

Needham v Migdal2 Mgt. 2010, LLC
2017 NY Slip Op 31428(U)
July 6, 2017
Supreme Court, New York County
Docket Number: 161690/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZPART 13*Justice*COREY NEEDHAM,

Plaintiff,

INDEX NO. 161690/2014MOTION DATE 05/24/17MOTION SEQ. NO. 003

MOTION CAL. NO. _____

-against-

MIGDAL2 MANAGEMENT 2010, LLC,
RONI ABUDI, and CARLOS "DOE",

Defendants.

The following papers, numbered 1 to 7 were read on this motion to preclude discovery and summary judgmentPAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-3; 4 - 6

Answering Affidavits — Exhibits _____

4- 6; 7

Replying Affidavits _____

Cross-Motion: ☒ Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's motion to preclude Defendants from further written discovery and for summary judgment on the ninth cause of action of the Complaint, is granted. Defendants' cross-motion for summary judgment, is denied.

Corey Needham (herein "Plaintiff") rented the basement of a multi-family rental building (herein "apartment") located at 307 East 104th Street, New York, New York (herein "Building") from Defendants pursuant to a lease dated June 3, 2013 (herein "Lease"). The Lease was for a two-year term and a monthly rental amount of \$1,400 (Moving Papers Ex. F).

Plaintiff brought this action on November 24, 2014 originally asserting twelve (12) causes of action based on: rent stabilization laws; the Apartment being declared illegal by the Department of Buildings (herein "DOB") because there is no residential Certificate of Occupancy for the Apartment; constructive and partial actual eviction due to the lack of repairs, and; fear and harassment by Defendants by threats of retaliation for Plaintiff complaining and bringing court action against the Defendants. Pursuant to a July 5, 2016 Order, this court dismissed Plaintiff's fourth, eighth, tenth and eleventh causes of action in the Complaint (Moving Papers Ex. D).

Plaintiff now moves to preclude Defendants from conducting further written discovery and for summary judgment on the ninth cause of action. Defendants oppose the motion and cross-move for summary judgment to dismiss the Complaint.

CPLR §3103[a] states in part that the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

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

Defendants have failed to comply with the preliminary conference order (Moving Papers Ex. A) three compliance conference orders (Moving Papers Exs. B, C, E) and the Court's July 5, 2016 Order (Moving Papers Ex. D). Notably, in the December 14, 2016 compliance conference order, this court specifically stated that "Defendants [were] to serve demands for D&I by January 20, 2017 or same shall be deemed waived" (Moving Papers Ex. E). Eleven (11) days after the court's deadline, Plaintiff filed this motion on February 6, 2017 when Defendants failed to serve any D&I demands. Defendants are precluded from seeking written discovery for the remainder of this action and Plaintiff is not required to respond to Defendants' D&I Demands annexed as an exhibit to this motion for the first time.

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*, 81 NY2d 833, 652 NYS2d 723 [1996]). 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 (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). 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, 677 NYS2d 136 [1st Dept. 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

With the ninth cause of action, Plaintiff seeks a declaratory judgment that Defendants have "overcharged Plaintiff, [by failing] to maintain [Plaintiff's] security deposit property, and [by failing] to provide Plaintiff with the required security deposit notices; in violation of New York law" (Moving Papers Ex. F). The Lease, in its' relevant portion states:

Security Deposit. On execution of this Lease, the Tenant will pay the Landlord a security deposit of \$4,200.00. The Landlord will return the Security Deposit at the end of this tenancy, less such deductions as provided in this Lease but no deduction will be made for damage due to reasonable wear and tear or for any deduction prohibited by the Act [the Act is later defined in the Lease as "the applicable legislation of the State of New York"]. During the Term of this Lease or after its termination, the Landlord may charge the Tenant or make deductions from the Security Deposit for any or all of the following: [Nine separate situations are listed, none that mention rent]...The Tenant may not use the Security Deposit as payment for the Rent (Moving Papers Ex. F).

Pursuant to the Lease, Plaintiff paid Defendants \$4,200 as conceded in Defendants' Interrogatories (Moving Papers Ex. H). Defendants also conceded all of the Security Deposit was applied to outstanding rent (id).

Defendants are not entitled to the Security Deposit as the Apartment had no certificate of occupancy to allow a lawful residential occupancy (Moving Papers Ex. I). Defendants violated Multiple Dwelling Law §302 when they converted Plaintiff's Security Deposit to rent. Multiple Dwelling Law §302, in its' relevant portion states:

A. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one ["[n]o multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department , during such ...] unlawful occupation any bond or note secured by a mortgage upon said dwelling or structure, or the lot upon which it stands, may be declared due at the option of the mortgagee.

b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent (N.Y. Mult. Dwell. Law §302).

There remain no genuine issues of fact on the ninth cause of action as Defendants unlawfully converted Plaintiff's Security Deposit. Summary judgment on the ninth cause of action of the Complaint is granted.

In view of the evidence provided, Defendants have not stated a basis for summary judgment. Defendants, by now arguing that the Apartment was not a lawful dwelling, contend Plaintiff's occupancy was illegal as a matter of law and therefore, the Lease is void as a matter of law. Following these assertions, the causes of action dealing with the implied warranty of habitability must not apply since the Lease was void. However, Defendants cannot have it both ways as they have accepted rent, accepted and converted the Security Deposit and refused to return the Security Deposit. Summary judgment for Defendants must fail as they cannot use the illegality of the Apartment as a sword and a shield.

Accordingly, it is hereby ORDERED, that Plaintiff's motion to preclude Defendants from conducting further written discovery for the remainder of this action is granted, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the ninth cause of action of the Complaint is granted, and it is herein,

ORDERED, that the remaining causes of action remain in effect, and it is further,

ORDERED, that Defendants' cross-motion for summary judgment is denied, and it is further,

ORDERED, judgment is granted in favor of Plaintiff and against Defendant Migdal2 Management 2010, LLC in the sum of \$4,200.00, and it is further,

ORDERED, that the Clerk of Court enter judgment accordingly, and it is further,

ORDERED, that the parties appear for a Status Conference in IAS Part 13, 71 Thomas Street, Room 210, New York, New York 10013, at 9:30 A.M., on October 18, 2017.

ENTER:

Dated: July 6, 2017


MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**