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

MURRAY SCHWARTZ, Index No. 150229/2012

Plaintiff,

-against-

HOTEL CARLYLE OWNERS CORPORATION, THE CARLYLE LLC, THE CARLYLE, A ROSEWOOD HOTEL, NEW WORLD DEVELOPMENT CO., ALEXANDRA E. TSCHERNE, and GREG DINELLA,

Defendants.

HOTEL CARLYLE OWNERS CORPORATION, Index No. 157070/2012

Plaintiff,

-against-

MURRAY SCHWARTZ,

Defendant.

ELLEN M. COIN, A.J.S.C.:

In the second-captioned action herein defendant Murray Schwartz (Schwartz) moves pursuant to CPLR §§ 2221 and 5015(a) for reargument and renewal of the motion of plaintiff Hotel Carlyle Owners Corporation (Carlyle) for payment of maintenance, past and ongoing.

Previously, by order dated February 25, 2014, this Court granted so much of the Carlyle's motion as sought payment of outstanding maintenance for the periods from April 1, 2012 through August 31, 2013, September 1, 2013 through February 1, 2014, and thereafter monthly until resolution of these actions or

until further order of the Court.

The facts are set forth in this Court's order dated February 25, 2104, and need not be repeated here. However, it is pertinent to the instant motion that by order dated August 7, 2014, this Court determined the Carlyle's summary judgment motion in the first-captioned action.

In opposing the Carlyle's summary judgment motion, Schwartz alleged that the Carlyle impeded his ability to make the apartment habitable during the period from May 2012 to a date after October 2012, by refusing to permit Schwartz' contractor, All Pro Cleaning and Restoration Services, Inc. (All Pro), to continue its work at the apartment. The Court found that Schwartz' contention raised a triable issue of fact as to the extent of his damages for his claim of breach of the covenant of quiet enjoyment and breach of the provision for abatement of rent for the period from May 2012 to a date after October 2012.

In light of this factual issue, to the extent that the February 25, 2014 order required Schwartz to make payment of maintenance for such disputed period, the order must be vacated.

Schwartz argues that there was no procedural legal basis for this Court's order to pay any interim maintenance, and that such order violates his due process rights. Further, he contends that the motion was improperly converted to one for summary judgment.

While the Court announced that it was deeming the Carlyle's

motion as seeking summary judgment, ultimately, after reviewing all of the parties' submissions, the Court did not determine the motion on that basis. Instead, it awarded use and occupancy pending trial.

Schwartz fails to show that he should not be required to pay ongoing use and occupancy for the apartment on the ground that he suffered a constructive eviction. Such constructive eviction occurs when a tenant abandons the leased premises because the landlord has prevented the tenant from using the premises for the intended purposes. (*See Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]; *Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999]).

Here, however, the record is clear that Schwartz has been in control of the apartment at least since November 2012. (Affidavit of Murray Schwartz sworn to November 19, 2013 ¶25 at 6; Ex 10 to the Affirmation of Richard T. Ferko dated March 28, 2014). Thus, it is not the Carlyle that has prevented him from using the premises, but Schwartz himself, claiming that it is too emotionally painful for him to do so. (Schwartz Aff ¶¶ 33-34 at 8; Ex. 10 to the Ferko Aff.).

The Court rejects Schwartz' argument that requiring him to pay maintenance fees violates his due process rights. He is contractually obligated to do so. The Lease clearly provides that the "Lessee will pay the rent [at] the office of the Lessor

[without] any abatement of, or deduction, counterclaim or setoff against rent, except as otherwise provided in this Lease.... (Lease at 3; Ex. 1 to the Ferko Aff.). Such "no setoff" provisions are enforceable. (*See Dune Deck Owners Corp. v Liggett*, 34 AD3d 523, 524 [2d Dept 2006] [shareholders of cooperative waived right to any offset for arrears by agreeing to no offset provision]).

The Lease provides that in case "the damage resulting from fire or other cause shall be so extensive as to render the Apartment partly or wholly untenantable, the rent hereunder shall equitably abate until the Apartment shall again be rendered wholly tenantable...." (Lease; ¶ 1.3(b)). As Schwartz is now in control of the apartment, he cannot simultaneously claim that the apartment is untenantable and avoid restoring it while withholding maintenance. Indeed, his claim that the apartment is untenantable is undercut by his assertion that he has listed the apartment with a real estate broker for sale. (Schwartz Aff. ¶ 35 at 8).

The obligation to pay rent continues so long as the lessee is in possession of the premises. (*Lincoln Plaza Tenants Corp. v MDS Props. Dev. Corp.*, 169 AD2d 509, 512 [1st Dept 1991]; *Earbert Rest. v Little Luxuries*, 99 AD2d 734, 734 [1st Dept 1984]; *Conforti v Carlton Regency Corp.*, 2013 WL 6919413, *12 [Sup Ct, New York County 2013]). A pending claim cannot provide a

shareholder of a cooperative corporation a license to withhold maintenance from the cooperative corporation for an indefinite time. (*Caspi v Madison 79 Assoc., Inc.*, 85 AD2d 583, 583-584 [1st Dept 1982]). Thus, Schwartz must pay use and occupancy pending trial of this matter.

To the extent that Schwartz moves to renew, he offers no new evidence and fails to show that there has been a change in the law that would change the Court's prior determination. (CPLR 2221(e)(2)). Accordingly, there is no basis for renewal.

In light of the foregoing, it is

ORDERED that the motion to reargue is granted, and it is further

ORDERED that upon reargument, the Court recalls and amends its prior order dated February 25, 2014, and grants the motion of Hotel Carlyle Owners Corporation for an order directing Murray Schwartz to pay outstanding maintenance for the period from November 1, 2012 through August 31, 2013; 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 to pay the accrued maintenance for the period from September 1, 2013 through July 31, 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 the within actions or until further order of this Court; and it is further

ORDERED that so much of the motion as seeks renewal of the prior motion is denied.

Dated: August 21, 2014

ENTER:

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