Costa v Kaushan
2015 NY Slip Op 31103(U)
May 22, 2015
Supreme Court, New York County
Docket Number: 155903/14
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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PAOLO COSTA,

Plaintiff,

Index No. 155903/14

-against-

DECISION/ORDER

VYACHESLAV KAUSHAN and MOVING AHEAD STORAGE, INC.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Paolo Costa commenced the instant action against defendants Vyacheslav Kaushan and Moving Ahead Storage, Inc. ("Moving Ahead") seeking damages arising out of the loss of or damage to certain items located and/or previously located in an apartment leased by defendant Kaushan. Defendant Kaushan now moves for an Order pursuant to CPLR § 3212 and General Obligations Law ("GOL") § 7-103(1) granting him partial summary judgment against plaintiff on his second counterclaim. Defendant Moving Ahead cross-moves for an Order pursuant to CPLR § 3025(b) granting it leave to file an amended answer to include an affirmative defense under General Obligations Law § 15-108 and, upon granting such leave, an Order pursuant to CPLR § 3212 granting it summary judgment dismissing Kaushan's asserted cross-

claims. For the reasons set forth below, both motions are granted.

The relevant facts according to the complaint are as follows. Defendant Kaushan is the former tenant of Unit 6401 (the "Apartment") in the building located at 150 West 56th Street, New York, NY which he leased from plaintiff pursuant to a written lease agreement (the "Lease") for a term from December 15, 2012 through December 31, 2013. Pursuant to Paragraph 5 of the Lease, Kaushan provided plaintiff with a security deposit of $22,000.00 (the "Security Deposit").

The complaint alleges that the Apartment was leased to Kaushan with certain items of furniture which belonged to plaintiff (the "Personal Property"). During the term of the Lease, Kaushan made arrangements for certain items of the Personal Property to be held at a storage facility. At the end of the term of the Lease, when it became time to move these items back to the Apartment, Luca Burato, plaintiff's agent, hired Moving Ahead to transport certain items of Personal Property from the storage unit back to the Apartment. Plaintiff alleges that during the move, certain items of Personal Property were lost and/or damaged.

Plaintiff commenced the instant action alleging causes of action for breach of contract, negligence and conversion. Plaintiff has since reached a settlement with Moving Ahead and plaintiff's claims against Moving Ahead have been discontinued. Additionally, plaintiff has provided Moving Ahead with a general release. However, plaintiff has not discontinued any claims against Kaushan and Kaushan has asserted three counterclaims in his amended answer. Further, Kaushan has also asserted cross-claims for contribution and indemnification against Moving Ahead, which have not been discontinued.

As an initial matter, Moving Ahead's cross-motion to amend its answer to Kaushan's

cross-claims to add an affirmative defense under General Obligations Law § 15-108 is granted without opposition. Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Here, there is no dispute that Moving Ahead's amendment is meritorious and Kaushan has failed to identify any prejudice he would face in allowing the amendment. Thus, Moving Ahead's motion to amend its answer to Kaushan's cross-claims is granted and the court now turns to the remaining motions for summary judgment.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, as an initial matter, Moving Ahead's motion for summary judgment dismissing Kaushan's cross-claim for common law and contractual indemnity is granted without opposition.

Additionally, Moving Ahead is entitled to summary judgment dismissing Kaushan's cross-claim for contribution under General Obligations Law § 15-108 as a matter of law as

plaintiff has settled with Moving Ahead and provided it with a release. Pursuant to General Obligations Law § 15-108(b), "[a] release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules." As such, the general release provided by plaintiff to Moving Ahead as part of their settlement now precludes Kaushan from seeking contribution from Moving Ahead in this action.

To the extent Kaushan argues in opposition that Moving Ahead's motion for summary judgment is premature as issue has not been joined on the newly added affirmative defense, such contention is without merit. Kaushan argues that a motion for summary judgment made at the same time as a motion for leave to amend a pleading is premature and must be denied because issue will not be joined with respect to the claims and defenses set forth in the amended pleading. In support of this contention, Kaushan cites *Valentine Tr. v. Kernizan*, 191 A.D.2d 159 (1st Dept 1993). However, Kaushan's reliance on *Valentine* is misplaced. In *Valentine*, unlike here, the plaintiff moved to amend its complaint to add an additional claim and for summary judgment on that claim at the same time. The court granted the motion to amend but denied the summary judgment motion as premature on the ground that a motion for summary judgment cannot be made until after issue is joined. Here, in contrast, Moving Ahead is not asserting a new claim against Kaushan but only adding an additional affirmative defense. An affirmative defense, unlike a new claim, does not require issue to be joined, or, in other words, an answer from Kaushan. Thus, *Valentine* is inapposite and Moving Ahead's motion for summary judgment is not premature.

Additionally, defendant Kaushan has established his *prima facie* right to partial summary

judgment on his second counterclaim for violation of GOL § 7-103(1). Pursuant to GOL § 7-103(1),

> Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same, but may be disposed of as provided in section 7-105 of this chapter.

It is well-settled that GOL § 7-103(1) "forbids landlords from commingling security deposit monies with their own funds" and once security deposit monies are indeed commingled with a landlord's own funds, a tenant has "an 'immediate right' to receive those monies." *Tappan Golf Dr. Range, Inc. v. Tappan Prop., Inc.*, 68 A.D.3d 440 (1st Dept 2009). Indeed, "[w]hen a landlord commingles the security deposit with his or her personal funds in violation of [GOL] § 7-103(1), the tenant has 'an immediate right to return of the funds, even if the [tenant] had breached the lease.'" *Solomon v. Ness*, 118 A.D.3d 773, 773-74 (2nd Dept 2014) (quoting *Gihon, LLC v. 501 Second St., LLC*, 103 A.D.3d 840, 842 (2nd Dept 2013)); *see also Dan Klores Assoc. v. Abramoff*, 288 A.D.2d 121, 122 (1st Dept 2001) ("As a result of such commingling, defendant forfeited any right he had to avail himself of the security deposit 'for any purpose,' entitling plaintiff to its 'immediate' return notwithstanding that plaintiff may itself have breached the lease.") (internal citations omitted).

Here, Kaushan has established his right to partial summary judgment on his second counterclaim to recover the Security Deposit based on plaintiff's own admission that he

commingled the Security Deposit with his own personal funds. On or about September 30, 2014, plaintiff testified, under oath, at a deposition in this action. During his deposition, plaintiff testified as follows:

Q: When the apartment was leased to Mr. Kaushan, did you receive a lease security deposit?
A: Yes.
Q: And in what form was that given to you? By check, wire or some other method?
A: Check.
Q: What did you do with that check?
A: I put it in the bank.
Q: Into what account?
A: The one I keep for the apartment.
Q: Is that the one that is a joint account with Mr. Burato?
A: The account, my personal one.
Q: At the time you deposited this security check into the account was there any other money in there?
A: Yes.
Q: Whose money was in there before you deposited Mr. Kaushan's check?
A: Mine.
Q: The money that was in the account before you deposited Mr. Kaushan's securities check, did that belong to anybody else but you or just you?
A: No, only mine.

...

Q: Did you deposit Mr. Kaushan's check soon after you signed the lease?
A: Yes.

Thus, as plaintiff has admitted, under oath, that he commingled the Security Deposit with his own personal funds, in violation of GOL § 7-103(1), defendant Kaushan is entitled to partial summary judgment on his second counterclaim for the return of his Security Deposit.

In opposition, plaintiff has failed to raise an issue of fact. Plaintiff's opposition does not deny that plaintiff co-mingled the Security Deposit with plaintiff's personal funds. Rather,

plaintiff alleges that defendant is not entitled to return of the Security Deposit as plaintiff has now cured the violation. However, this contention is without merit as the case law is clear that when a landlord commingles a security deposit, the tenant has an *immediate* right to its return. *See Tappan Golf Drive Range, Inc.*, 68 A.D.3d at 440-441. Thus, plaintiff's belated act of transferring the Security Deposit into a segregated account does not excuse the prior violation, nor does it affect Kaushan's right to the return of the Security Deposit at this time.

Further, neither of the cases cited by Kaushan for the proposition that a party is entitled to cure a violation of General Obligations Law § 7-103 after termination of the lease without losing its entitlement to the Security Deposit stand for such proposition. *See Shandwick USA, Inc. v. Exenet Techs.*, 744 N.Y.S.2d 640 (N.Y. Civ. Ct. 2002); *In Re Ford Motor Credit Co. Motor Vehicle Lease Litig.*, 1998 WL 159051 (S.D.N.Y. 1998). As an initial matter, the court in *Shandwick* held only that the law permits for a "cure [of a violation of General Obligations Law § 7-103] prior to the termination of the lease." Here, however, plaintiff's alleged cure occurred well after the termination of the Lease. Thus, *Shadwick's* holding is inapposite. Further, nowhere in *In Re Ford Motor Corp.* does the court state that there is an ability to cure a violation of New York General Obligation Law § 7-103 when the lease has terminated. Indeed, Kaushan's reliance on *In Re Ford Motor Corp.* is completely misplaced as that case does not even address when a landlord may cure a violation of General Obligation Law § 7-103.

Accordingly, both Kaushan's motion and Moving Ahead's motion is granted in its entirety and it is hereby

ORDERED that Moving Ahead's proposed amended answer to Kaushan's cross-claims as annexed to its moving paper is hereby deemed served *nunc pro tunc*; and it is further

ORDERED that Moving Ahead's motion for summary judgment dismissing Kaushan's cross-claims is granted; and it is further

ORDERED and ADJUDGED that this action is hereby dismissed as to Moving Ahead; and it is further

ORDERED Kaushan's motion for partial summary judgment on his second counterclaim is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Kaushan and against plaintiff for the Security Deposit amount of $22,000.00, plus interest from December 26, 2012, together with costs and disbursements. This constitutes the decision and order of the court.

Date: 5/22/15

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.