

Solomon v Ness

2012 NY Slip Op 33726(U)

October 19, 2012

Supreme Court, New York County

Docket Number: 1522/12

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MORDECAI SOLOMON and MELANY SOLOMON,

Plaintiffs,

- against -

SETH NESS and JUDITH NESS,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 1522/12
Motion Seq. Nos.: 01, 02
Motion Dates: 07/31/12
07/31/12

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 02), Affirmations and Exhibits</u>	<u>2</u>
<u>Affidavit in Opposition to Cross-Motion and Further Support of Motion Seq. No. 01 and Exhibits</u>	<u>3</u>
<u>Reply Affirmations in Further Support of Cross-Motion and Exhibits</u>	<u>4</u>
<u>Reply Affirmation in Further Support of Motion Seq. No. 01 and in Opposition to Cross-Motion</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3212, for an order granting partial summary judgment on their first counterclaim. Plaintiffs oppose the motion and cross-move (Seq. No. 02), pursuant to CPLR § 3025, for an order granting them leave to file an Amended Complaint; and cross-move, pursuant to CPLR §§ 3211 and 3212, for an order granting them partial summary judgment with respect to their first cause of action in the Complaint, striking defendants' defenses contained in the Answer and awarding plaintiffs a monetary judgment in the amount of \$29,424.24,

with the right to seek additional amounts as necessary and warranted; and cross-move, pursuant to CPLR §§ 3211 and 3212, for an order granting them summary judgment with respect to their second cause of action in the Complaint, for costs and disbursements, including reasonable attorneys' fees in the amount of \$7,604.19 and granting plaintiffs a monetary judgment in that amount, with the right to seek additional sums as necessary and warranted; and cross-move, pursuant to CPLR §§ 3211 and 3212, for an order granting them summary judgment with respect to defendants' counterclaims and dismissing said counterclaims with prejudice. Defendants oppose the cross-motion.

Defendants executed a lease with plaintiffs to utilize plaintiffs' residence located at 357 Felter Avenue, Woodmere, New York, ("the Premises") for residential purposes. The lease term was for one (1) year, commencing on August 1, 2011, and ending on July 31, 2012. Pursuant to the lease, the monthly rent was \$3,000.00 and the security deposit was \$6,000.00. The lease was executed on July 17, 2011, and defendants delivered a check to plaintiffs in the amount of \$9,000.00, of which \$3,000.00 was for the first month's rent and \$6,000.00 (the "security deposit") was for the security deposit required under the lease. Defendants contend (*see* Defendants' Affirmation in Support ¶ 11) that they moved into the Premises on August 1, 2011, and that certain conditions which were to be corrected by plaintiffs prior to said date were not performed, including the installation of a smoke detector and carbon monoxide detector and a new cook top in the kitchen. Therefore, defendants argue that plaintiffs were in violation of the lease as of August 1, 2011. On or about September 4, 2011, defendants left the Premises and provided plaintiffs with the keys and a note regarding the use of the security deposit. *See* Defendants' Affirmation in Support Exhibit A ¶ 35. At that time, defendants also provided an additional \$3,000.00 check as

and for rent for September 2011. *See* Defendants' McMahon Affirmation in Support ¶ 15. Plaintiffs listed the Premises for sale and a closing took place on January 17, 2012.

Plaintiffs instituted this action on February 6, 2012, seeking damages for defendants' alleged breach of the lease agreement, from October 1, 2011 through January 16, 2012.¹ Defendants, in their Answer, counterclaimed for the return of their \$6,000.00 security deposit pursuant to General Obligations Law ("GOL") § 7-103.² Defendants now move for partial summary judgment on their first counterclaim. Plaintiffs cross-moved for summary judgment as to liability on defendants' alleged breach of the lease and on the amount of damages. Plaintiffs also moved to amend their Complaint to hold defendants liable for the entirety of the lease (August 1, 2011- July 31, 2012) even though plaintiffs sold the premises on January 17, 2012.

Plaintiffs argue that defendants' summary judgment motion should be denied because they did not breach the lease as the corrected conditions required pursuant to the lease were performed prior to the date the defendants moved in, to wit: August 18, 2011. *See* Plaintiffs' Prabhu Affirmation in Support ¶ 87. Further, plaintiffs argue that, pursuant to defendants' September 4, 2011 letter, plaintiffs were authorized to utilize the \$6,000.00 security deposit to mitigate any damages sustained. *See id.* at ¶ 49.

The crux of defendants' argument for partial summary judgment is that, in violation of GOL § 7-103, plaintiffs failed to send defendants written notice of the banking institution where the security deposit was deposited, the amount deposited and the account number utilized for this purpose. *See* Defendants' Goldberg-Ness Affirmation in Support at ¶ 4. Defendants further contend

¹ *See* Defendants' Affirmation in Support Exhibit D.

² *See* Defendants' Affirmation in Support Exhibit E ¶ 29.

that plaintiffs commingled the security deposit with their personal funds in violation of the GOL § 7-103. *See id.* It is important to note that at page 1, paragraph 4 of the lease sets forth in pertinent part, that “such security may be commingled with the landlord’s general funds and shall not bear interest.”

GOL § 7-103 provides in pertinent part, that whenever the person receiving money so deposited or advanced shall deposit such money in a banking organization, such person shall thereupon notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit. In addition, subparagraph (3) of GOL § 7-103 specifically states that “any provision of such a contract or agreement whereby a person who so deposits or advances money waives any provision of this section is absolutely void.” Further, such commingling constitutes a conversion, as well as a breach of fiduciary duty (*see LeRoy v. Sayers*, 217 A.D.2d 63, 635 N.Y.S.2d 217 (1st Dept 1995)) and, regardless of any noncompliance by the tenant with the terms of the lease, it entitles the tenant to an immediate return of the deposit. *Id.* In the event of such commingling, the landlord may not use any portion of the deposit even for otherwise legitimate purposes. *See id.*; *Dan Klores Assoc. v. Aramoff*, 288 A.D.2d 121, 733 N.Y.S.2d 388 (1st Dept. 2001).

Plaintiffs agree that the waiver of the rules of GOL § 7-103 as set forth in the lease are void, but contend that since defendants instructed plaintiffs to utilize the security deposit, defendants are no longer entitled to receive their deposit back. *See* Plaintiffs’ Prabhu Affirmation in Support ¶ 49. Further, plaintiffs contend that the kitchen cook top was in place and a smoke and carbon monoxide detector were installed in the premises prior to defendants taking possession of the Premises. *See id.* at ¶ 86. Plaintiffs claim defendants moved in on August 18, 2011. *See id.* at ¶ 12.

On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 A.D.3d 70, 778 N.Y.S.2d 98 (2d Dept 2004) *aff'd as mod.* 4 N.Y.3d 627, 797 N.Y.S.2d 403 (2005) *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Once the movant has met their burden of proof, the burden shifts to the opposing party to provide proof of material issues of fact in dispute. *See Alvarez v. Prospect Hospital, supra* at 324.

Plaintiffs request that the Court find that, the fact that, subsequent to entering into the lease agreement, defendants advised in their September 4, 2011 letter that plaintiffs were to use the security deposit for mitigation of the landlord's damages, serves as a bar to the tenant's claim under GOL § 7-103. This Court does not find that to be the case. GOL § 7-103 cannot be any more clear. The waiver of the terms of GOL § 7-103 is a violation of the statute and is phrased as if the scrivener of said lease was well aware of its existence and clear language. Therefore, the Court finds summary judgment in favor of defendants with regard to the \$6,000.00 security deposit, plus interest. Further, plaintiffs have failed to meet their burden for summary judgment and therefore, that portion of their cross-motion is **DENIED**.

With regard to that portion of plaintiffs' cross-motion for leave to amend their Complaint, in the form annexed as Exhibit M to their moving papers, C.P.L.R. § 3025(b) states that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Prejudice is the main barrier, and defendants failed to show any prejudice if this Court were to allow plaintiffs'

Complaint to be amended. Although the Court is unsure of the feasibility of such an argument, CPLR § 3025(b) warrants the allowance of the amended pleading. Although the Court's have become more prone to look into the merits of proposed amendments, in *Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008), the Court opined that if there is a sustainable merits attack that can be made against the proposed new claim, it should be raised by the defendant afterwards, as on a motion for summary judgment. Therefore, plaintiffs' request to amend the Complaint is **GRANTED**.

Accordingly, defendants' motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting partial summary judgment on their first counterclaim is hereby **GRANTED**.

That portion of plaintiffs' cross-motion (Seq. No. 02), pursuant to CPLR § 3025, for an order granting them leave to file an Amended Complaint is hereby **GRANTED**.

Plaintiff is directed to serve the Amended Complaint, in the form annexed as Exhibit M to their cross-motion, upon all parties herein by November 5, 2012. A copy of this Order shall be served with those papers.

However, those portions of plaintiffs' cross-motion (Seq. No. 02), pursuant to CPLR §§ 3211 and 3212, for an order granting them partial summary judgment with respect to their first cause of action in the Complaint, striking defendants' defenses contained in the Answer and awarding plaintiffs a monetary judgment in the amount of \$29,424.24, with the right to seek additional amounts as necessary and warranted; for an order granting them summary judgment with respect to their second cause of action in the complaint, for costs and disbursements, including reasonable attorneys' fees in the amount of \$7,604.19 and granting plaintiffs a monetary judgment in that amount, with the right to seek additional sums as necessary and warranted; and for an order granting them summary judgment with respect to defendants' counterclaims and dismissing said

counterclaims with prejudice are hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on December 3, 2012, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 19, 2012

ENTERED
OCT 22 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE