WE 616 Halsey LLC v Abdelsamad

2017 NY Slip Op 32257(U)

October 20, 2017

Supreme Court, New York County

Docket Number: 158275/16

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

---X

WE 616 HALSEY LLC,

Plaintiff,

- against -

NAEL ABDELSAMAD and MICHELLE REIMER,

Defendants.

---X

Index No. 158275/16

Seq. 002

Decision and Order

HON. ROBERT D. KALISH, J.:

The Order to Show Cause by Defendants Nael Abdelsamad and Michelle Reimer seeking an order, pursuant to CPLR 5015 (a) (1), to vacate and set aside a prior order, dated April 20, 2017, which granted Plaintiff WE 616 Halsey LLC's motion for summary judgement, is granted. Further, upon review of the papers submitted on the original motion for summary judgment, and the papers submitted on the instant motion, Plaintiff's motion for summary judgment is denied.

I. Defendants' Motion to Vacate

BACKGROUND

On December 29, 2016, Plaintiff filed a motion for summary judgment, Seq. 001 (Drossman affirmation, exhibit D). On February 10, 2017, Defendants filed opposition to the summary judgement motion (Drossman affirmation, exhibit E).

On February 23, 2017, Plaintiff filed a reply (Drossman affirmation, exhibit F).

On April 20, 2017, the motion court granted Plaintiff's motion by stating in a gray sheet decision that the motion was "granted" (Drossman affirmation, exhibit A). The decision also stated that "[t]he [motion] court never received Defendants' opposition papers, although the court's rules require them and the court on 3/6/17 sent an email requesting them" (*id.*). The email, from the motion court's part clerk, (1) alerted all parties that the motion file from the submissions part only had Plaintiff's reply papers enclosed; and (2) asked the parties to submit working copies of their original papers (Drossman affirmation, exhibit I). Presumably, such copies of Defendants' opposition papers were never received by the motion court.

The motion court's order, dated May 26, 2017, granting Plaintiff's motion for summary judgment, stated that the motion court read Plaintiff's motion papers ("[n]otice of motion," "affirmation," "affidavit," "reply affirmation," "exhibits," and "proof of proper service of the motion with supporting papers upon all required parties"). With respect to Defendants' papers, the order states that "Defendant[s] fail[ed] to submit working copies of Defendant[s'] opposition papers as required by the [motion c]ourt's rules, and the [motion c]ourt's email to the parties dated March 6, 2017." (NYSCEF Doc # 81 [Order of Lebovits, J.].)

On May 5, 2017, the Honorable Erika M. Edwards, J., signed an Order to Show Cause staying the motion court's April 20, 2017 order and restoring the action to the calendar. Subsequently, the motion court recused itself and the action was transferred to this Court for consideration of the instant motion.

WRITTEN ARGUMENTS

On the instant motion, Defendants argue in their papers that they timely filed an answer and opposition to the underlying motion for summary judgment (affirmation of Drossman at ¶ 8). Defendants argue further that, while Defendants' counsel did not provide the motion court with working copies as required by that part's rules, a working copy was mailed to the court in accordance with Defendants' counsel's standard practice (*id.*). Defendants argue further that a "regrettable . . . technical error" that "was neither willful nor part of a pattern of dilatory behavior" is responsible for the working copy not arriving at the motion court (*id.* at ¶ 12). Defendants do not dispute that the motion court's part clerk contacted their counsel by email requesting working copies of the motion papers but state that their counsel's office computer misdirected the email (*id.* at ¶ 13). Defendants' counsel states that they did not find the email until April 24, 2017, immediately after Plaintiff filed its Notice of Entry of the motion court's April 20, 2017 decision (*id.*).

In opposition, Plaintiff argues in its papers that the motion court granted Plaintiff's summary judgment motion on the merits and not on default as Defendants argue (affirmation of Marks at ¶ 4). As such, Plaintiff argues that CPLR 5015 (a) (1) is inapplicable here (*id.* at ¶¶ 29–31). Elsewhere, Plaintiff argues that Defendants' failure to comply with the motion court's rules "precluded their opposition to Plaintiff's motion" (*id.* at ¶ 11). Plaintiff further argues that Defendants have failed to submit a sufficient excuse for their failure to timely submit papers in opposition to the motion (*id.* at ¶¶ 20–25). In addition, Plaintiff argues that Defendants have failed to submit a meritorious defense to the underlying motion (*id.* at ¶ 26). Plaintiff also argues that Defendants' opposition only goes to issue of damages and does not refute their liability (*id.* at ¶¶ 14, 16).

The instant action has been reassigned to this Court at random.

ORAL ARGUMENTS

At oral argument on June 8, 2017, Defendants' counsel argued that Defendants e-filed their opposition to Plaintiff's motion for summary judgment on time (tr at 3). Defendants' counsel stated that his firm sent a working copy to the motion court "upon information and belief" (*id.* at 8, line 19), but may have sent it to the wrong address or it may simply not have arrived if properly sent (*id.* at 3–4, 7–9). Defendants' counsel admitted his firm missed the motion court's email

seeking copies of the parties' papers but argued that it is reasonable to miss an email when a law office has already followed a motion court's rules by sending working copies which were not received for whatever reason (*id.* at 3–4, 8–9).

Defendants' counsel also argued that Defendants have established Plaintiff's breach of the warranty of habitability as a meritorious affirmative defense (*id.* at 5, 9–10). Defendants' counsel argued that the affidavit of defendant Reimer, originally submitted with Defendants' opposition papers to Plaintiff's summary judgment motion and included with the instant motion (Drossman affirmation, exhibit E, at 21–25), sufficiently describes this meritorious defense (*id.* at 26). Defendant's counsel concedes that Ms. Reimer's affidavit, having been notarized in Utah, has no certificate of conformity but asks the Court to "overlook that and accept [Ms. Reimer's affidavit] as [Ms. Reimer's] actual statement" (*id.* at 61, lines 7–20).

In opposition, Plaintiff's counsel argued that Defendants fail to meet their burden because Defendants' failure to send working copies of their opposition papers to the motion court was unreasonable (*id.* at 22–23). Plaintiff's counsel also argued that Defendants fail to meet their burden in the absence of an affidavit of merit in Defendants' papers on the instant motion that specifically addresses the issues of excusable default (here, law office failure) and meritorious defense (*id.* at 24). Plaintiff's counsel further argued that Defendants have failed to follow the

rules by submitting an "improper" affidavit (*id.* at 64).

ANALYSIS

A party seeking to vacate an order entered upon its default in opposing a motion may be relieved from the judgment upon the ground of excusable default (CPLR 5015 [a] [1]). Such a movant must demonstrate both a reasonable excuse for the default and a meritorious defense to the action (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Cheri Rest., Inc. v Eoche*, 144 AD3d 578, 579 [1st Dept 2016]; *Allstate Ins. Co. v Grodzki*, 112 AD3d 919, 919 [2d Dept 2013]). Determining what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*Lyubomirsky v Lubov Arulin, PLLC*, 125 AD3d 614, 614 [2d Dept 2015]; *see also Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510, [1st Dept 2010]). Further, there exists in New York a "strong public policy to dispose of cases on their merits" (*Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]; *see also* CPLR 2001, 2005).

As this action has been reassigned to this Court, now, on the motion to vacate the default by Defendants in failing to provide the motion court with working copies, the Court, in the exercise of its discretion, finds that Defendants' excuse of law office failure is reasonable and shows that their default was neither willful nor dilatory. Further, the Court finds that, based upon the papers submitted and the

arguments made at oral argument, Defendants have a meritorious defense to Plaintiff's motion for summary judgment. Although there is no certificate of conformity (CPLR 2309 [c]), this is a mere irregularity, is not a fatal defect, and may be corrected later (*Am. Cas. Co. of Reading v Motivated Sec. Sec. Servs., Inc.*, 148 AD3d 521, 521 [1st Dept 2017]). As such, the prior decision granting Plaintiff's motion for summary judgment is vacated.

II. Plaintiff's Motion for Summary Judgment

The Court will now consider Plaintiff's motion for summary judgment based upon the papers submitted and the arguments made at oral argument.

BACKGROUND

Plaintiff is the owner and landlord of 616 Halsey Street, Brooklyn, New York, 11233. On July 17, 2015, Defendants entered into a lease, commencing on July 15, 2015 and ending on July 31, 2016, with Plaintiff for apartment 1R (the "Unit") at 616 Halsey Street (affirmation of Sodroski ¶ 6). The rent was $2650.00 a month (*id.* ¶ 7). Under the terms and provisions of the lease, a late fee of 5% of the monthly rent owed would become immediately due to Plaintiff for any month when Plaintiff did not receive Defendants' rent by the seventh calendar day of that month (*id.* ¶ 8). The lease provides, with respect to attorney's fees, that "[Defendants] shall reimburse [Plaintiff] for . . . [a]ny legal fees and disbursements for legal actions or

proceedings brought by [Plaintiff] against [Defendants] because of [Defendants'] default or defending lawsuits brought against [Plaintiff] because of the actions of [Defendants], or [Defendants'] invitees or employees" (*id.* ¶ 9). The lease also requires that Defendants pay 200% of the monthly rent for any holdover tenancy (*id.* ¶ 10).

On May 24, 2016, Plaintiff commenced a summary nonpayment proceeding against Defendants in housing court (*WE 616 Halsey LLC v Nael Abdelsamad and Michelle Reimer*, L&T-71023-16 [Kings County Civ. Ct. 2016]). On August 8, 2016, the housing court issued an order that appears to require that Plaintiff have access to the Unit on August 17, 2016 and August 18, 2016 to "repair" the "bedroom closet, windows[, and] bedroom radiator" (defendants' answer, exhibit D; Drossman affirmation, exhibit F). The parties settled the housing court action on September 12, 2016, stipulating that they reserve their rights to their claims and defenses and that Defendants "acknowledge they have vacated [the Unit], no other persons remain at the [Unit] and they hereby surrender possession of the [Unit]" (Sodroski reply affirmation, exhibit A).

Plaintiff alleges that Defendants have failed to pay monthly rent for April, May, June, and July 2016. (Aff of Weissman ¶¶ 1, 9.) Mr. Weissman also stated that Defendants held over on their lease in August and September 2016 and have

paid no rent for those two months as well (*id.* at ¶¶ 18–19).

Plaintiff provides a rent ledger allegedly tracking amounts charged to and owed by Defendants as relates to their lease of the Unit. The ledger is dated September 21, 2016. Line 1 of the ledger indicates an $8000 "Deposit Charge" dated July 15, 2015. The lines that follow detail rent charges, rent payments, late fees, and legal fees from January 1, 2016 through October 1, 2016. Rent in the amount of $2650 was charged on the first of each month from January 2016 through July 2016. Rent in the amount of $5300 was charged on August 8, 2016 and September 1, 2016. Late fees were charged from February 2016 through September 2016. Legal fees totaling to $1,384.10 appear as charges related to the housing court litigation. (Sodroski affirmation, Exhibit D, at 2.)

In her affidavit in opposition to Plaintiff's motion for summary judgment, defendant Reimer stated that Plaintiff "failed to provide water and heat to the [Unit] among other unsafe conditions" despite "being repeatedly notified, in breach of the warrant[y] of habitability" (aff of Reimer ¶ 2). Ms. Reimer further stated that the only water that came out of the shower was "sc[a]lding hot" forcing Defendants to shower in a nearby gym for the entire duration of their tenancy (*id.* ¶ 4). Ms. Reimer also alleged the following issues were present in the Unit during the tenancy:

(1) exposed wiring;

(2) a cracked bathtub, which caused an injury about which Plaintiff was allegedly notified on August 12, 2015;

(3) missing windows screens;

(4) "[c]loset sliding doors [that] were not on [their] rail[s] and [that] fell on [Defendants] several times;

(5) a broken house door lock, which locked Defendants out of the Unit and which Defendants allegedly paid $299.75 to fix themselves, having called Plaintiff about the issue and having been told "the foreman would arrive immediately," but the foreman never did after over two hours had passed;

(6) a broken buzzer and intercom;

(6) upon move-in, "pubic hair lining the refrigerator, kitchen and bathroom cabinets," "dirt everywhere," and "debris/unknown residue" in the oven; and

(7) an "extensively leaking" bedroom heater "unusable" in December 2015.

(*Ibid.*)

With respect to the notice that Defendants provided to Plaintiff regarding the issues with the Unit, Ms. Reimer stated that Plaintiff was notified about the cracked bathtub and broken door lock on August 12, 2015 and September 18, 2015, respectively (*ibid.*). Ms. Reimer further stated that she had contacted Plaintiff "over three dozen" times as of April 2016 for "repairs to the heat and water" (*id.* ¶ 7). Ms.

Reimer allegedly sent Plaintiff an email on May 9, 2016 listing 47 dates on which Defendants "attempt[ed] to get [Plaintiff] to remediate the heat and water problems to no avail" (*id.* ¶ 7; Drossman affirmation, exhibit B).

Ms. Reimer alleged that, on the same day, May 9, 2016, building manager Ozgur Uludag entered the Unit without permission and would not leave until Ms. Reimer threatened to call the police. On May 11, 2016, Defendants reported the incident to Sara Levy, a Tenant Support Specialist with "New York City housing," and filed an official complaint regarding the heat and water issues with the New York State Division of Housing and Community Renewal. (aff of Reimer ¶ 8.) Immediately afterward, on that same day, May 11, 2016, Plaintiff emailed Defendants to set up a time to accomplish the following repairs: (1) "BATHROOM—WATER SUPPLY—NO COLD WATER"; (2) "BATHROOM—WATER SUPPLY—SCALDING HOT WATER"; (3) "ENTIRE APARTMENT—WINDOW FRAME—LOOSE OR DEFECTIVE"; and (4) "BEDROOM—RADIATOR—BROKEN OR MISSING" (Reimer aff, exhibit D). Ms. Reimer stated that the repairs were not made (aff of Reimer ¶ 9).

Ms. Reimer further alleged that, on August 8, 2016, Defendants requested Plaintiff join Defendants for a final walkthrough of the Unit. Ms. Reimer stated that the superintendent did the walkthrough with Defendants on August 9, 2016. Ms.

Reimer further stated that the superintendent told Defendants to leave the apartment keys in the management office mailbox. Ms. Reimer alleged that Plaintiff was notified by email on August 9, 2016 that Defendants had left the premises and delivered the keys. (*Id.* ¶ 12.)

ARGUMENTS

On its motion for summary judgment, Plaintiff argues it is entitled to:

(1) $10,600.00, representing four months of unpaid rent Defendants allegedly owe from during the lease tenancy, from April 2016 through July 2016;

(2) $795.00, representing six months of unpaid late fees Defendants allegedly owe from during the lease tenancy, from February 2016 through July 2016;

(3) an additional $10,600.00, representing two months of unpaid rent Defendants allegedly owe from Defendants' alleged holdover tenancy in August and September 2016, with a 200% penalty applied in accordance with paragraph 17 of the Lease Rider;

(4) $530.00, representing two months of unpaid late fees that Defendants allegedly owe from the holdover tenancy;

(5) $1,384.10, representing Plaintiff's allegedly reasonable attorney's fees from its prosecution of the action in housing court;

(6) $10,000.00, or a greater amount to be determined by the Court, allegedly

representing Plaintiff's reasonable attorney's fees in this action; and

(7) the dismissal of Defendants' affirmative defenses.

(Drossman affirmation, exhibit D, at 6–9, 16–17, 51.)

Plaintiff argues that, because Defendants paid none of the rent from April 2016 through September 2016, Defendants breached the lease and Plaintiff is entitled to summary judgment. Plaintiff further argues that, regardless of Defendants' warranty of habitability claim, Defendants still were required to make payment of the rent pursuant to the lease and, therefore, summary judgment is appropriate. In effect, Plaintiff argues that it is entitled to summary judgment on the issue of liability and that Defendants' argument as to warranty of habitability only goes to the issue of damages Plaintiff is entitled to recover.

Defendants argue that they made 47 separate complaints to Plaintiff and sought repairs for serious issues to no avail. Defendants further argue that, because they turned in the keys to the apartment on August 9, 2016, they were improperly charged rent and late fees afterward.

ANALYSIS

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in

admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The implied warranty of habitability provides that, in every written lease for residential purposes, the landlord "shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety" (RPL § 235-b[1]).

To the extent Defendants request relief in their opposition papers, "[w]hile it may be ultimately proven that [Plaintiff] breached the implied warranty of habitability, the present record does not as a matter of law establish it" (*Armstrong v Archives LLC*, 46 AD3d 465, 466 [1st Dept 2007]).

As such, Plaintiff's motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

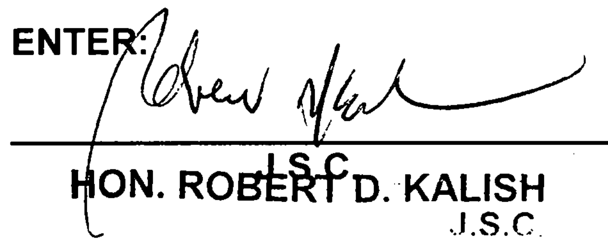
ORDERED that Defendant's motion to vacate the motion court's decision, dated April 20, 2017, is granted; and it is further

ORDERED that, upon this Court's de novo review of Plaintiff's motion for summary judgment (Seq. 001), the motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: October 20, 2017
New York, New York

ENTER:



HON. ROBERT D. KALISH
J.S.C.