

Summer Fun Leasing v Bienen
2010 NY Slip Op 30836(U)
March 10, 2010
Supreme Court, Suffolk County
Docket Number: 20006/05
Judge: Joseph C. Pastoressa
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH C. PASTORESSA

SUMMER FUN LEASING, x

Plaintiff(s),

-against-

MIKE BIENEN, RYAN SMITH, PATRICK P.
O'BRIEN, MIKE GATTO, JACK LUQUER, ED
MANLY, JR., JEFF BAUSCH, JOHN
PAUKOVITS, NICHOLAS CARDACI, TIM
GOGER, BRYAN HONSTETTER, Tenants,
BRYAN SULLIVAN,

Defendant(s),

x

Mot Seq: #002-Mot-d #003-MD
#004-MD #005-MD
#007-MD #008-MD
#009-MD

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Pages Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2, 3, 4, 5, 6, 7, 8
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Upon the foregoing papers, the following defendants each move individually pursuant to CPLR §3212 for summary judgment dismissing the plaintiff's complaint: Bryan J. Honstetter, Bruce E. Honstetter, and Cheryl A. Honstetter (motion sequence #002); Ryan Smith and Kevin J. Smith (motion sequence #003); Edward M. Manly, Jr. s/h/a Ed Manly, Jr. and Susan F. Manly (motion sequence #004); Nicholas Cardaci and Christine Cardaci (motion sequence #005); Catherine Gatto, Mike Gatto, Daria T. O'Brien, and Patrick P. O'Brien (motion sequence #007); Michael Bienen and Richard A. Bienen (motion sequence #008); and Jeff Bausch and Linda S. Bausch (motion sequence #009).

This is an action for damages regarding an alleged breach of lease agreement entered into on or about September 2003 between the plaintiff and defendants for the lease period from September 4, 2003 through May 14, 2004 in connection with property located at 9 Laura Court, East Quogue, Town of Southampton, State of New York (hereinafter "subject premises"). The following defendants executed the lease agreement: Michael Bienen, Ryan Smith, Patrick O'Brien, Mike Gatto, Jack Luquer, Ed Manly, Jr., Jeff Bausch, John Paukovits, Nicholas Cardaci, and Tim Goger. The remaining defendants are the purported parents and/or guardians of the aforementioned signatories to the lease who executed guarantees on behalf of their respective children; Christine Cardaci for Nicholas Cardaci; Catherine Gatto for Michael Gatto; Daria O'Brien for Patrick O'Brien; Linda Bausch for Jeff Bausch; Susan F. Manly for Ed Manly; Richard A. Bienen for Michael Bienen; and Kevin J. Smith for Ryan Smith. The defendants Bryan Honstetter, Cheryl A. Honstetter, and Bruce E. Honstetter also signed a lease agreement guaranty.

The plaintiff in sum and substance avers the following eleven causes of action against the defendants: the first cause of action is for breach of the lease for failure to pay rent for the months March, April, and May of 2004 totaling \$6,320; the second cause of action is for failure to pay rent from March 2004 through May 2004 totaling \$6,320 based on the fair and reasonable value of the occupancy; the third cause of action is for unjust enrichment in the amount \$6,320; the fourth cause of action is for breach of the lease for damages in the amount of \$9,568.29; the fifth cause of action is for breach of the lease for failure to pay the utilities used by the defendants during their tenancy in the amount of \$1,787.88; the sixth cause of action is for unjust enrichment in the amount of \$1,787.88; the seventh cause of action is for breach of the lease for the cost of the cable installation in the amount of \$368.40; the eighth cause of action is for breach of the lease for late fees in the amount of \$1,250; the ninth cause of action is for breach of the lease for a liquidated damages claim in the amount of \$100,000 for failure to vacate the premises; the tenth cause of action is for breach of the lease guaranty; and the eleventh cause of action is for breach of the lease for costs and attorney fees.

The moving defendants aver that the lease agreement and the lease agreement guaranty entered into between the parties is illegal and therefore is unenforceable as a matter of law. The defendants contend that the dwelling at the subject premises was issued a certificate of occupancy by the Town of Southampton for a single family dwelling, however, the lease in the instant matter allowed the subject dwelling to be rented to a number of individuals in contravention to the certificate of occupancy and in violation of the Town Code. In particular, the defendants aver that there was no certificate of occupancy permitting the subject dwelling to be used by “ten or twelve unrelated college students resembling a fraternity house.” The Town of Southampton issued a certificate of occupancy dated May 7, 1996 for a “two story single family dwelling” for the dwelling located at the subject premises. The defendants aver that section 270-9(a) of the Town of Southampton Town Code pertaining to rental properties provides that “a rental property shall only be leased, occupied or otherwise utilized in accordance with the certificate of occupancy issued for the dwelling unit”¹ and Town Code section 123 -21(a) states, inter alia, that “it shall be unlawful for any person, firm or corporation to . . . use, occupy or maintain any building . . . in a manner not permitted by an approved building permit or certificate of occupancy.” The defendants aver that they were not living as a family as defined by the Town Code section 270-1 which defines a family, inter alia, as follows: “four or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family. (1) Evidence that four or more persons living in a single dwelling unit who are not related by blood, marriage or legal custody shall create a rebuttable presumption that such persons do not constitute the functional equivalent of a traditional family.”²

In addition, the defendants Honstetter aver that the causes of action pertaining to the lease should be dismissed because none of the Honstetters signed the lease agreement and therefore are not bound by its terms. Moreover, the defendants Honstetter, Smith, Manly, Cardaci, Gatto, O’Brien, Bienen, and Bausch claim that the fourth cause of action for property damage was settled by the plaintiff with its insurance carrier. The defendants aver that Greenwich Insurance Company agreed to reimburse the plaintiff for all claims of property damage at the subject location with the exception of the replacement of a birch tree valued at approximately \$1,250. The defendants allege that the plaintiff allegedly assigned all rights regarding the property damage and the loss of personal property to the insurance company.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to

¹ Town code section 270-9(a) currently states: “A rental property shall only be leased, occupied or used by a family”.

² In support of the defendants arguments concerning the illegality of the subject lease and guaranty, the defendants rely upon two nisi prius cases. The first involves a legal malpractice case, and the second case involves circumstances where the court declined to enforce a lease when the owner failed to obtain a certificate of occupancy before the tenant occupied the premises, but, in a subsequent decision the lease was found to be valid.

defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065).

“Illegal contracts are generally unenforceable (sic). Where contracts statutory provisions are merely *malum prohibitum*, the general rule does not always apply. If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied” (Rosasco Creameries v Cohen, 276 NY 274, 278). The courts distinguish between *malum prohibitum* contracts [the conduct is prohibited by statute] and *malum in se* contracts [evil in itself i.e. the conduct thereunder by its very nature is prohibited] (see, Lloyd Capital Corporation v Henchar, 80 NY2d 124; Speciality Restaurants Corporation v Barry, 262 AD2d 926. In addition, “[a]s a general rule also, forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as ‘a sword for personal gain rather than a shield for the public good’” (Lloyd Capital Corporation v Henchar, supra at 128 quoting Charlebois v Weller Assocs., 72 NY2d 587, 595). Moreover, “[a]llowing parties to avoid their contractual obligation is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law” (Lloyd Capital Corporation v Henchar, supra at 128).

Applying the foregoing principles of law, the court finds that the defendants have failed to establish a prima facie case of entitlement to summary judgment dismissing the action based on the alleged illegality of the subject lease and/or guaranties. The Town of Southampton code provisions cited by the defendants do not contain any language expressly providing that a violation of the Town code provision at the time of the occupancy of the subject premises precludes the alleged violator from enforcing the lease or denying their ability to collect rent under the lease. Nothing in the Town code provisions cited by the defendants during the period of the defendants occupancy show any intent by the Town Board to deprive a landlord of his or her the right to recover under a lease in the case where the Town code provisions are allegedly violated.³ Moreover, the Town code provides penalties and fines in the event that a violation of the Town code occurs.⁴ Finally, the subject defendants are using the illegality defense as a sword for personal gain rather than a shield for public good. The defendants are seeking to deny payment of rent to the landlord despite their occupancy of the subject premises when they too clearly knew they were not renting there as a “family”. The court notes that absent from the moving papers were any affidavits on behalf of the defendants denying any of the allegations contained in the complaint or that they were raising this defense for the public good.

The portion of the defendants motion seeking the dismissal of the fourth cause of action is

³ In contrast, Town code section 270-13 (effective January 1, 2008 pursuant to Town code section 270-3) entitled “Collection of Rent” states: “The following shall be conditions precedent to the collection of rent for the use and occupancy of a rental property: (A). The existence of a valid permit for the rental property.”

⁴ Sec, Town code section 123-21 (B).

denied for the defendants failure to establish a prima facie case of entitlement to summary judgment. The plaintiff's fourth cause of action seeks damages in the approximate amount of \$9,568.29 for damage sustained to the "premises, its furniture, fixtures, appliances, appurtenances and equipment pursuant to the terms of the lease entered into between the parties hereto during September 2003."

The defendants aver that the plaintiff made a claim for damage of the subject premises against their insurance policy to which they were paid by Greenwich Insurance Company. The defendants further aver that the plaintiff submitted a claim for \$15,818.62 for property damage to which the insurance carrier agreed to pay \$14,568.62 representing the entire property damage claim with the exception of the cost of the replacement of a birch tree. Moreover, the plaintiff received payment from the insurance carrier in the amount of \$6,164.82 for the loss of personal property. The defendants submission of a subrogation receipt dated January 13, 2005 signed by Matthew Vichnick as president of Summer Fun Leasing, Inc. states that payment of said claim is "for loss and damage by vandalism occurring on the 1 day of March A.D., 2004" and a report from US Adjustment Corporation dated January 5, 2005 entitled "Seventh Report-To File" states that the date of loss was March 1, 2004, which creates a material issue of fact as to whether the payment of said claim was concerning the alleged damage to the subject premises during the tenants occupancy. Nonetheless, the plaintiff submitted an uncontroverted affidavit by Matthew Vishnick as president of the plaintiff, which avers that the claim was specifically for damages that occurred on March 1, 2004, and are separate and apart from the damages that were caused by the defendants during occupancy of the premises which creates a triable issue of fact precluding the granting of summary judgment.

Finally, the portion of the defendant Honstetters' motion seeking dismissal of the plaintiff's causes of action pertaining to breaches of the subject lease is granted. The defendant Honstetter's established a prima facie case of dismissal of the causes of action pertaining to breaches of the subject lease. The defendant Honstetters provided a copy of the subject lease demonstrating the absence of any of their signatures on the subject lease. The plaintiff in opposition failed to show a triable issue of fact precluding the issuance of summary judgment on those causes of action pertaining to breaches of the subject lease. Accordingly, the plaintiff's first, fourth, fifth, eighth, ninth, and eleventh causes of action asserted against the defendants Honstetter are dismissed.

This shall constitute the decision and order of the court.

DATED: March 10, 2010


HON. JOSEPH C. PASTORESSA