2d 732 (1984). Moreover, despite any ambiguity, the meaning of paragraph 13 can be interpreted, with reference to the lease as a whole and as to other specific provisions.

Paragraph 54 of the lease, as detailed above, and relied upon by plaintiff, merely obligates tenants to continue to pay the monthly rent until notified by the landlord that a new tenant has leased the premises, in two potential scenarios, neither of which is applicable here: (1) "[i]f tenant moves out prior to 24 months residency"; or (2) "without 60 days prior notice during the third year of this lease". Here, defendants moved out after completing 24 months of residency and therefore, in accordance with paragraph 54 of the lease, defendants are not obligated for the

rent for the third year of the lease. This section does not in any way prohibit defendant tenants from cancelling the third year of the lease, with more than 60 days prior notice, and after remaining in possession for a complete two (2) year period.

Further, paragraph 54 further supports defendants' position that the lease merely required that they remain in occupancy for a minimum of 24 months, and not 26 months as argued by plaintiff. If plaintiff's interpretation was correct, arguably paragraph 54 would have indicated "if tenant moves out prior to" 26 months residency, rather than the way it was in fact written to indicate "if tenant moves out prior to 24 months residency". (emphasis supplied).

Paragraph 63 of the lease, also referenced by plaintiff, does not preclude the within interpretation of the lease, as it provides for circumstances for displaying a "for sale"/ "for rent" sign on the premises. It is noted that while the papers fail to contain information as to whether in fact a "for sale/for rent" sign was displayed, there is no dispute that defendants provided plaintiff with unlimited access to the subject premises to show to prospective tenants/buyers.

Further, the undisputed actions of the parties *after* defendants supplied plaintiff with notice in July 2007 of their intent to vacate after the completion of the second year, are consistent with the above interpretation. From the time such notice was given, plaintiff, with defendants' consent and cooperation, was active in trying to find a new tenant or buyer for the subject premises. In fact, in an email from plaintiff's property manager to defendant Emily Butts dated January 16, 2008, it is indicated that defendants supplied access to such prospective future tenants/buyers on approximately 50 or 60 occasions. [Exh G, Notice of Motion].

With respect to plaintiff's argument that he did not receive formal notice after February 28, 2009 of defendants intent to vacate, the lease fails to require a specific method of giving

notice. Paragraph 47, referred to by plaintiff, merely provides the address of plaintiff for the purpose of notice, but does not require that notices be in writing or in a specific form.

Based upon the above, defendants' motion for summary judgment is granted, as they have established an entitlement to judgment of dismissal of plaintiff's claim for rent, penalties, interest and attorneys' fees, as a matter of law. Defendants are further granted summary judgment as to their counterclaim for legal fees. As the prevailing parties to this lawsuit, and in accordance with RPL §234<sup>3</sup>, since the subject residential lease provides for the recovery of attorneys' fees by the landlord (§27, Lease, Exh. D, Notice of Motion), defendants are entitled to their reasonable legal fees associated with this action. Such counterclaim is severed and, in accordance with CPLR §4317(b), is referred to a Special Referee to hear and determine the amount of attorneys' fees to be awarded, unless plaintiff agrees to reimburse defendants for their reasonable attorneys' fees which shall be detailed by letter to plaintiff's counsel, within 30 days of entry of this order. Plaintiff's motion for summary judgment is denied, based upon the above.

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment dismissing the complaint and severing defendants' counterclaims is granted and a judgment of dismissal shall be entered by the Clerk of the Court, upon proof of service of a copy of this order with notice of

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<sup>3</sup> RPL 234 is titled "Tenants' right to recover attorneys' fees in actions or summary proceedings arising out of leases of residential property" and provides, in relevant part, as follows:

"[w]herever a lease of residential property shall provide that in any action...the landlord may recover attorneys' fees...incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease,...there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant...in the successful defense of any action...commenced by the landlord against the tenant arising out of the lease".


entry; it is further

ORDERED that defendants' counterclaim for attorneys' fees is referred to a Special Referee to hear and determine the amount of such attorneys' fees, in accordance with CPLR 4317(b) as provided above; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that *within 45 days of entry of this order*, defendants shall serve a copy of this order with notice of entry, upon all parties and upon the Clerk of the Judicial Support Office to arrange a calendar date for the reference to a Special Referee; failure by defendants to timely pursue their counterclaim for attorneys' fees, as provided herein, will be deemed a waiver of such counterclaim.

Dated: 10/19/09

  
Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\sohmer.butts\grant sj for defendant sohmer.butts.wpd

**FILED**  
OCT 26 2009  
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