

**Matter of 233-5 Realty LLC v Sheehan**

2011 NY Slip Op 32811(U)

October 25, 2011

Sup Ct, NY County

Docket Number: 106393/11

Judge: Donna M. Mills

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

IN THE MATTER OF APPLICAITON OF  
233-5 REALTY LLC,

Plaintiff,

-against-

MICHAEL SHEEHAN,

Defendant.

INDEX NO. 106393/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

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

1-4

Answering Affidavits- Exhibits \_\_\_\_\_

5-6

Replying Affidavits \_\_\_\_\_

CROSS-MOTION:  YES  NO

**FILED**

**OCT 26 2011**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION. NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/25/11

*Donna M. Mills*  
J.S.C.  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----  
IN THE MATTER OF APPLICATION OF  
233-5 REALTY LLC.,

INDEX NO.  
106393/11

**FILED**

**OCT 26 2011**

Plaintiff,

- against -

MICHAEL SHEEHAN,

NEW YORK  
COUNTY CLERK'S OFFICE

Defendant.

-----  
**DECISION/ORDER**

**Justice Donna M. Mills  
I.A.P. 58**

This action was brought against the defendant for unpaid rent resulting from defendant's alleged breach of a lease agreement, plus expenses under said lease to re-rent defendant's apartment, including returned check fee, based on defendant's early termination of lease without notice to owner.

Plaintiff brings this motion to remove and transfer the action from the New York City Civil Court to the New York County Supreme Court. Plaintiff, acknowledges commencing the action in the Civil Court by mistake since clearly the summons and endorsed complaint sought damages in excess of \$25,000.00. Defendant's do not oppose this branch of Plaintiff's motion so this action will be removed and transferred to this Court.

Plaintiff also seeks partial summary judgment against the Defendant. Defendant opposes summary judgment and cross moves to disqualify Plaintiff's counsel, Alan E. Rabunski, pursuant to 22 NYCRR §1200.29 the advocate witness rule. In opposition to Defendant's cross motion, Plaintiff's counsel has withdrawn from

representing plaintiff and filed simultaneously with its opposition papers, a Substitution of Counsel, which designates Robert Ehrenfeld, Esq., of the firm of Cohen Hurkin Ehrenfeld Pomerantz and Tenenbaum, LLP, as the attorneys for plaintiff.

### **FACTUAL ALLEGATIONS**

From 2005 to September 30, 2010, defendant Sheehan was a rent stabilized tenant of plaintiff 233-5 Realty LLC, and resided in Apartment D, at the subject premises, pursuant to a written lease. The lease was most recently renewed by lease renewal dated January 1, 2010, for a two year period commencing May 1, 2010 and ending on April 30, 2012. Defendant admits that in the Summer of 2010 he brought a dog as a pet to live with him in the apartment. There is no dispute that the lease contained a "no pet" clause. There is a dispute, however, as to when the building superintendent became aware of the fact that the Defendant had the dog in his apartment. Sometime, in September, 2010, Defendant spoke with Plaintiff's counsel who informed him that he had to remove the dog from the apartment or vacate the premises. Defendant vacated the apartment and turned over the keys to Plaintiff's superintendent on September 29, 2010.

Plaintiff was able to re-rent the subject apartment in May 2011 for \$1,599.00 a month. Plaintiff now brings this action to collect the monthly rent in the amount of \$1,987.25 from September 2010 through April 30, 2011, and the difference between Defendants monthly rent and the new tenant's monthly rent from May 1, 2011 through April 30, 2012. Plaintiff also seeks an award for damages done to the property upon defendant vacating same.

## DISCUSSION

Plaintiff seeks summary judgment as a consequence of defendant's early termination of the subject lease. Defendant opposes the motion on the grounds that the lease was terminated by operation of law based on the conduct of the parties surrounding the defendant vacating the apartment.

"A surrender by operation of law occurs when the parties to a lease do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated" (*Riverside Research Inst. v. KMGA, Inc.*, 68 N.Y.2d 689, 692, 506 N.Y.S.2d 302, 497 N.E.2d 669 [internal citations omitted] ). A surrender by operation of law is inferred from the parties' conduct (*id.*), where not only must the tenant abandon the premises, but the landlord must accept the premises as a surrender ( *see Daggett v. Champney*, 122 App.Div. 254, 256, 106 N.Y.S. 892). The mere retention of keys to the premises by the landlord after the tenant has returned them does not alone constitute a surrender by operation of law ( *see Thomas v. Nelson*, 69 N.Y. 118). Whether or not a surrender by operation of law has occurred in a particular case is a factual determination ( *see Riverside Research Inst. v. KMGA, Inc.*, 68 N.Y.2d at 692, 506 N.Y.S.2d 302, 497 N.E.2d 669; *Brock Enters. v. Dunham's Bay Boat Co.*, 292 A.D.2d 681, 682, 738 N.Y.S.2d 760). Here, the defendant has raised triable issues of fact regarding plaintiff's intent in re-letting the premises and whether or not it accepted control and possession of the subject premises upon retaining the keys from the defendant in September 2010 ( *see generally Stahl Assoc. Co. v. Mapes*, 111 A.D.2d 626, 630, 490 N.Y.S.2d 12; *cf. 80 State St. v. Allwen, Inc.*, 6 A.D.3d 978, 978-979, 774

N.Y.S.2d 889).

Additionally, as a general rule, "under CPLR 3212 (f), 'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied . . . . This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion' " (Juseinoski v New York Hosp. Med. Ctr. Of Queens, 29 AD3d 636, 637 [2006], quoting Baron v Incorporated Vil. of Freeport, 143 AD2d 792, 792-793 [1988]). As such this Court finds that summary judgment is premature since the parties have not laid bare their proof and chartered a summary judgment course.

Accordingly, for the reasons stated above, it is

ORDERED that the venue of this action is changed from the New York Civil Court, County of New York, to this Court and the Clerk of the Civil Court, County of New York, is directed to transfer the papers on file in this action (Index NO. 067031/10) to the Clerk of the Supreme Court, County of New York, upon service by movant of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the Clerk of the Supreme Court, New York County, upon receipt of a copy of this order with notice of entry, shall, without further fee, assign a New York County index number to the file transferred pursuant to this order; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied, as premature, without prejudice. and it is further

ORDERED that Defendant's cross motion disqualifying plaintiff's counsel is denied as moot; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 12/9, 2011, at 10:00 AM.

Dated: 10/25/11

ENTER:

*DM*  
J.S.C.

DONNA M. MILLS, J.S.C.

**FILED**

OCT 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE