SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63
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Hotel Carlyle Owners Corporation,

Index No. 157070/12
Decision and Order

Plaintiff,

-against-

Murray Schwartz,

Defendant.
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Ellen M. Coin, J.:

Hotel Carlyle Owners Corporation (Hotel Carlyle) moves for an order compelling Murray Schwartz (Schwartz) to pay it outstanding maintenance of $124,504.40 (the Outstanding Rent) and currently accruing maintenance in the amount of $7,591.51 (the Monthly Rent) pending the resolution of this action and an action entitled *Murray Schwartz v Hotel Carlyle Owners Corp., The Carlyle LLC, The Carlyle, a Rosewood Hotel, New World Development Co., Alexandra E. Tscherne, Greg Dinella and Eric Steinbock,* pending in Supreme Court, New York County, index number 150229/2012 (the Related Action), or, alternatively, to deposit into court the Outstanding Rent and the Monthly Rent as it accrues.

Parties and Procedural Background

Hotel Carlyle is a cooperative corporation which owns and operates a building (the Building) located at 35 East 76th

Street, New York, New York (complaint, ¶ 2). Since May 20, 1993, Schwartz has been the proprietary lessee, pursuant to a proprietary lease (the Lease), and shareholder of shares for apartment 1418-1419 (the Apartment) in the Building (*id.*, ¶ 3; Burke affirmation dated August 20, 2013 [the First Burke Affirmation], ¶ 6).

On or about July 19, 2011, the Apartment suffered water damage due to a water leak (*id.*, ¶ 9; Related Action complaint, ¶ 2). In mid-August 2011, after some repair work was done in the Apartment, Schwartz instructed Hotel Carlyle and its managing agent to stop any further action to repair damage to the Apartment (First Burke Affirmation, ¶ 9; Schwartz EBT at 107-108). Hotel Carlyle gave Schwartz a complete rent abatement from August 2011 through April 2012 (First Burke Affirmation, ¶ 10). It then sought payment of rent as it accrued, but Schwartz has not paid any rent since that time (*id.*, ¶ 11).

Hotel Carlyle contends that the repairs to the Apartment could have been completed within two to four weeks after the work commenced (Murphy EBT at 35, 110-111; Coblin affidavit, ¶ 11). It seeks payment of the Outstanding Rent as use and occupancy in the amount of $124,504.40 for the period from April 1, 2012 through August 31, 2013 and the Monthly Rent thereafter as it accrues in the amount of $7,591.51, the amount Schwartz previously paid pursuant to the Lease. On or about October 10,

2012, Hotel Carlyle commenced this action.

On or about February 15, 2012, Schwartz commenced the Related Action, seeking damages arising from the water leak (Related Action complaint, ¶¶ 2-4). He also asserts that Hotel Carlyle and its employees trespassed into the Apartment, that personal property was taken, and that Hotel Carlyle "failed to fully disclose the truth about the loss and damage to [the] Apartment" (*id.*, ¶¶ 31, 41). He states that he would not feel safe returning to the Building, contending that the Apartment is unlivable and that therefore he should not have to pay either the Outstanding or Monthly Rent (Schwartz affidavit, ¶¶ 33, 40).

On March 20, 2013, Schwartz moved to dismiss this action based upon the pendency of the Related Action and on April 1, 2013, Hotel Carlyle cross-moved for a judgment of default against him for failure to interpose an answer. On June 5, 2013, the court issued an order (the June 2013 Order) resolving the motion and cross-motion. In the June 2013 Order, the court denied dismissal of the complaint, denied the cross-motion for a default judgment against Schwartz in this action, directed Schwartz to interpose an answer, and ordered that this action and the Related Action be consolidated for joint discovery and joint trial. On August 20, 2013, Hotel Carlyle brought this motion seeking payment of the Outstanding and Monthly Rent.

Use and Occupancy

Real Property Law § 220 provides, in pertinent part:

> "[T]he landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement. . . ."

Generally, "[i]n determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative" (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]). "[I]t has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis" (*Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]; *see also Oxford Towers Co., LLC v Wagner*, 58 AD3d 422, 423 [1st Dept 2009]). The same rule requiring a tenant to pay use and occupancy also does not permit a proprietary lessee "to withhold the monthly maintenance and other charges from the . . . co-operative corporation, which is but a formal association of [Schwartz's] fellow tenants, for an indefinite period of time" (*Caspi v Madison 79 Assoc.*, 85 AD2d 583, 583-584 [1st Dept 1981]).

Discussion

Schwartz asserts that due to the condition of the Apartment, he cannot reside there, and, accordingly, should not have to pay the Outstanding or Monthly Rent. Hotel Carlyle disputes

Schwartz's characterization of the Apartment's condition and asserts that to the extent that there are problems with it, they are due to Schwartz's instructions to cease repairs. Currently, the Apartment is under Schwartz's control, since Hotel Carlyle cannot enter it to make repairs without Schwartz's permission. Schwartz is, therefore, occupying the Apartment "rent-free" (*Oxford Towers*, 58 AD3d at 423; *see also Levinson*, 22 AD3d at 403).

The actual condition of the Apartment, the responsibility for delays in repairs and the amount of repair work needed are factual controversies that will be resolved at trial. In the interim, Schwartz's "pending claim cannot provide [him] with a license to withhold maintenance [f]rom the cooperative corporation for an indefinite time" (*Conforti v Carlton Regency Corp.*, 2013 WL 6919413 *12 [Sup Ct, New York County][citation omitted]; *Kanner v West 15th St. Owners*, 236 AD2d 341, 341-342 [1st Dept 1997]; *cf. 170 W. End Ave. Owners Corp. v Turchin*, 37 Misc 3d 1226(A) *8 [Civ Ct, New York County 2012]). Consequently, Hotel Carlyle's motion for an order compelling Schwartz to pay the Outstanding and Monthly Rent is granted.

Finally, Hotel Carlyle's arguments were not frivolous, made in bad faith or wrongful (*Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011]; *see also Costanza v Seinfeld*, 279 AD2d 255, 256 [1st Dept 2001]) and, accordingly, the court declines to impose

sanctions.

Order

It is, therefore,

ORDERED that the motion of Hotel Carlyle Owners Corporation for an order directing Murray Schwartz to pay the outstanding maintenance of $124,504.40 for the period from April 1, 2012 through August 31, 2013 is granted; and it is further

ORDERED that Murray Schwartz is directed to make such payment within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that Murray Schwartz is directed pay the accrued maintenance for the period from September 1, 2013 through February 1, 2014 at the rate of $7,591.51 per month within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that Murray Schwartz is directed to pay accruing maintenance at the rate of $7,591.51 until the resolution of this action and the action entitled *Murray Schwartz v Hotel Carlyle Owners Corp., The Carlyle LLC, The Carlyle, a Rosewood Hotel, New World Development Co., Alexandra E. Tscherne, Greg Dinella and Eric Steinbock,* pending in Supreme Court, New York County, index number 150229/2012, or until further order of this court.

This is the decision and order of the Court.

Dated: February 25, 2014

ENTER:

Ellen M. Coin, A.J.S.C.