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| <b>N&amp;S Rosen Realty, LLC v Khan</b>  |
| 2019 NY Slip Op 31378(U)   |
| May 2, 2019  |
| Supreme Court, New York County   |
| Docket Number: 150248/2018   |
| Judge: Frank P. Nervo  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK P. NERVO

PART

IAS MOTION 4

Justice

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INDEX NO. 150248/2018

N&S ROSEN REALTY, LLC,

MOTION DATE 4/25/19

Plaintiff,

MOTION SEQ. NO. 002

- v -

FAIZAN KHAN, NANCY CHAUDHRY

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53

were read on this motion to/for

DISMISSAL

The instant matter stems from defendants' residential tenancy in plaintiff's building. Plaintiff alleges defendants used their apartment, apt. #5, as an illegal short-term rental to transients, charging on a daily or weekly basis, in violation of their lease and applicable zoning laws. On October 19, 2017, plaintiff was issued four violations from the Department of Buildings ("DOB"), identified by the last three digits and letter of the "ECB Violation Number": 967P, 966N, 965L, and 964J (defendants' notice of motion - exhibit D). On December 7, 2017, plaintiff again received several violations from the DOB: 100J, 101L, 796R, 797Z, 798K, and 799M (id.). On February 2, 2018, an administrative hearing was held, and the summonses from December 10, 2017 (100J, 101L, 796R, 797Z, 798K, and 799M) were sustained, and penalties entered as follows: 100K \$400; 101L \$400; 796R \$3,200 and a daily penalty of \$1,000 for 36 days totaling \$36,000; 797Z \$1,200; 798K \$1,200; and 799M \$1,600. Plaintiff thereafter brought the instant suit seeking: 1. a declaratory judgment that defendants operated an illegal hotel and/or short-term rental in violation of applicable zoning laws and their lease, 2. a permanent injunction enjoining defendants from operating an illegal hotel and/or short-term rental, 3. an order ejecting defendants from the apartment, 4. damages for loss of reputation, 5. damages for penalties resulting from DOB violations, and 6. attorney's fees. Defendants did not renew their lease and vacated the apartment in late January or early February of 2018 (plaintiff's notice of cross-motion - exhibit I at p. 32;

exhibit J at p. 24). Defendants assert the affirmative defenses of failure to state a claim, statute of frauds, and unclean hands (defendants' notice of motion – exhibit C).<sup>1</sup>

Defendants move for summary judgment pursuant to CPLR § 3212. Plaintiff cross-moves to dismiss defendants first, second, and third affirmative defenses, failure to state a claim, statute of frauds, and unclean hands, respectively, pursuant to CPLR § 3211(b). Plaintiff also seeks summary judgment.

#### **PLAINTIFF'S CROSS-MOTION TO DISMISS DEFENSES**

CPLR § 3211(b) provides for the dismissal of a defense that is without merit or not properly stated. To dismiss a defense pursuant to CPLR 3211(b), “the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law” (*Granite State Ins. Co. v. Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015]). The defendant is given the benefit of “every reasonable intendment of the pleading, which is to be liberally construed” (*534 E. 11<sup>th</sup> St. Hous. Dev. Fund. Corp. v. Hendrick*, 90 AD3d 541 [1st Dept 2011]), and the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. Design Dev. Concepts*, 300 AD2d 198 [1st Dept 2002]). Where questions of fact requiring a trial remain, dismissal is inappropriate (*Granite State Ins. Co.*, 132, AD3d at 481). However, affirmative defenses which are pled as conclusions of law without factual support are properly dismissed (*Piemenou v. Arvanitakis*, 39 AD3d 612 [2d Dept 2007]).

As an initial matter, defendants have failed to address any of their affirmative defenses in opposition to plaintiff's cross-motion.

First, plaintiff contends that the first affirmative defense, failure to state a cause of action, should be dismissed as plaintiff has stated an action for, inter alia, breach of the parties' lease resulting in penalties to plaintiff. As plaintiff has stated a cause of action and defendants' affirmative defense is pled as a conclusion of law, defendants' first affirmative defense is dismissed (*see Piemenou*, 39 AD3d 612).

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<sup>1</sup> Defendants fourth affirmative defense, failure to provide notice of default, was withdrawn.

Second, plaintiff contends that the statute of frauds is inapplicable where, as here, the parties have entered into a written agreement. The lease was reduced to writing and all parties were signatories (defendants' notice of motion – exhibit A). Defendants' second affirmative defense, which alleges violations of the statute of frauds, amounts to a mere conclusion of law without factual support, even when viewed in the light most favorable and providing their answer the benefit of every intendment. Consequently, defendants' second affirmative defense must also be dismissed (*see Piemmenou*, 39 AD3d 612).

Third, plaintiff alleges defendants have failed to establish the necessary elements for a defense of unclean hands. The defense of unclean hands requires a plaintiff's illegal conduct to be directly related to the action being litigated and the party invoking the doctrine must have been injured by the illegal conduct (*National Distillers & Chem. Corp. v. Seyopp Corp.*, 17 NY2d 12 [1966]; *see also TNT Communications v. Management Tel. Sys.*, 32 AD2d 55 [1st Dept 1969]). Defendants have failed to furnish any factual support for their assertion that plaintiff acted illegally and such conduct injured them. Instead, to the extent that defendants' opposition to plaintiff's summary judgment cross-motion can be deemed opposition to plaintiff's motion to dismiss defendants' affirmative defenses, defendants contend that plaintiff should have called the defendants as witnesses during the agency hearing to testify that they were not operating an illegal hotel. This argument, however, fails to identify illegal conduct by the plaintiff as a basis for a defense of unclean hands. Consequently, defendants' third affirmative defense must be dismissed as a bare conclusion of law without factual support (*see Piemmenou*, 39 AD3d 612).

**SUMMARY JUDGMENT MOTIONS**

On a motion for summary judgment, pursuant to CPLR § 3212, the burden rests with the moving party to make a prima facie showing that it is entitled to judgment as a matter of law, and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “[I]t is proper for the court to ... deny summary judgment if facts are alleged in opposition to the

motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, issues of fact preclude summary judgment. The DOB violation notices submitted by both parties in support of their respective summary judgment motions fail to conclusively establish, as a matter of law, that defendants operated an illegal hotel and/or short-term rental, in violation of their lease. Likewise the violation notices fail to establish, as defendants contend, that the violations occurred before their tenancy or otherwise do not relate to their apartment. Of the ten DOB violation notices, only notice 796R explicitly states that apt. #5 was illegally used for transient guests (defendants’ notice of motion – exhibit D). Violation notices 966N, 965L, 964J, 101L, 797Z, 798K, and 799M relate to a separate apartment, not to apt. #5, and thus do not establish that defendants use of the apt. #5 violated the lease or zoning laws (*id.*). Notwithstanding, violation notices 967P, 100J, and 797Z may apply to use violations of apt. #5, however; the description section of the violation notice is truncated, and no apartment number is visible on those notices (*id.*).

Additionally, the depositions of plaintiff’s building manager and defendants are contradictory and fail to resolve issues of fact (defendants’ notice of motion – exhibits I and J; plaintiff’s notice of cross-motion – exhibit E). The building manager testified that defendants used the apartment as an illegal hotel, and admitted this use to her during a meeting (*id.*). Defendants both testified that they have never used the apartment as an illegal hotel or short-term rental and never admitted to such use (*id.*).

Finally, although defendants contend that because plaintiff cannot provide the identities of the alleged transient guests, summary judgment must be rendered in their favor, an issue of fact remains as to whether the apartment was in fact utilized as an illegal hotel

and/or short-term rental. Consequently, defendants' motion and plaintiff's cross-motion for summary judgment are denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent of dismissing defendants' first, second, and third affirmative defenses.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

May 2, 2019

DATE



FRANK P. NERVO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: