

Learsy v 57 Minerva, LLC

2011 NY Slip Op 31780(U)

June 29, 2011

Supreme Court, New York County

Docket Number: 101290/10

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

landlord, and the plaintiff Learsy is the tenant, of a condominium apartment at an initial monthly rent of \$2,033.00. Paragraph 3 (a) of the lease provides that after the initial one-year term, Learsy's rent shall be re-calculated. Paragraph 3 the lease further provides that

(d) Starting with the first day of the month immediately following the end of the Initial Term, and annually thereafter during the Term Owner shall have the right in its sole discretion to increase the rent for the remainder of the then-current term and each successive 12-month period to an amount equal to the product obtained by multiplying 120% times the sum of all the common charges, capital and operating surcharges, assessments, real estate taxes and any other costs or expenses imposed upon the Unit by the Board of Managers or any governmental authority for such successive 12-month period ("New Rent"). All such costs and expenses which are used to calculate Tenant's New Rent are referred to collectively as "Rental Expenses."

(e) Tenant understands and agrees that all or a certain portion of the Rental Expenses may be based upon estimates of the Rental Expenses for the successive 12-month period determined by Owner and consents to Owner using such estimates. Tenant further understands that during a rental period additional costs or expenses relating to the use or ownership of the Unit, which are permitted under the provisions of this Paragraph 4 (a) [sic] to be included in the New Rent, may arise which were not anticipated or estimated by Owner in calculating the New Rent for the successive 12-month period ("Additional Expenses"). Tenant agrees that Owner shall have the right to adjust the New Rent of Tenant for the 12-month consecutive period immediately following the 12-month consecutive period for which Tenant's New Rent was calculated by the amount of: (i) any Additional Expenses; and (ii) the difference between Owner's estimate of the Rental Expenses for the immediately prior period. Such amount under subparagraphs (i) and (ii) shall be referred to as "Adjustment Amount". The Adjustment Amount shall be added to, or subtracted from, as the case may be, the total of the Rental Expenses for the next successive 12-month period for the purpose of

calculating the New Rent for such consecutive successive 12-month period. Tenant's New Rent for each month shall be equal to 1/12 of the amount calculated in this Paragraph 4 (a) [sic].

On December 20, 2009, the landlord Minerva mailed a renewal form stating a monthly rent of \$4,141.69, more than doubling the prior rent. This is an action for a judgment declaring that the new rent is not a good faith estimate of 120% of the expected carrying charges for the calendar year 2010. The second cause of action is for harassment in violation of New York City Administrative Code § 27-2005. The third cause of action is for breach of the covenant of good faith and fair dealing. The fourth and final cause of action is for attorney's fees. The answer sets forth a single counterclaim for legal fees.

In support of its motion for summary judgment, the landlord Minerva alleges that the monthly common charges are \$1,879.37, the monthly ongoing assessment is \$363.71, and the monthly property tax is \$1,207.83 totaling \$3,450.91. Applying the lease's formula of 120%, the new monthly rent is \$4,141.09.

In opposition to the motion for summary judgment, the tenant Learsy argues that the landlord Minerva has failed to make a conclusive factual showing that the \$4,141.09 rent charged represents 120% of the property taxes and condominium charges paid for the subject apartment. It is alleged that the apartment is eligible for a tax abatement, and that the real estate taxes are in substantial arrears.

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 issue of fact from the case. Smalls v AJI Indus., Inc., 10 NY3d 733, 735, rearg denied 10 NY3d 885 (2008); JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 (2005). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope, or unsubstantiated allegations... are insufficient" for this purpose. Zuckerman v City of New York, 49 NY2d 557 (1980).

The landlord Minerva establishes prima facie its right to judgment as a matter of law by submitting evidence in admissible form sufficient to estimate the rental expenses for the successive 12-month period. By submitting the invoices for the common charges and assessment, together with the real estate tax bills, the landlord demonstrates that under the lease it is entitled to a renewal rent in the sum of \$4,141.09.

In opposition, the tenant Learsy fails to raise a triable issue of fact. The renewal provision of the lease must be enforced according to its plain terms. "Furthermore, the implied covenant of good faith and fair dealing . . . cannot be used to create terms that do not exist in the writing." Vanlex Stores, Inc. v. BFP 300 Madison II, LLC, 66 AD3d 580, 581 (1st Dept 2009).

On the issue of the availability of a real estate tax abatement, once executed, a lease is a present transfer of an estate in real property, fixing the lessee's obligation to pay rent according to its terms, and "a landlord is under no obligation or duty to the tenant . . . to minimize damages. Holy Props LP v Kenneth Cole Prods, 87 NY2d 130, 133 (1995). In addition, it was the tenant Learsy's obligation to ascertain the amount due for real estate taxes. Pope v Battcock, 218 App Div 857 (2d Dept 1926).

On the question of the outstanding real estate bill, the tenant Learsy does not seriously disagree that the taxes must eventually be paid. The arrears could be explained by the fact that the 2009 rent is less than the apartment's carrying charges.

However, the counterclaim must be dismissed. A landlord cannot recover attorney's fees in an action commenced by the tenant for a judicial declaration of her rights under a lease because the tenant has not defaulted in the performance of any

lease obligation. Braun v 941 Park Ave, Inc, 32 AD3d 21 (1st Dept) ly denied 7 NY3d 717 (2006).

Accordingly, it is

ORDERED that the plaintiff's cross-motion to strike, preclude and compel is denied; and it is further

ORDERED that the branch of the defendant's motion which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted with costs and disbursements to defendant as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that a monthly rent of \$4,141.69, is a good faith estimate of 120% of the expected carrying charges for the calendar year 2010; and it is further

ORDERED that the branch of defendant's motion which seeks dismissal of the complaint is granted to the extent that the second, third and fourth causes of action are dismissed; and it is further

ADJUDGED that the second, third and fourth causes of action, and the counterclaim are all dismissed; and it is further

ADJUDGED that the defendant having an address at 320 East 39th Street, New York, NY 10016, do recover from the plaintiff, Florence Learsy, having an address at Apt. 4D, 444 East 57th Street, New York, NY 10021, costs and disbursements as taxed by

the Clerk upon the submission of an appropriate bill of costs and defendant have execution therefor.

This is the decision and order of the court.

Dated: JUN 29 2011

ENTER:

Debra A. James J.S.C.

DEBRA A. JAMES

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).