

Sherman v Elliott

2013 NY Slip Op 30384(U)

February 8, 2013

Supreme Court, New York County

Docket Number: 113245/2011

Judge: Lucy Billings

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

PRESENT: _____
Justice

PART 44

Index Number : 113245/2011
SHERMAN, HELENE S.
vs.
WALDO ELLIOTT, CATHERINE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 2, were read on this motion ~~to~~ for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1
2

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants plaintiff's motion for summary judgment to the limited extent set forth, but otherwise denies her motion, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (c).

FILED

FEB 22 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/8/13

Lucy Billings

LUCY BILLINGS

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----x

HELENE S. SHERMAN,

Index No. 113245/2011

Plaintiff

- against -

DECISION AND ORDER

CATHERINE WALDO ELLIOTT, aka
CATHERINE WALDO, and ERIC ELLIOTT,

FILED

Defendants

FEB 22 2013

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LUCY BILLINGS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, an attorney, moves for summary judgment against defendants, her former tenants, for breach of their lease, seeking (1) \$14,550.00 in rent due both before defendants vacated the rental unit and over the balance of the lease and (2) \$970.40 for damage to the unit. C.P.L.R. § 3212(b) and (e). After oral argument, for the reasons explained below, the court grants plaintiff's motion to the limited extent set forth, but otherwise denies her motion.

I. THE UNDISPUTED LEASE PROVISIONS

Plaintiff authenticates the parties' lease, which "Defendants signed," extending from January 15, 2011, through January 30, 2013, and providing for \$2,400.00 per month in rent, a \$2,400 security deposit, a \$250.00 move-in fee, and a \$250.00 move-out fee. Aff. of Helene S. Sherman ¶ 10. The lease expressly specifies that the security deposit may not be applied to the "last month's rent." Id. Ex. 4 ¶ 4(A).

The lease further provides that:

If this Lease is cancelled, or Landlord takes back to Unit, . . .

- (1) . . . rent for the unexpired term becomes due and payable. . . .
- (2) Landlord may re-rent the Unit Landlord may charge any rent or no rent Landlord may, at Tenant's expense, do any work Landlord feels is needed to put the Unit in good repair and prepare it for renting.
- (3) Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses and second to pay any amounts Tenant owes under this Lease.

Id. Ex. 4 ¶ 23(D). Since plaintiff permitted defendants to keep their two dogs in the unit, ¶ 39(5) also applies:

Tenant shall be wholly responsible for any damage (even ordinary wear and tear) which is caused by Tenant's pet, including but not limited to replacement of carpet, tile, or repainting at the end of Tenant's lease term, if such replacement, repair or repainting is made necessary due to the behavior of Tenant's pet.

Id. Ex. 4. The parties do not dispute that defendants vacated the rental unit at the end of September 2011, well before the end of the lease term, without paying the \$250.00 move-out fee, and owing \$1,500.00 in rent for August 2011 and \$2,400.00 for September 2011.

II. PLAINTIFF'S CLAIMS

Plaintiff seeks the \$3,900.00 in rent for the last two months of defendants' occupancy; the \$250.00 move-out fee; \$4,800.00 for October and November 2011, when she was unable to re-rent the unit; and \$400.00 per month or \$5,600.00 for the balance of defendants' lease term, representing the difference between their rent and the \$2,000.00 per month at which she re-rented the unit. Plaintiff claims that the delay in re-renting

the unit was due to the cleaning and repair of the unit, "including painting and installing new flooring," that she performed, id. ¶ 14, because defendants left "scratches on . . . every wall," id. ¶ 13, "the carpeting ruined," id. ¶ 12, a "chewed up door handle" and "broken blinds." Id. ¶ 29. She shows cleaning and repair expenses totalling \$3,470.40, to which she applies defendants' \$2,400.00 security deposit, reducing her claim for property damage to \$970.40.

A. Lack of Evidence Supporting Plaintiff's Claims

Even if defendants' move from the unit did not release defendants from their lease obligations, but rendered "rent for the unexpired term . . . due and payable," id. Ex. 4 ¶ 4(A)(1), and even if plaintiff was permitted to "charge any rent or no rent" in re-renting, id. Ex. 4 ¶ 4(A)(2), she was obligated to apply "any rent" she did receive to the amounts she claims defendants owe under the lease. Id. Ex. 4 ¶ 4(A)(3). Yet plaintiff presents no admissible evidence of when her re-rental began or of the rent charged or received for that re-rental. She does not indicate that, unlike her lease with defendants, the re-rental was pursuant to an oral rental agreement. Thus nothing suggests that her mere statement that she was "able to rent the unit . . . to a new tenant for \$2,000.00 per month" is anything but a recitation of written lease terms and thus hearsay. Id. ¶ 15. See People v. Joseph, 86 N.Y.2d 565, 570 (1995); Schozer v. William Penn Life Ins. Co. of N.Y., 84 N.Y.2d 639, 643 (1994); Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44

A.D.3d 317, 318 (1st Dep't 2007); Washington v. Montefiore Medical Ctr., 9 A.D.3d 271, 272 (1st Dep't 2004). In fact, she does not even state that she actually did rent for \$2,000.00 per month, nor does she present any account of the rent actually received. Therefore no admissible evidence shows the amounts to be applied against plaintiff's claim of \$4,800.00 in rent for the months when the unit was vacant and \$5,600.00 for the balance of defendants' lease when plaintiff re-rented at a lower rate.

Regarding plaintiff's claim for damage to the rental unit, the lease permits plaintiff to charge defendants only for "work Landlord feels is needed to put the Unit in good repair and prepare it for renting," Sherman Aff. Ex. 4 ¶ 4(A)(2) (emphasis added), or for "replacement, repair or repainting . . . made necessary due to the behavior of Tenant's pet." Id. Ex. 4 ¶ 39(5) (emphasis added). While plaintiff substantiates her specific cleaning and repair expenses, she fails to show that they became "needed" because of defendants' occupancy, let alone "made necessary" by any first-hand account of their dogs' behavior. The photographs to which she refers, according to her own description, depict "the condition of the apartment before and after Defendants' occupancy." Id. ¶ 20. Yet she nowhere specifies exactly when, before defendants' occupancy, between plaintiff's acquisition of the unit and January 15, 2011, or when, after defendants' occupancy, between September 2011 and the filing of the complaint to which the photographs are attached, during the new tenant's occupancy, they depict the unit.

B. Defendants' Rebuttal to Plaintiff's Claims

Plaintiff supports her motion with defendants' verified Answer. Its sworn allegations are enough to raise factual issues regarding plaintiff's claims.

In defense to plaintiff's claims for the \$250.00 move-out fee, as well as \$4,800.00 in rent when the unit was vacant, and \$5,600.00 over the balance of defendants' lease, defendants insist that they were acceding to plaintiff's demands that they move out by the end of September 2011:

Landlord continuously asked us to leave She also said that if we did she would not commence litigation. She said to be out by 9/30/11. . . . We moved out so she could rereat the apartment as requested.

Id. Ex. 2 at 1-2.

In defense to plaintiff's claims for new flooring, repair and repainting of the walls, and cleaning in the rental unit, defendants attest that:

Carpets were already dirty and stained. She tried to clean but was unsuccessful. . . . Also there were holes in the walls from the previous tenant. There was also colored paint on walls from previous tenant. She never painted or repaired walls. . . . The dogs always stayed in foyer. . . . Bathrooms were cleaned

Id.

Defendants' opposition to plaintiff's motion corroborates and substantiates their sworn Answer. "She gave us a time to be out and we honored that." Aff. of Catherine Waldo and Eric L. Elliott at 2. "She has included damages prior to our moving in, i.e. holes in walls, damaged carpet." Id. at 1-2.

On the other hand, defendants nowhere dispute that they

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failed to pay \$1,500.00 of their rent due for August 2011 or their rent for September 2011. They indicate an expectation that their security deposit would be applied to the last month's rent, but the undisputed lease prohibits that setoff.

III. CONCLUSION

For the foregoing reasons, the court grants plaintiff's motion for summary judgment on her first claim for defendants' breach of their lease, to the extent of \$3,900.00 in undisputed rent arrears covering August and September 2011, when defendants leased and occupied plaintiff's rental unit, with interest at 9% per year from September 1, 2011, when rent for September 2011 was due. Id. Ex. 4 ¶ 4(A). The court otherwise denies her motion. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment of in favor of plaintiff and against defendants, individually and jointly, for \$3,900.00, with interest at 9% per year from September 1, 2011. The court will mail copies to the parties.

DATED: February 8, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

FILED

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J.S.C.