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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

HELLER FAMILY TRUST and HELLER COMMERCIAL PROPERTY, LLC,
Plaintiff

- v -

FRANCOIS LASRY AND MURIEL LASRY,

Defendant.

INDEX NO. 102736/12
MOTION DATE 01-29-2014
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion by plaintiff for summary judgment on its first and third causes of action and cross motion for summary judgment by defendants dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-2,
Answering Affidavits — Exhibits	3-4
Replying Affidavits	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by plaintiffs for summary judgment on its First and Third causes of action is granted to the extent of granting plaintiff HELLER FAMILY TRUST summary judgment as against the defendants. Defendants' cross motion for summary judgment dismissing the complaint is granted solely as against plaintiff Heller Commercial Property, LLC, the balance of the motion is denied.

Plaintiffs bring this action to recover against the defendants for Breach of Contract. In June of 2010 Plaintiff HELLER FAMILY TRUST and defendants entered into a residential lease for a Triplex apartment comprising the third, fourth and fifth floor in a building located at 121 East 71st. Street. The lease was for a term of one year commencing on August 1, 2010 and ending on July 31, 2011. Plaintiff Heller Commercial Property, LLC was not a party to this lease agreement. The lease granted the defendants an option to extend the lease for an additional year, up to July 31, 2012 at a monthly rental of $19,656.00. Such option to extend the lease for one year had to be exercised by the defendants by March 31, 2011.(See Lease Par. 33, Exhibit B moving papers).

The lease contained a late penalty clause of 4% on payments made after the fifteenth day of the month and same would constitute additional rent (see Lease Par. 35). It contained a waiver of counterclaims (see Lease Par. 55), obligated defendants to maintain the utility meters for the Third, Fourth and Fifth floors and to pay Three-Fifths of "all oil, water and common area gas and electricity charges for the entire building" within 5 days of landlord's demand. Failure to pay said bill would be deemed failure to pay rent and a default under the lease (see Lease Par. 57). At Paragraph 60

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

the lease clearly and unambiguously states what would be considered an event of default under the lease (See Lease Par. 60).

The defendants timely exercised the option to renew the lease. They agreed to extend the lease under the same terms and conditions as detailed in the lease and rider with the same force and effect. In addition they agreed "that this extension of the lease term will terminate on June 30, 2012(instead of July 31, 2012), on the condition precedent that [they] have fully performed and have not defaulted in any obligations, rents, payments, duties or responsibilities under the Lease and Rider".[see motion Exhibit D].

There is no dispute that defendants failed to pay the rent for the months of May 2012 and June 2012. They also failed to pay their share of the utilities for the building as contained in paragraph 57 of the Lease Rider. These are all elements of default under the lease. On June 29, 2012 they vacated the premises.

Plaintiffs bring this action to collect the rent for the months of May, June and July 2012. They also seek to collect additional rent for utilities for these three months and late payment fees. Defendants allege that they do not owe rent for the month of July because they vacated the premises at the end of the lease term in June 2012.

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing. A written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms (Banco Espirito Santo, S.A., v. Concessionaria Do Rodoanel Oeste, S.A., 100 A.D.3d 100, 951 N.Y.S.2d 19 [1st. Dept. 2012]). The language of the lease and its rider are unambiguous. The rent to be paid is $19,656.00, the lease expires on June 30, 2012 as long as defendants are not in default in the payment of rent or additional rent, in that event the lease expires on July 31, 2012. Defendants failed to pay rent and additional rent -which they were obligated to pay as per Paragraphs 33 and 57 of the Lease and Rider and owe late payment penalty of 4% on these outstanding charges (see Myers Parking System, Inc., v. 475 Park Avenue So. Co., et al, 186 A.D.2d 92, 588 N.Y.S.2d 32 [1st. Dept. 1992] the language of the lease clearly and unambiguously specifies what defendants was to pay).

"Counterclaims must generally be dismissed where a lease contains a waiver of the right to interpose counterclaims, except where the circumstances of the counterclaim are so inextricably intertwined with an affirmative defense that the counterclaim waiver clause ought to be disregarded" (90 N.Y. Jur. 2d Real Property-Possessory actions § 225 waiver of right to interpose counterclaim). The lease contains a counterclaim waiver clause. The counterclaims asserted are not inextricably intertwined with the affirmative defenses.

The counterclaim for breach of warranty of habitability, although it would generally be entertained notwithstanding the counterclaim waiver clause, is spacious at best. Defendants originally signed a one year lease and exercised the option for an additional year. The Affidavit of Francois Lasry mentions "certain defective conditions" at the time they moved in. It also mentions "certain defective condition or damage caused due to flooding", and "the elevator breaking down on numerous occasions" These conditions apparently were repaired because when the defendants

moved out they "left the premises in impeccable condition". (see Lasry Affidavit annexed to Cross Motion).

This court has reviewed the photographs taken by Mr. Lasry and annexed to the cross motion, as well as the ones provided in the Thumb Drive annexed to the moving papers, and has failed to see any conditions in the premises that would rise to the level of breaching defendants warranty of habitability. Defendants have failed to state how these "defective conditions" to the extent they existed impacted upon their health, safety or welfare. In the eyes of a reasonable person, the conditions depicted in the photographs provided by defendants do not deprive a tenant of those essential functions which a residence is expected to provide (see Park West Management Corp., v. Mitchell, 47 N.Y.2d 316, 391 N.E.2d 1288, 418 N.Y.S.2d 310 [1979]).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Plaintiff Heller Family Trust has come forward with evidence in admissible form to show its entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. Defendants have failed to rebut that prima facie showing. However, the evidence presented shows that plaintiff Heller Commercial Property, LLC, was not a signatory to the Lease and therefore has no capacity to sue for breach of contract (see Chestnut Holdings of New York, Inc., v. LNR Partners, LLC, 106 A.D.3d 575, 965 N.Y.S.2d 470 [1st. Dept. 2013]).

Accordingly, it is ORDERED that the motion for summary judgment is granted to the extent of granting Plaintiff HELLER FAMILY TRUST summary judgment on its First and Third Causes of action , and it is further

ORDERED, that the motion for summary judgment by plaintiff HELLER COMMERCIAL PROPERTY, LLC, is denied, and it is further

ORDERED that plaintiff HELLER FAMILY TRUST is granted judgment against the defendants jointly and severally in the sum of $61,889.58, inclusive of penalties and utility charges, plus interest to be computed from July 31, 2012, plus costs and disbursements as taxed by the clerk, and it is further

ORDERED that the claims of HELLER FAMILY TRUST continue against the defendants on the Second and Fourth Causes of action, and it is further

ORDERED that defendants counterclaims are dismissed without prejudice, and it is further

ORDERED that defendants cross-motion for summary judgment is granted to the extent of dismissing all claims by HELLER COMMERCIAL PROPERTY LLC, and it is further

ORDERED that the balance of defendants' cross-motion for summary judgment is denied, and it is further

ORDERED that the clerk of court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 21, 2014

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE