

Scott v Ackermann

2011 NY Slip Op 31365(U)

May 11, 2011

Supreme Court, New York County

Docket Number: 600093/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MONICA SCOTT and DWAYNE SCOTT,

INDEX NO. 600093/2009

Plaintiffs,

MOTION DATE _____

- against -

MOTION SEQ. NO. 003

HANSPETER ACKERMANN,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 3, were read on this motion by defendant for summary judgment, pursuant to CPLR 3212.

FILED

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits (Memo)
Replying Affidavits (Reply Memo)

MAY 24 2011

1 _____
2 _____
3 _____

NEW YORK

COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Plaintiffs Monica Scott and Dwayne Scott ("Mr. Scott") (collectively "plaintiffs"), bring this action against their former tenant, defendant Hanspeter Ackermann ("defendant"), to recover damages for an alleged breach of a residential lease. They claim that a rider to the lease required defendant to provide six months notice if the lease would not be extended beyond the lease term, and that defendant owes additional rent for the one-year period after the lease expired. Defendant contends that six months notice was required only if he intended to renew the lease, and that when the lease expired, he continued occupancy as a month-to-month tenant and owes no additional rent. The parties have completed discovery and the Note of Issue was filed on October 21, 2010. Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and awarding reasonable attorney's fees. Plaintiffs have responded in opposition to the motion, and defendant has filed a reply.

BACKGROUND

In support of his summary judgment motion, defendant submits, *inter alia*, his own affidavit; Mr. Scott's deposition; and copies of the subject lease, deposited rent checks, and relevant correspondence. In opposition, plaintiffs submit only Mr. Scott's affidavit. The following facts are undisputed.

On August 16, 2006, defendant executed a residential lease for an apartment owned by plaintiffs located 21 West 123rd Street #1, New York, New York. The lease was for a term of two years, commencing on September 1, 2006 and ending on August 31, 2008, at a monthly rent of \$4,850. The lease additionally contained a Rent Adjustment Rider ("the Rider"), which provided in pertinent part:

- "1. The parties agree that the rent for the subject apartment for the 2 year period from September 1, 2006 through August 31, 2008 shall be \$4,850.00.
2. The parties agree that upon a lease renewal the rent for the subject apartment will subsequently change to \$5,150.00 for the 1 year period from September 1, 2008 through August 31, 2009.
3. The parties agree that 6 months notice is required prior to the end of the current lease if a lease renewal is requested." (Not. of Motion, Ex. C).

Defendant paid a \$4,850 security deposit and remained current on all of his rent payments during his tenancy. When the lease expired on August 31, 2008, he continued to reside in the apartment until January 31, 2009, and to pay rent to plaintiffs which they accepted and deposited. He paid rent in the amount of \$4,850 for each of the months of September 2008, October 2008, and November 2008. For his December 2008 rent, however, he paid only \$4,292.41, purportedly because of an agreement with plaintiffs that he could deduct \$557.59 for expenses he incurred to repair the washing machine and clean the carpet. Defendant's December 2008 rent check was accompanied by a letter indicating that the rent for that month was reduced due to the repairs.

On December 29, 2008, defendant notified plaintiffs in writing that he would be vacating the apartment by January 31, 2009. He also requested that plaintiffs identify the escrow account where his security deposit was being maintained, but plaintiffs did not respond to his request. Defendant subsequently withheld his January 2009 rent payment, which he claims was satisfied by the security deposit.

On January 31, 2009, defendant vacated the apartment and surrendered possession to plaintiffs. Plaintiffs thereafter leased the apartment to a new tenant, commencing in July 2009, at a monthly rent of \$4,000.

Plaintiffs commenced the present action alleging that defendant breached the lease because he failed to comply with paragraph 3 of the Rider, which they allege required defendant to provide six months notice if the lease would not be extended. Plaintiffs claim that the six-month notice requirement was intended to give them a sufficient opportunity to locate a new tenant prior to termination of the lease. Plaintiffs also claim that defendant owes additional rent because under paragraph 2 of the Rider, the parties agreed that the terms of the Rider would apply for a one-year period and that the monthly rent would increase to \$5,150. Plaintiffs seek damages for breach of contract, specific performance, and attorney's fees and costs.¹

In his affidavit in opposition to summary judgment, Mr. Scott alleges that defendant made a unilateral decision to pay less rent than was purportedly owed after the lease expired. He also asserts that defendant had no authority to reduce his December 2008 rent based upon alleged repairs. At his deposition, however, Mr. Scott admitted that he deposited defendant's December 2008 rent check, and that he received the accompanying letter addressing the reduction in rent due to the repairs. Plaintiffs do not dispute that the January 2009 rent was

¹ Plaintiffs seek damages in the sum of \$33,808.59, representing: (1) \$300 per month for September 2008 through November 2008; (2) \$858.59 for December 2008; (3) \$5,150 per month for January 2009 through June 2009; and (4) \$1,150 for the months of July 2009 and August 2009, when they collected only \$4,000 per month from the new tenant.

offset by defendant's security deposit.

DISCUSSION

Defendant argues that he is entitled to summary judgment dismissing the complaint, as a matter of law, because the lease contained no provision requiring six months notice prior to his vacating the premises on January 31, 2009. Rather, defendant contends that paragraph 3 of the Rider required six months notice only if a lease *renewal* was requested, and that the Rider must thus be construed as an option to renew the lease that was never exercised. Defendant further argues that when he remained in possession after the lease expired and continued paying rent which plaintiffs accepted, he became a month-to-month tenant by operation of law pursuant to Real Property Law ("RPL") § 232-c. He claims that the terms of his tenancy remained the same, which included the monthly rent of \$4,850. Defendant additionally argues that he is entitled to an award of reasonable attorney's fees pursuant to RPL § 234 and paragraph 19 of the lease.

Plaintiffs argue that there is an exception to the general rule creating a month-to-month tenancy under RPL § 232-c where the parties agree otherwise. They claim that such an "other agreement" exists here because when the parties negotiated the lease, their intent was that defendant could not hold over unless he abided by the terms of the Rider requiring six months notice and an increase in rent for the one-year period after the lease expired. Plaintiffs further contend that defendant lacked authority to reduce his December 2008 rent based on alleged repairs. They also assert that defendant is not entitled to attorney's fees under RPL § 234 because, if defendant is found to be a month-to-month tenant, there would no longer be a lease.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. RPL § 232-c

The Court finds that defendant has set forth sufficient evidence to establish, prima facie, his entitlement to judgment as a matter of law dismissing the complaint. When a lease expires in the absence of notice to renew prior to expiration, the nature and duration of the tenancy resulting from continued possession and payment and acceptance of rent is to be determined within the contours of RPL § 232-c (*see Jaroslow v Lehigh Valley R.R. Co.*, 23 NY2d 991, 993 [1969]; *United Mut. Life Ins. Co. v ICBC Corp.*, 64 AD2d 506, 508 [1st Dept 1978]). RPL § 232-c provides:

“Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by

virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

Further, unless there is an agreement otherwise, a month-to-month tenancy pursuant to RPL § 232-c continues on the same terms as the expired lease (*see City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300 [1975]; *Akivis v Drucker*, 177 AD2d 349, 350 [1st Dept 1991]; *McClenan v Brancato Iron & Fence Works*, 282 AD2d 722, 722 [2d Dept 2001]; *Metz v Melendez*, 2004 WL 2300455, at *1 [Dist Ct Nassau County 2004] ["It is certainly true that if the landlord accepts rent from the tenant following the expiration of a lease, a monthly tenancy arises, presumed as a matter of law to be controlled by the same terms as the expired lease"]).

Here, it is undisputed that the lease expired on August 31, 2008; that defendant remained in occupancy for several months thereafter until January 31, 2009; that defendant continued to make monthly rent payments consistent with the lease until vacating the apartment on January 31, 2009; that all of the rent payments were accepted and deposited by plaintiffs; and that defendant gave 30 days written notice before vacating the apartment on January 31, 2009. Thus, by operation of law, when the lease expired by its express terms, defendant's status became transformed to that of a holdover tenant, and, upon plaintiffs' acceptance of rent after that date, defendant became a month-to-month tenant with his tenancy governed by the terms and conditions set forth in the lease (*see Weiden v 926 Park Avenue Corp.*, 154 AD2d 308, 308 [1st Dept 1989]; *Farrell Lines, Inc. v City of New York*, 63 Misc 2d 542, 544 [Sup Ct NY County 1970], *aff'd* 35 AD2d 788 [1970]). Defendant's month-to-month tenancy concluded when he vacated the apartment on January 31, 2009, after providing 30 days notice (*see* RPL § 232-b).

In opposition, plaintiffs have failed to raise a triable issue of fact sufficient to defeat

summary judgment. Although plaintiffs argue that the Rider demonstrates the parties' agreement that defendant would not hold over without abiding by the terms of the Rider, the Court finds, as a matter of law, that the Rider and defendant's failure to give six months notice did not effectuate a renewal of the lease or require plaintiff to pay increased rent after the lease expired. The language of paragraph 3 of the Rider is clear and unambiguous on its face, and expressly provides: "The parties agree that 6 months notice is required prior to the end of the current lease *if a lease renewal is requested*" (Not. of Motion, Ex. C [emphasis supplied]). Paragraph 2 of the Rider provides: "The parties agree that *upon a lease renewal* the rent for the subject apartment will subsequently change to \$5,150.00 for the 1 year period from September 1, 2008 through August 31, 2009" (*id.* [emphasis supplied]). The express language of the Rider, therefore, sets forth terms and conditions of a lease renewal, and do not address a holdover situation at all (see *W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 163 [1990] ["It is well settled that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face"] [internal quotations omitted]).

There is also no evidence that defendant ever agreed to a renewal of the lease, so as to trigger the increased rent provisions set forth in paragraph 2 of the Rider (see *Carner v Board of Educ.*, 212 AD2d 381, 381 [1st Dept 1995] [evidence supported finding that defendants never agreed to a renewal lease and no new tenancy was created by defendant's remaining in occupancy as a month-to-month tenant]; *Joyous Holdings, Inc. v Volkswagen of Oneonta, Inc.*, 128 AD2d 1002, 1004 [3d Dept 1987] ["a tenant's election to renew a lease must be timely, definite, unequivocal and strictly in compliance with the terms of the lease"]). Nor did such an increase in rent occur by operation of law (see RPL § 232-b; *Lantz v Metaxas*, 48 Misc 2d 924, 926-27 [Civ Ct NY County 1965] [pursuant to RPL § 232-b, a landlord can request an increase in rent involved in a month-to-month tenancy only after giving the tenant notice of the proposed

rent increase “at least one month before the expiration of the term”]; *Livecchi v Pyatt*, 2003 WL 21246096, at *7-8 [County Ct Monroe County 2003]; *62 Spruce St. Realty Co.*, 62 Misc 2d 973, 977 [Dist Ct Nassau County 1970]).

Plaintiff’s argument that there is a question of fact regarding defendant’s authority to deduct the costs of alleged repairs from his December 2008 rent does not require denial of summary judgment. The only evidence plaintiffs submit in opposition to defendant’s claim that plaintiffs agreed to the reduced rent for that month is Mr. Scott’s self-serving affidavit, which appears tailored to avoid the consequences of Mr. Scott’s testimony at his deposition admitting that he deposited defendant’s December 2008 check and that he received the accompanying letter addressing the reduced rent due to the repairs (*see Phillips v Bronx Lebanon Hospital*, 268 AD2d 318, 320 [1st Dept 2000] [“where, as here, the self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff’s own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant’s motion for summary judgment”]). In any event, even if defendant still owes additional rent for December 2009, that fact alone would not effectuate a renewal of the lease (*see Jaroslow*, 23 NY2d at 993; *Leland House, Inc. v Antar*, 74 Misc 2d 188, 193 [Civ Ct NY County 1973]).

C. Attorney’s Fees

The Court further finds that defendant has established his entitlement to an award of reasonable attorney’s fees and costs incurred in defending this action. Pursuant to RPL § 234, whenever a residential lease entitles a landlord to seek attorney’s fees, a reciprocal covenant is implied imposing upon the landlord a duty to compensate a successful tenant for attorney’s fees and expenses (*see RPL § 234; Cier Industries Co. v Hessen*, 136 AD2d 145, 150 [1st Dept 1988]). Here, paragraph 19 of the lease provides in pertinent part:

“A. Owner’s Right. You must reimburse Owner for any of the following fees and expenses incurred by Owner . . .

5. Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits against Owner because of Your actions. . . . If this Lease has ended when these fees and expenses are incurred, You will still be liable to Owner for the same amount as damages.

B. Tenant's Right. Owner agrees that unless sub-paragraph 5 of this Article 19 has been stricken out of this Lease, You have the right to collect reasonable legal fees and expenses incurred in a successful defense by You of a lawsuit brought by Owner against you or brought by You against Owner to the extent provided by Real Property Law, section 234" (Not. of Motion, Ex. C).

The reciprocity provisions of RPL § 234 are thus triggered and defendant is entitled to an award of attorney's fees as a matter of law (*see Cier*, 136 AD2d at 150). The Court, moreover, is unpersuaded by plaintiffs' argument that defendant cannot recover attorney's fees if he is deemed a month-to-month tenant, as "the terms and conditions of the expired lease continued into the holdover month-to-month tenancy" (*Triborough Bridge & Tunnel Auth. v Wimpheimer*, 2004 WL 2979727, at *1 [App Term 1st Dept 2004]; *see also City of New York*, 37 NY2d at 299).

Accordingly, defendant's motion for summary judgment is granted, and this matter will be referred to a Special Referee for an inquest to determine the amount of reasonable attorney's fees and costs to be awarded to defendant.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint and awarding defendant reasonable attorney's fees is granted; and it is further,

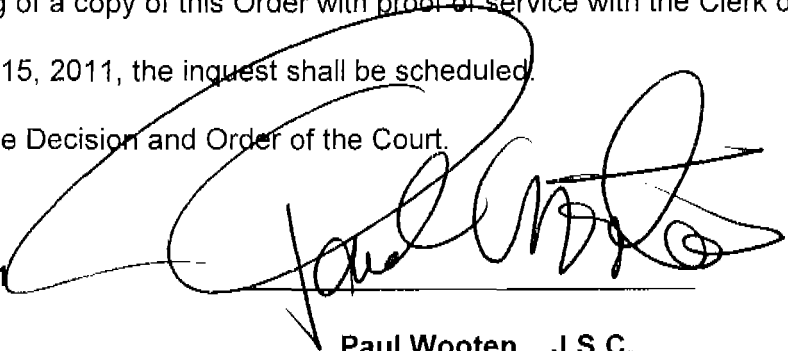
ORDERED that this action is referred to a Special Referee to hear and determine the amount of attorney's fees and costs to be awarded to defendant, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the attorney's fees issue; and it is further,

ORDERED that not later than June 1, 2011, defendant shall serve a copy of this Order with Notice of Entry and Notice of Inquest on plaintiffs' counsel. Upon payment of the

appropriate fees and filing of a copy of this Order with proof of service with the Clerk of this Court not later than June 15, 2011, the inquest shall be scheduled.

This constitutes the Decision and Order of the Court.

Dated: May 11, 2011



Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST

FILED

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