

<b>GG Broadway Terrace, Inc. v Favin</b>
2019 NY Slip Op 31843(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 654810/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

-----X INDEX NO. 654810/2016

GG BROADWAY TERRACE, INC.,

Plaintiff,

MOTION 11/08/2017, DATE 02/27/2019

- v -

LAURA FAVIN,

Defendant.

MOTION SEQ. NO. 001 002

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 38, 42, 43, 71

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for JUDGMENT - SUMMARY .

Plaintiff GG Broadway Terrace, Inc., commenced this action against its former tenant, defendant Laura Favin, seeking post-possession use and occupancy. In her answer defendant asserted several counterclaims. On May 21, 2018 the Court dismissed plaintiff's complaint as the causes of action raised in it were addressed and settled by a stipulation and mutual release in a previous lawsuit between the parties. Plaintiff now moves for summary judgment dismissing defendant's counterclaims, and defendant

cross-moves for leave to reargue this Court's previous denial of her motion for summary judgment on her counterclaims.

The Court first addresses plaintiff's motion for summary judgment dismissing the counterclaims. On a motion for summary judgment, the movant carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When there are no triable material issues of fact, it is incumbent upon a court, in the interests of judicial economy, to grant summary judgment (*Andre v Pomeroy*, 35 NY2d 557 [1980]).

On June 21, 2007, defendant entered into a lease agreement with plaintiff for apartment 1D in the building located at 5 Broadway Terrace in Manhattan. In 2009, plaintiff commenced a summary landlord-tenant proceeding against defendant, which was ultimately settled by a stipulation and mutual release. On August 5, 2009, defendant commenced a second proceeding and was awarded legal possession of the leased premises. By the time plaintiff recovered possession, rental arrears for the apartment had accumulated to \$73,461.11.

Plaintiff commenced the instant action to recover that sum. On May 21, 2018, Justice Bannon issued a decision and order dismissing plaintiff's complaint based on the 2009 stipulation of settlement and mutual release agreement which already addressed and resolved plaintiff's claim for use and occupancy. As such, the issue of defendant's counterclaims is all that remains in this case.

Defendant's counterclaims all lack merit. The first and second counterclaim allege breach of the agreements between the parties, and the eighth and ninth counterclaims are for fraud and frivolous litigation. However, in the affidavits attached to its motion, plaintiff avers that it was unaware of the prior settlement and mutual release, as plaintiff lost the settlement documents at issue when they switched management companies. Upon learning of the settlement, plaintiff immediately halted prosecution, searched for the settlement documents, and upon confirmation of the terms, offered to withdraw its complaint with prejudice. In response, defendant has failed to raise any evidence to suggest fraud or bad faith (*see Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1983] [an opposing party's assertion of conclusory, unsubstantiated allegations is insufficient to raise an issue of fact mandating denial of summary judgment]).

Several of defendant's counterclaims seek legal fees. As to past fees, paragraph two of the stipulation of settlement voided the lease and any other agreements that may have been entered into between the parties, and paragraph three released plaintiff from obligations based in contract, tort, statute, or any other legal or equitable theory of recovery. As such, legal fees incurred in the previous litigation, as well as those incurred in litigating this case, are subject to the general "American Rule" and each party is presumed responsible for its own attorney's fees (*see Fleming v Barnwell Nursing Home*, 15 NY3d 375 [2010]; *Hunt v Sharp*, 85 NY2d 883 [1995]).

Similarly, defendant's fifth counterclaim for her security deposit was waived and released in the stipulation of settlement and mutual release agreement. Defendant's sixth counterclaim seeking a preliminary injunction fails to allege the elements that would warrant injunctive relief, is duplicative of the breach of settlement defense, and is moot because the complaint has been dismissed and defendant has already availed herself of an adequate remedy at law, to wit, the enforcement of the parties' settlement.

Defendant's seventh counterclaim alleging various violations of N.Y. Gen. Bus. L. § 601 lacks merit as the settlement agreement at issue is a private contract—not a "deceptive act" in a "typical consumer transaction" (*see N.A. v. Sablic*, 55 AD3d 651 [2008]).

Lastly, defendant's counterclaims all generally seek damages for alleged "emotional and financial damages." However, aside from her counterclaims for legal fees and the security deposit, defendant has not alleged or illustrated any other form of financial damages. As to the "emotional damages" sought in the counterclaims, it is well settled that "absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty (*Riffat v Continental Ins. Co.*, 104 AD2d 301, 303 [1984] *quoting Wehringer v Standard Security Life Inc. Co. of N.Y.*, 57 NY2d 757, 759 [1982]). Defendant has not set forth any evidence that would raise an issue that the exception to the general rule applies here (*see Johnson v Jamaica Hosp.*, 62 NY2d 523 [1984]). Nor is defendant entitled to punitive damages.

Accordingly, plaintiff's motion for summary judgment dismissing the counterclaims must be granted.

Next, defendant seeks leave to reargue Justice Bannon's May 21, 2018 decision and order, which denied defendant's motion for summary judgment on her counterclaims. Under CPLR 2221 a motion to reargue should be decided by the judge who issued the order in question. As such, defendant's motion seeking leave to reargue is respectfully referred to Hon. Nancy Bannon.

Accordingly, it is

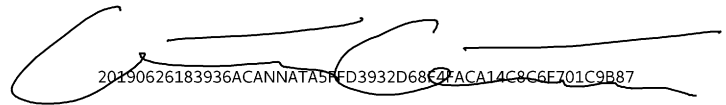
**ORDERED** that plaintiff's motion for summary judgment is granted and the defendant's counterclaims are dismissed; and it is further

**ORDERED** that defendant's motion seeking leave to reargue is respectfully referred to Hon. Nancy Bannon; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

6/26/2019

DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: