

<b>COD, LLC v Vera-Olvera</b>
2019 NY Slip Op 31804(U)
June 21, 2019
Supreme Court, New York County
Docket Number: 154478/2017
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

*Justice*

-----X  
INDEX NO. 154478/2017  
COD, LLC, MOTION DATE N/A  
Plaintiff, MOTION SEQ. NO. 001  
- v -

MARCO VERA-OLVERA,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 were read on this motion to/for COMPEL / SUMMARY JUDGMENT

In this action seeking unpaid rent, damages, and fees, defendant Marco Vera-Olvera (“Olvera”) moves, pursuant to CPLR 3124, for an order compelling plaintiff COD, LLC (“COD”), to produce further responses to Olvera’s Supplemental Notice of Discovery and Inspection, dated February 6, 2018. In particular, Olvera seeks documents concerning the ownership of the subject building, the parties authorized to execute leases, and certain construction work that caused a gas leak and the cessation of gas services to Olvera’s apartment. COD opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment on its claims for various breaches of the subject lease. Olvera opposes the cross-motion.

**BACKGROUND**

COD is the owner of a building located at 151 East 80th Street, New York, New York (the “Building”). On September 12, 2016, Olvera and COD entered into a lease agreement (the “Lease”) for apartment 6A (the “Apartment”) in the Building. Pursuant to the Lease, Olvera was to pay \$19,090.00 per month for the Apartment. In addition, Olvera was required to deposit \$57,270.00, three months’ rent, as security. The term of the Lease was one year and seventeen

days, beginning September 14, 2016 and ending on September 30, 2017. Within days of executing the Lease, Olvera took occupancy of the Apartment. (Lease, NYSCEF Doc. No. 14, ¶ 1; Gotlib Affirmation, NYSCEF Doc. No. 13, ¶¶ 3-4).

On Monday, November 14, 2016, Olvera received notice from COD that, due to a gas leak in another apartment in the Building, in an abundance of caution, Con Edison had shut down gas services for the entire Building. The notice conceded that investigation and repair of the Building's gas lines would be a lengthy process. As an alternative, COD stated that it would explore replacing all gas stoves and dryers in the Building with electric appliances, which could significantly reduce the time it would take to restore services. COD further stated that, as an accommodation, it had ordered hot plates and would make them available to tenants the following day (NYSCEF Doc. No. 15, p.1).

On Wednesday, November 16, 2016, COD sent a second notice to Olvera stating that COD would be installing temporary electric stoves and dryers in all apartments for use until the gas lines in the Building could be repaired. COD further stated that the temporary appliances had been ordered and would start to arrive at the Building for installation as early as Friday, November 18, 2016 (NYSCEF Doc. No. 15, p.3). After minor delays by the appliance vendor, delivery of the electric appliances was completed on or about Wednesday, November 23, 2016. (NYSCEF Doc. No. 15, p. 6). However, when COD attempted to replace Olvera's gas stove with an electric stove, Olvera refused, arguing that installation of the electric stove "would have transformed the beautiful kitchen into an unsightly one with empty cavities in the cabinetry", rendering the Apartment useless to Olvera as a home to entertain and host his business clients (Olvera Affidavit, NYSCEF Doc. No. 34, ¶ 12).

Olvera states that, because of the cessation of gas services to the Building and the subpar aesthetics of replacing his "Wolf range" with an electric stove, Olvera sought to vacate the Apartment and terminate his tenancy. In particular, Olvera alleges, without specifying the time and place of such conversation, that he entered into an oral agreement with Andrew Goldfarb, an agent of COD, under which Olvera would vacate the Apartment in a reasonable time in exchange for Mr. Goldfarb's accepting Olvera's security deposit in full satisfaction of Olvera's obligations under the Lease. (Olvera Affidavit, NYSCEF Doc. No. 34, ¶¶ 12-13). In purported reliance on this oral agreement, Olvera ceased paying rent as of December 1, 2016 (Olvera MOL in Opp, NYSCEF Doc. No. 33, p. 5).

On January 18, 2017, COD commenced a non-payment proceeding against Olvera seeking unpaid rent for December 2016 and January 2017, a judgment of possession, and a warrant of eviction. After Olvera failed to appear or answer the petition, a judgment was entered, on default, on March 9, 2017, awarding COD possession of the Apartment and directing the issuance of a warrant of eviction (Judgment, NYSCEF Doc. No. 38, p. 2). Olvera was evicted on April 5, 2017.

Upon recovery of possession of the Apartment, COD discovered that Olvera had damaged the Apartment in violation of the Lease. In particular, Olvera purportedly (1) damaged the wood floor of the Apartment by applying excessive wax and (2) left holes in a wall. The costs of repairing the wood floor and the wall were \$7,251.08 and \$150.00, respectively. After repairs, the Apartment was relet on June 1, 2017.

In light of Olvera's failure to pay the amounts due and owing under the Lease, COD commenced this action on May 15, 2017. The Complaint seeks (1) unpaid rent for the months of December 2016 through May 2017 in the amount of \$114,540.00 (less Olvera's forfeited security deposit in the amount of \$57,270.00), (2) reimbursement for the costs of repairing the

wood floor and the wall of the Apartment in the amount of \$7,401.08, (3) late charges pursuant to the Lease in the amount of \$5,727.00, and (4) reimbursement for the attorneys' fees incurred by COD in the prior non-payment proceeding and in this action.

On June 8, 2017, Olvera filed an Answer denying the material allegations of the Complaint and asserting two affirmative defenses; (1) accord and satisfaction and (2) material breach of the Lease by COD. First, Olvera argues that an oral agreement with COD to vacate the Apartment promptly and forfeit his security deposit absolves him of any further liability under the Lease. In the alternative, Olvera asserts that COD's failure to ensure gas services to the Apartment constitutes a material breach of the Lease by COD, which entitled him to terminate his tenancy. Thus, Olvera asserts, no sums are due by him to COD from and after the date of cessation of gas services on November 14, 2016 (Answer, NYSCEF Doc. No. 3).

On February 22, 2018, COD filed the note of issue. On March 5, 2018, Olvera filed a motion to compel further responses to its Supplemental Notice of Discovery and Inspection, dated February 6, 2018. On April 6, 2018, COD filed opposition to Olvera's motion and cross-moved for summary judgment. The motion was fully submitted on May 25, 2018. After the motion was submitted, the matter was transferred to this part by order on December 4, 2018.

## DISCUSSION

### I. Olvera's Motion to Compel.

Olvera moves, pursuant to CPLR 3214, to compel COD to produce further responses to Olvera's Supplemental Notice of Discovery and Inspection, dated February 6, 2018. Principally, Olvera seeks documents regarding the construction work that damaged the gas lines in the Building, which resulted in Con Edison's decision to shut down all gas services to the Building.

A motion to compel may be granted where the requested documents and information are material and necessary to the claims and defenses in an action. (*40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 [1st Dept 2007] [citations omitted]).

Here, COD correctly argues that the documents sought by Olvera regarding the construction that damaged the gas lines in the Building are not material or relevant to the issue of Olvera's liability for unpaid rent for the period from December 1, 2016 through May 31, 2017, or Olvera's affirmative defenses of accord and satisfaction and material breach. COD concedes that gas service was shut off to Olvera's Apartment starting on November 14, 2016 and that, as a result, COD was forced to replace the gas appliances in the Building with temporary electric appliances. The requested documents regarding construction work are not material or relevant to the issue of the severity and duration of the cessation of gas services to the Apartment, which are conceded. As for the requested documents regarding ownership of the Building, Olvera conceded at his deposition that he executed the Lease for the Apartment in the Building, which is owned by COD (Olvera Deposition, NYSCEF Doc. No. 28, p. 21; Deed, NYSCEF Doc. No. 25, p.1).

Accordingly, Olvera's motion to compel is denied.

## **II. COD's Cross-Motion for Summary Judgment.**

COD cross-moves, pursuant to CPLR 3212, for an order granting COD summary judgment on its claims for Olvera's breaches of the Lease. In particular, COD seeks (1) unpaid rent for the period from December 1, 2016 through May 31, 2017, in the amount of \$114,540.00, less Olvera's forfeited security deposit in the amount of \$57,270.00, (2) reimbursement for the costs of repairing the wood floor and the wall in the Apartment, in the amount of \$7,401.08, (3) late fees under the Lease in the amount of \$5,727.00, and (4) reimbursement for attorneys' fees incurred by COD in the prior non-payment proceeding and in this action.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, COD establishes the material facts of its claim, that Olvera executed a valid Lease and that he defaulted in his obligations thereunder when he “ceased paying rent in December 2016” (Olvera MOL, NYSCEF Doc. No. 33, p.2). In his defense, Olvera argues that he entered into an oral contract with COD whereby he would promptly vacate the Apartment and forfeit his security deposit and COD would accept his security deposit in full satisfaction of his obligations under the Lease, due to the cessation of gas services.

“In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” (*10839 Assoc. v David Feldman USA, LLC*, 2014 WL 5502913 [Sup Ct New York County 2014], quoting *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Here, the Lease contains a clause prohibiting oral modifications. (Lease, NYSCEF Doc. No. 14, ¶ 25[b]). Thus, assuming an oral agreement did exist, it would still not be admissible evidence under the statute of frauds to defeat COD’s summary judgment motion (*see 310 S. Broadway*

*Corp. v Barrier Gas Serv., Inc.*, 224 AD2d 409, 410 [2d Dept 1996] [a lease containing a provision forbidding modifications except by a writing executed by both parties is governed by the statute of frauds]; *see also* General Obligations Law § 15-301[1]). Olvera's alleged reliance on an oral modification of the Lease is of no import since it violates the statute of frauds (*see 10839 Assoc.*, 2014 WL 5502913 [holding allegation that plaintiff made an oral contract with defendants to use all reasonable efforts to find a new tenant for defendants' space so as to extricate defendants from the lease was of no impact since it violated the statute of frauds]). As Olvera fails to prove that his forfeiture of his security deposit constituted full settlement of his obligations under the Lease, his affirmative defense of accord and satisfaction is dismissed. (*see 174 Second Equities Corp. v Fancy R & S Leather Cleaners, Inc.*, 11 Misc 3d 133(A) [App Term, 1st Dept 2006] [affirming dismissal of tenant's accord and satisfaction affirmative defense based on an alleged oral modification of a lease containing a no oral modifications clause]).

In the alternative, Olvera argues that COD's failure to provide gas services to the Apartment was a material breach of the Lease by COD that entitled Olvera to terminate the Lease and cease paying rent from and after the date of cessation of gas services on November 14, 2016. (Answer, NYSCEF Doc. No. 3, ¶ 37). Olvera's contention is without merit. Gas services is not included in the definition of the required services that COD agreed to provide under the Lease. (Lease, NYSCEF Doc. No. 14, ¶ 11[a]). Moreover, COD made no representation that it would ensure the availability of gas services, which were to be provided by Con Edison. (Lease, NYSCEF Doc. No. 14, ¶ 9[d]). Accordingly, COD's failure to provide gas services to the Apartment starting on November 14, 2016 did not give rise to Olvera's right to terminate the Lease or obviate Olvera's obligation to pay rent according to its terms.

To the extent Olvera's second affirmative defense was intended as a claim for breach of the warranty of habitability, under New York Real Property Law §235-b, and a request for an abatement of rent, the claim is barred in part by the doctrine of res judicata and otherwise lacks merit.

To establish a cause of action for breach of the warranty of habitability, the tenant must show that the premises were not "fit for human habitation and for the uses reasonably intended by the parties" through the existence of conditions which were "dangerous hazardous or detrimental to [the occupants'] life, health or safety" (RPL § 235-b [1]). A non-waivable warranty of habitability and reasonable fitness for use is part of every written or oral lease or rental agreement for residential purposes (RPL § 235-b). A claim for breach of the warranty of habitability may be asserted as a defense or counterclaim in an action or summary proceeding for the nonpayment of rent, or in a plenary action.

(*Dominguez v Ilan*, 31 Misc 3d 1219(A) [Sup Ct New York County 2011]).

"Pursuant to the doctrine of res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Lazides v P & G Enterprises*, 58 AD3d 607, 609 [2d Dept 2009]). "[R]es judicata applies 'to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior [action]'" (*id.* at 609, quoting *Matter of Eagle Ins. Co. v. Facey*, 272 AD2d 399, 400 [2d Dept 2000]). Here, COD obtained a final judgment against Olvera and a warrant of eviction based on Olvera's failure to pay rent for the months of December 2016 and January 2017. Olvera could have asserted a defense for breach of the warranty of habitability based upon COD's failure to provide gas services in that proceeding (*see RVR Realty LLC v Tenants Alliance*, 305 AD2d 289 [1st Dept 2003] [breach of warranty of habitability is an affirmative defense to nonpayment of rent]). Accordingly, to the extent Olvera seeks an abatement for COD's purported breach of the warranty of habitability for the period from November 14, 2016 through January 31, 2017, the defense is barred by the doctrine of res judicata (*see 101 Cooper*

*St. LLC v Beckwith*, 55 Misc 3d 145(A) [App Term, 1st Dept 2017] [to the extent a tenants' habitability counterclaim relates to the time period at issue in a prior proceeding, it is barred]).

As for the period from February 1, 2017 through May 31, 2017, the last date before which the Apartment was relet, Olvera fails to allege facts sufficient to establish a claim for breach of the warranty of habitability. It is undisputed that, had Olvera not refused to allow COD to install electric appliances in the Apartment on or about November 23, 2016, Olvera's ability to cook and do laundry would not have been impaired during the period from February 1, 2017 through May 31, 2017.<sup>1</sup> The decrease in aesthetic appeal of the Apartment's kitchen that would have resulted from installation of the electric stove, which Olvera alleges "would have transformed the beautiful kitchen into an unsightly one with empty cavities in the cabinetry", is not the type of condition that gives rise to a claim for breach of the warranty of habitability (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979] ["absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition."]); Olvera Affidavit, NYSCEF Doc. No 34, § 12). Accordingly, to the extent Olvera seeks an abatement for COD's purported breach of the warranty of habitability for the period from February 1, 2017 through May 31, 2017, that defense is without merit and is dismissed.

In addition to unpaid rent, COD seeks (1) late charges, (2) reimbursement of repair costs, and (3) reimbursement of attorneys' fees incurred in this action and the prior non-payment proceeding. COD's demand for late fees and repair costs are both supported by specific

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<sup>1</sup> Olvera concedes that he refused to allow COD to install an electric stove in the Apartment on or about November 23, 2016. Thus, Olvera may not rely upon COD's failure to provide cooking and laundry services after November 23, 2016 to establish a claim for breach of the warranty of habitability as "[h]e who prevents a thing from being done may not avail himself of the non-performance which he has, himself, occasioned, for the law says to him, in effect; This is your own act, and, therefore, you are not damnified" (*Nassau Tr. Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 185 [1982], quoting *Imperator Realty Co. v Tull*, 228 NY 447, 457 [1920] [Cardozo, J.]).

provisions of the Lease (Lease, NYSCEF Doc. No. 14, ¶ 3[b], late charges, ¶ 17[a], repair costs).

Accordingly, the branch of COD's motion for summary judgment on those claims is granted.

However, the Lease does not entitle COD to reimbursement for the attorneys' fees it incurred in this action or the prior non-payment proceeding. "Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986] [citations omitted]). Furthermore, "[l]egal fee clauses must be strictly construed" (*Reade v Highpoint Assoc. IX, LLC*, 36 AD3d 496, 497 [1st Dept 2007], citing *Gottlieb v. Such*, 293 A.D.2d 267, 268 [1st Dept 2002], *lv. denied* 98 N.Y.2d 606 [2002]).

Here, the Lease contains three clauses that detail the circumstances under which COD may recover attorneys' fees from Olvera. First, COD reserved a right to recover attorneys' fees in the event Olvera filed a notice of mechanics lien against the Building (Lease, NYSCEF Doc. No. 14, ¶ 8[d]). Second, COD reserved a right to recover attorneys' fees, under certain circumstances, in the event Olvera desired to assign or sublet the Apartment (*id.* at ¶ 13[a]). Finally, COD reserved the right, in the event the Lease was terminated due to Olvera's default, and the Apartment was subsequently re-rented, to recover "Owner's expense for attorney's fees, advertisements, broker's fees and the cost of preparing the Apartment for re-rental" (*id.* at ¶ 15[c][ii]). The Lease does not, however, expressly entitle COD to recover attorneys' fees incurred in connection with a special proceeding to recover possession of the Apartment or in an action to recover unpaid rent or other amounts owed by Olvera to COD under the Lease. Thus, upon searching the record, the court finds that COD's cause of action for attorneys' fees must be dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's motion to compel is denied; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is granted on the terms set forth herein; and it is further

ORDERED that the clerk enter judgment in favor of Plaintiff COD, LLC, and against Defendant Marco Vera-Olvera, for unpaid rent in the amount of \$57,270.00, for repair costs in the amount of \$7,401.08, and for late fees in the amount of \$5,727.00, for a total sum of \$70,398.08, plus interest thereon at the rate of nine percent from the date of May 31, 2017 through the date of entry of judgment by the clerk, as calculated by the clerk, together with costs and disbursements as taxed by the clerk upon submission by COD of an appropriate bill of costs.

Any requests for relief not otherwise discussed herein have nonetheless been considered by the court and are hereby denied and this constitutes the decision and order of the court.

June 21, 2019  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE

APPLICATION:  DENIED

CHECK IF APPROPRIATE:  SUBMIT ORDER  FIDUCIARY APPOINTMENT