SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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DENISE HESSE,

Plaintiff,

- against -

6485 AND 6495 BROADWAY APARTMENTS, INC.,

Defendant.

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DECISION AND ORDER

Index No. 304377/2014

PRESENT: Hon. Lucindo Suarez

Upon the order to show cause signed August 15, 2014 and the affidavit and exhibits submitted in support thereof; defendant's affirmation in opposition dated September 2, 2014 and the exhibits submitted therewith; plaintiff's affirmations (2) in reply dated October 16, 2014 and the exhibits submitted therewith; and due deliberation; the court finds:

Plaintiff proprietary lessee alleges that defendant lessor failed to repair windows in her apartments, and that the condition of the windows in her apartments permitted cold weather elements to enter her apartments, causing property damage and rendering one of the apartments uninhabitable. Plaintiff states that she requested that defendant repair the windows, which it is undisputed is defendant's responsibility pursuant to paragraph 18(a) of the lease. When the windows were not repaired, plaintiff withheld the entirety of all sums, including maintenance and other fees, for both apartments, claiming that she was entitled to an abatement of rent pursuant to paragraph 4(b) of the lease, and continues to so withhold payments. Plaintiff's counsel has apparently informed defendant that it will hold such payments in escrow until repairs are made.

On or about April 28, 2014, defendant served a notice of default for nonpayment of maintenance and other charges from June 2013 through April 2014. Pursuant to the notice, plaintiff

had until May 13, 2014 to cure. When plaintiff did not cure, plaintiff served a notice of termination upon plaintiff on or about August 7, 2014, terminating the lease on August 17, 2014. Plaintiff filed the instant order to show cause on August 14, 2014, seeking an order enjoining defendant from declaring her to be in default of her proprietary lease for non-payment of maintenance, terminating such lease and assessing late fees. Defendant argues that plaintiff cannot not be granted an injunction, as her time to cure has expired, and that she cannot meet any facet of the proof required for such injunction.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840, 833 N.E.2d 191, 192, 800 N.Y.S.2d 48, 49 (2005). "While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action," *1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 23, 924 N.Y.S.2d 35, 39 (1st Dep't 2011), "[p]reliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers," *Koultukis v. Phillips*, 285 A.D.2d 433, 435, 728 N.Y.S.2d 440, 442 (1st Dep't 2001) (citation omitted).

The first issue is whether plaintiff is in default of the lease, and the court finds that she is. Contrary to her interpretation of the lease, she is not entitled to an abatement under the circumstances herein. She claims entitlement to damages pursuant to defendant's failure to make repairs as required by paragraph 18(a). However, the paragraph pertaining to rent abatement is contained in a section which explicitly excludes repairs which would be covered by paragraph 18(a). Paragraph 4(a) reads as follows:

> If the Apartment or the means of access thereto or the Building shall be damaged by fire or other cause covered by multiperil policies commonly carried by cooperative corporations in New York City (*any other damage to be repaired by Lessor or Lessee pursuant to Paragraphs 2 and 18, as the case may be*), the Lessor shall at its own cost and expense, with reasonable dispatch after receipt of notice of said damage, repair or replace or cause to be repaired or replaced . . .

(emphasis added). Accordingly, the provision regarding abatements is inapplicable to the circumstances alleged by plaintiff. This is borne out by resort to paragraph 12 of the lease, which states that "[t]he Lessee will pay the rent to the Lessor upon the terms and at the times herein provided, *without any deduction on account of any set-off or claim which the Lessee may have against the Lessor*" (emphasis added), and "a contract should not be interpreted so as to render any of its clauses meaningless." *UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 579, 910 N.Y.S.2d 55, 59 (1st Dep't 2010). The exclusionary language of paragraph 4(a) cannot be ignored, as "every clause and word [of a contract] should be given meaning." *Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. City of New York*, 46 A.D.3d 378, 380, 848 N.Y.S.2d 80, 82 (1st Dep't 2007). Thus, as plaintiff cannot establish a likelihood of success on the merits with regard to this facet of the application, she is not entitled to an injunction enjoining defendant from declaring her in default. *See e.g. ERS Enters. v. Empire Holdings, LLC*, 286 A.D.2d 206, 729 N.Y.S.2d 23 (1st Dep't 2001).

The next issue is the propriety of the notice of termination. Defendant served the notice of default upon plaintiff's lender at the time it served the default notice upon plaintiff. Accordingly, paragraph 17(b)(i) of the lease is invoked, which defines a "secured party" as, *inter alia*, a mortgagee of the lease, and states that

> if the Lessee shall fail to cure the default specified in such notice within the time and in the manner provided for in this Lease, then the Secured Party shall have an additional period of time, equal to the time originally given to the Lessee, to cure said default for the account of the Lessee or to cause same to be cured, and the Lessor will not act upon said default unless and until the time, in which the Secured Party may cure said default or cause same to be cured as aforesaid, shall have elapsed, and the default shall not have been cured.

Thus, upon expiration of plaintiff's cure period, the bank had an equal cure period in which to pay the arrears to defendant. Plaintiff's fifteen-day cure period expired May 13, 2014; the bank's cure period would commence on May 14, 2014 and expire on May 28, 2014. It is apparent from excerpts from an email exchange between the bank and defense counsel that the bank intended to cure plaintiff's default as per paragraph 17(b)(i). On the first day of the bank's cure period, however, defendant's attorney told the bank's representative in an email to "hold off on sending the arrears payment." Defendant's opposition neglected to address this, and it is apparent from defendant's repeated reference to May 13, 2014 as the expiration of the cure period that it has disregarded the additional cure period of paragraph 17(b)(i).

Contrary to plaintiff's argument, the bank was obviously given an opportunity to cure. *Cf. Overseas Commodities Ltd. v. Dunolly Owners Corp.*, NYLJ, Jan. 14, 1993, at 25, col 1 (Supreme Court, Queens County, Friedmann, J.). However, defendant's direction to "hold off" on remitting payment created an ambiguity as to whether it would require strict compliance with the cure period, such that defendant's notice of termination was premature. *See id.*

"Waiver is unilateral and, 'not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform.'" *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc., LLC*, 30 A.D.3d 1, 5-6, 811 N.Y.S.2d 47, 51 (1st Dep't), *affirmed*, 8 N.Y.3d 59, 861 N.E.2d 69, 828 N.Y.S.2d 254 (2006), *citing Bank Leumi Trust Co. v. Block 3102 Corp.*, 180 A.D.2d 588, 580 N.Y.S.2d 299 (1st Dep't), *appeal denied*, 80 N.Y.2d 754, 600 N.E.2d 633, 587 N.Y.S.2d 906 (1992). There is no indication that defendant provided either plaintiff or the bank with notice that the second cure period would resume or be enforced. Accordingly, the premature notice of termination was invalid. *See Overseas Commodities Ltd., supra.* Given the

invalidity of the notice of termination, to additionally enjoin defendant from terminating the lease according to its terms would not merely preserve the status quo but would amount to a windfall for plaintiff. Therefore, this facet of the application must be denied.

With respect to plaintiff's application for an injunction enjoining defendant from assessing late fees because such fees are not contemplated by the lease, regardless of whether plaintiff is correct, economic loss compensable by monetary damages does not constitute irreparable harm. *See C C Vending, Inc. v. Berkeley Educ. Servs. of N.Y., Inc.*, 74 A.D.3d 559, 903 N.Y.S.2d 37 (1st Dep't 2010), *leave denied*, 16 N.Y.3d 705, 944 N.E.2d 658, 919 N.Y.S.2d 120 (2011); *Zodkevitch v. Feibush*, 49 A.D.3d 424, 854 N.Y.S.2d 373 (1st Dep't 2008); *ERS Enters. v. Empire Holdings, LLC*, 286 A.D.2d 206, 729 N.Y.S.2d 23 (1st Dep't 2001). If the lease does not contemplate late fees for overdue maintenance payments, it does, in paragraph 12, contemplate the imposition of interest "at the maximum legal rate from the date when such installment shall have become due to the date of the payment thereof, and such interest shall be deemed additional rent hereunder."

As to plaintiff's application for attorney's fees for the motion, "[i]t is well established that in the absence of specific statutory authority counsel fees 'are merely incidents of litigation and thus are not compensable.'" *In re Green*, 51 N.Y.2d 627, 629-30, 416 N.E.2d 1030, 1032, 435 N.Y.S.2d 695, 696 (1980), *reh'g denied*, 52 N.Y.2d 1073 (1981) (citations omitted); *see also Braithwaite v. 409 Edgecombe Ave. HDFC*, 294 A.D.2d 233, 742 N.Y.S.2d 280 (1st Dep't 2002). Plaintiff, having submitted only paragraphs 4 and 18 of the lease, submitted no evidence of a contractual or other provision that would entitle it to such fees. To the extent that plaintiff relies on the implied reciprocal covenant for attorney's fees created by Real Property Law § 234, plaintiff submitted no proof of any such fees incurred. *Cf. Bankers Trust Co. of Cal., N.A. v. W. Shore Apt. Corp.*, 281 A.D.2d 351, 722 N.Y.S.2d 165 (1st Dep't), *lv dismissed*, 97 N.Y.2d 638, 760 N.E.2d 1290, 735

N.Y.S.2d 494 (2001).

Accordingly, it is

ORDERED, that the application of plaintiff to enjoin defendant from declaring her in default of her proprietary lease is denied; and it is further

ORDERED, that the application of plaintiff to enjoin defendant from terminating the lease is denied as moot in light of the invalidity of the August 7, 2014 notice of termination; and it is further

ORDERED, that the application of plaintiff to enjoin defendant from charging late fees is denied; and it is further

ORDERED, that the application of plaintiff for attorney's fees is denied.

This constitutes the decision and order of the court.

Dated: October 28, 2014

Lucindo Suarez, J.S.C.