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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden, Justice PART 11

Index Number : 115438/2010
LEVINSON, MARK
vs.
BAILEY, ROGER
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/17/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

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

FILED
JUN 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 15, 2012

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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MARK LEVINSON ,

Plaintiff,

INDEX NO. 115438/10

-against-

ROGER BAILEY and TONY GUETTI,

Defendants

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JOAN A. MADDEN, J.:

In this action alleging a breach of a lease agreement for a condominium unit, plaintiff moves for an order (i) granting him summary judgment on his first cause of action against defendants in an amount to be determined by the court but in no event less than $23,170, (ii) dismissing with prejudice defendants' first, second and third affirmative defenses, and (iii) dismissing defendants' first and second counterclaims. Defendants oppose the motion, and cross move to dismiss the action.

Background

In this action, plaintiff seeks to enforce defendants' obligations under an alleged lease agreement between plaintiff, as landlord, and defendants, as tenants, for the premises located at 140 7th Avenue, Unit 1-E, New York, NY ("the Premises").

In November 2010, plaintiff commenced this action by filing a summons and complaint. The first and only cause of action for breach of contract alleges that the parties entered into lease for the Premises dated September 14, 2007 for a three-year term commencing on October 1, 2007 and ending September 30, 2010. The complaint alleges that under the lease, defendants were obligated to pay: for the period of October 1, 2007 through September 30, 2008, monthly rent of

$3,500; for the period October 1, 2008 through September 30, 2009, monthly rent of $3,640; and for the period October 1, 2009 through September 30, 2010, monthly rent of $3,780.

The complaint alleges that defendants stopped paying rent after vacating the Premises in October 2009, and seeks damages for the rent due at owing from October 1, 2009 through September 30, 2010. Specifically, plaintiff seeks for the period between October 2009 and December 2009, when the Premises was vacant, three months rent at a rate of $3,780 per month, and for remainder of the lease term, the difference between the rent due under the lease and the rent amount of $2,900 per month paid by the replacement tenant who took possession of the Apartment on January 1, 2010. Plaintiff also seeks to recovery various costs and expenses arising from defendants' breach of the lease in accordance with paragraph 23(D) of the lease.

By notice of motion dated January 6, 2011, defendants moved for an order requiring plaintiff to correct the complaint, asserting that they could not frame a response to it as plaintiff had failed to attach a fully executed copy of the lease agreement identified in the complaint. In its decision and order dated April 7, 2011, the court granted defendants' motion to the extent of requiring plaintiff to provide a copy of the fully executed lease agreement between the parties. In compliance with this directive, plaintiff produced a lease dated September 15, 2007.

Defendants then moved to dismiss the complaint and to hold plaintiff in contempt due to the one day discrepancy between the September 14, 2007 date of the lease alleged in the complaint, and the date of the September 15, 2007 lease which plaintiff produced. Plaintiff cross moved for sanctions and attorneys' fees. By decision and order dated July 14, 2011, the court denied the motion and cross motion and directed plaintiff to serve and file an amended complaint and for defendants to answer it.

Plaintiff filed and served an amended complaint which is substantially the same as the original complaint, except that it alleges that defendants breached the September 15, 2007 lease produced by plaintiff and annexed a copy of the September 15, 2007 lease to the amended complaint. Defendants filed an answer in which they asserted the affirmative defenses alleging that (1) the September 15, 2007 lease was not genuine, (2) defendants were month-to-month tenants or tenants at will, (3) failure to mitigate, and (4) failure to state a cause of action. Defendants also asserted two counterclaims. The first counterclaim alleges that plaintiff engaged defendant Roger Bailey ("Bailey") to perform certain remodeling services at the Premises and did not pay him, and the second counterclaim alleges that plaintiff failed to return defendants' security deposit.

Plaintiff now moves for summary judgment on its first cause of action based on a September 14, 2007 lease signed by defendants but not plaintiff (hereinafter the "September 14 Lease"), plaintiff's affidavit, the invoices evidencing defendants' arrears, and a copy of the lease with the replacement tenant. Plaintiff asserts that the September 15, 2007 lease described in the amended complaint and attached thereto is not the actual lease between the parties but is a draft lease.

Plaintiff also argues that defendants' affirmative defenses are without merit and should be dismissed.. As for the counterclaims, plaintiff asserts that the first counterclaim is insufficient as it fails to allege any contract existed between him and defendant Bailey, and that, in any event, that plaintiff had an informal agreement with Bailey to forgive certain rent in exchange for Bailey performing such services and that such services were fully paid. With respect to the second counterclaim, plaintiff notes that the lease provides that in the event of a breach, plaintiff

may retain the security deposit.

Defendants oppose the motion, asserting that the documentary evidence establishes that there are various drafts of the purported lease agreement between the parties, thus raising issues of fact as to whether a lease governed the obligations of the parties, or whether defendants had a month-to-month tenancy. In support of their position, defendants submit four copies of the lease: (1) a copy of the September 14 Lease, (2) a copy dated September 15, 2007, which appears to be signed by plaintiff and defendants, (3) a copy dated September 14, 2007 which appears to be signed by defendants and an employee of plaintiff named Connie Wilson, and (4) a copy dated September 14, 2007 which appears to be signed by defendants, and has a minor typographical error on the last page. Defendants also argue that while they signed the September 14 Lease, it is not enforceable as it was never mailed to them or executed by plaintiff.

In support of their position, defendants submit their affidavits. In his affidavit, Bailey states that in or about August 2007, he was presented with a copy of the September 14 Lease which he and defendant Tony Guetti ("Guetti") signed; however, he asserts the plaintiff rejected this lease "because [defendant Tony] Guetti and I would only agree to have the lease in both of our names and Plaintiff wanted only one tenant on the lease. This lease was never delivered to me fully executed. I confirm that the signature that appears therein is genuine" (Bailey Aff. ¶ 2). He also states that he does not recall seeing that September 15, 2007 lease, until it was produced by plaintiff's attorney in April 2011, and that although signature on the lease appears to be his "I cannot understand how my signature could appear on a document which I have never seen before" (Id, ¶ 3). According to Bailey, he has never saw the copy of the version of the September 14, 2007 lease executed by Connie Wilson and has never received a "lease full executed" and

that he "doubts the genuineness of my signature therein as well as that of Connie Wilson's and I say that as to Connie's Wilson based on a comparison of her signature...[on] as letter dated April 14, 2006"(Id, ¶ 4).

Like Bailey, Guetti states that he signed September 14 Lease, but that plaintiff rejected it as it was in his name and Bailey's name and that fully executed lease was never delivered. Guetti also states that he did not see the September 15, 2007 lease until it was produced in discovery and states that the signature on the lease is not his signature. He also states that he never saw the lease signed Connie Wilson and states that he doubts the genuineness of her signature.

Defendants also contend that there are issues of fact as to whether Bailey was paid for the remodeling work he performed, and that as they are residential tenants, plaintiff had a duty to mitigate his damages. Defendants further argue that the amended complaint should be dismissed as it is based on the September 15, 2007 lease, which plaintiff concedes is not the lease governing the relationship between the parties.[1]

In reply, plaintiff asserts that the defendants have mischaracterized virtually identical drafts of the Lease as different lease agreements. Plaintiff also notes that defendants do not deny signing the September 14 Lease, or ratifying their obligations under the lease by their conduct, including paying rent for two years in the amount provided in the lease.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

[1] Defendants also argue that there are issues of fact as to whether a three-year lease is void under the Condominium's rules. This argument is without merit as the condominium's subletting policy is irrelevant to defendants' obligations under the Lease.

material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, plaintiff has made a prima facie showing that defendants breached the lease by failing to pay rent for the Premises during the period from October 2009 through September 2010, and defendants have not controverted this showing. Under New York law, a contract for the sale or lease of real property, must be signed by the party charged (General Obligations Law § 5-703(2)). Here, the defendants, the party charged with the obligations under the lease, concede that they signed the September 14 Lease. Morever, contrary to defendants' position, that plaintiff did not sign the lease does not prevent plaintiff from enforcing defendants' obligations thereunder.[2] See Kaplan v. Lippman, 75 NY2d 320, 324, n.4 (1990)("the absence of the signature of the party seeking to enforce the agreement is without legal significance"); Vista Properties, LLC v. Rockland Ear, Nose & Throat Associates, P.C., 60 AD3d 846 (2d Dept), lv dismissed, 12 NY3d 900 (2009); 1407 Broadway Real Estate LLC v. H.C.A. Leasing Corp., 2009 WL 3268572 (Sup Ct NY Co. 2009).

Furthermore, that there are various copies of the lease in existence is insufficient to raise

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[2]At oral argument, counsel for defendants asserted that the failure of plaintiff to deliver a fully executed lease rendered it ineffective based on a provision above the signature line of the Lease entitled "Signatures, effective date," which states that "Landlord and Tenant have signed this Lease as of the above date. It is effective when the Landlord delivers to the Tenant a copy signed by all the parties." However, this provision relates to the date that the signatures are effective and cannot be interpreted as meaning that the landlord's failure to sign the lease invalidates the lease.

an issue of fact precluding summary judgment since the material terms of the September 14 Lease signed by defendants, including the amount of rent due each month, are the same in each copy of the lease. And, plaintiff's error in the amended complaint in alleging that the defendants breached the lease dated September 15, 2007, and including a copy of that lease, is not fatal to plaintiff's claim, as the material terms of the September 15, 2007 are the same as those contained in the September 14 Lease.

In addition to signature of the party charged, delivery of a lease is required in order for a lease to be effective. See 219 Broadway Corp. v. Alexander's, Inc., 46 NY2d 506, 511 (1979). In this case, while defendants assert that September 14 Lease was not mailed to them, the delivery requirement was nonetheless met. In determining whether a delivery of a lease or other interest in real property has occurred the court looks at whether the "acts or words or both acts and words (of the parties) ... clearly manifest that it is the intent of the parties that an interest in land is, in fact, being conveyed." Id.; see also, Anyang-Kusi v. Solomon, 24 Misc3d 140(A)(App. Term, 1st Dept 2009); Shulkin v. Dealy, 148 Misc2d 486 (Sup Ct. N.Y. Co. 1990). Here, delivery requirement was met based on the parties' conduct, including defendants' receipt of keys for the Premises from plaintiff, defendants' provision of a security deposit to plaintiff, and defendants' payment of rent to plaintiff in accordance with the lease during the two years defendants occupied the Premises. See e.g., Townhouse Company, LLC v. Williams, 307 AD2d 223 (1st Dept 2003)(granting summary judgment as to tenant's liability for rent under lease even though landlord failed to deliver lease where tenant paid two months rent); Storico Development, LLC v. Batle, 9 AD3d 908(4th Dept 2004) (delivery requirement met when tenant paid a security deposit and first months rent); Cayea v. Lake Placid Granite Co., Inc., 245 AD2d 659 (3d Dept

1997)(delivery requirement met where parties manifested an intent to convey interest in real property).

Next, the affirmative defenses and counterclaims asserted by defendants are insufficient to raise an issue of fact. With respect to the first affirmative defense, which alleges that September 15, 2007 lease is not genuine, such defense is irrelevant as defendants admit to signing the September 14 Lease and, as stated above, the material terms of the leases do not differ. The second affirmative defense, which alleges that defendants are month-to-month tenants or tenants at will, must be dismissed as the September 14 Lease is valid for the reasons above and establishes the nature of the defendants' tenancy. As for the third defense, failure to mitigate, paragraph 23(D) of the lease expressly states that plaintiff does not have a duty to re-rent the unit in the event plaintiff takes back the Premises due to the tenant's default, and in any event, plaintiff did mitigate its damages by re-letting the Premises in January 2010. The last affirmative defense, failure to state a cause of action is without merit as, for the reasons above, the complaint is sufficient to state a claim.

The first counterclaim, which seeks to recovery monies due and owing Bailey for certain work he performed at the Premises, must be dismissed as plaintiff has submitted uncontroverted evidence that Bailey was paid for this work through reductions in the rent. The second counterclaim, which seeks the return of defendants' security deposit is not viable since the lease expressly permits the plaintiff to retain the deposit in the event he suffers damages as a result of defendants' failure to perform under the lease. See Lease, ¶ 6

Accordingly, plaintiff is entitled to summary judgment on its breach of contract claim and to recover $11,340.00 for rent for October through December 2009, and $7,900 for the difference

between the rent due under the September 14 Lease and the $2,900 a month in rent paid by the replacement tenant for a total of $19,340, plus various fees,[3] and other expenses and costs associated with defendants' premature vacating of the Premises (less the security deposit) in accordance with Paragraph 23(D) of the lease,[4] with the amount of such fees, expenses and costs to be determined by a Special Referee as directed below.

In view of the above, it is

ORDERED that plaintiff is entitled to summary judgment on the first cause of action, and with respect to that part of the cause of action seeking rent due and owing under the lease, the Clerk is directed to enter judgment in favor of plaintiff Mark Levinson and against defendants Roger Bailey and Tony Guetti in the amount of $19,340, plus interest from March 15, 2012, at the statutory rate, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that issue of the amount due to plaintiff from defendants for legal fees, brokers fees and other costs and expenses associated with re-letting the Premises as provided for

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[3]While plaintiff seeks to recovery attorneys' fees expended in prosecuting this action as a prevailing party under the lease, there is no provision in the lease for recovery of such fees. In addition, paragraph 23(D), on which plaintiff relies, provides only for the recover of legal fees associated with getting possession of, and re-renting the Premises, and not attorneys' fees expended in seeking damages for unpaid rent and other costs associated with the tenant's premature vacating of the Premises.

[4]Paragraph 23(D)(2)&(3) of the Lease provide respectively, in relevant part, that in the event the Tenant defaults and the Landlord re-lets the Premises, "[l]andlord may, at Tenant's expense, do any work Landlord feels is needed to put the Unit in good repair and prepare for renting. Tenant remains liable and is not released in any manner...," and that "[a]ny rent received by Landlord for re-renting shall first be used to pay Landlord's expenses and second to pay any amounts Tenant owes under the Lease. Landlord's expenses include the costs of getting possession, and re-renting the unit, including but not only, reasonable legal fees, brokers fees, cleaning and repairing costs, decorating costs and advertising costs."

in Paragraph 23(D) of the lease, less the amount of the security deposit, is referred to Special Referee to hear and report with recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), shall assign this matter to a Special Referee to hear and report as specified above; and it is further

ORDERED that counsel for plaintiff shall, on or before July 20, 2012, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the failure of plaintiff to comply with the immediately preceding paragraph shall result in the dismissal of that part of the first cause of action seeking the fees, costs, and expenses associated with re-letting the Premises; and it is further

ORDERED that the parties shall appear at the hearing, including with any witnesses and/or evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special

Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that defendants' cross motion to dismiss is denied.

Dated: June 15 2012

J.S.C.