SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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40 CPS ASSOCIATES LLC,

Plaintiff,

- v -

LAUREN MOSKOWITZ, MATTHEW CHOATE

Defendant.

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INDEX NO. 652854/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL.

The motion to dismiss by defendants is denied.

Background

This action arises out of purportedly unpaid rent owed by defendants in an apartment located on Central Park South. Plaintiff alleges that defendants entered into a one-year lease starting in October 2019 and terminating on October 31, 2020 which set the monthly rent at $22,000 per month. It contends that defendants breached the lease by vacating the apartment on May 31, 2020, prior to the expiration of the lease.

Defendants move to dismiss on the ground that this action is premature and the controversy is not ripe for judicial intervention. Defendant Moskowitz contends that in March 2020 she contacted the management company and asked about terminating the lease. She contends that the management company refused to reach a reasonable settlement and defendants ended up vacating the apartment at the end of May. Ms. Moskowitz claims that plaintiff

accepted their surrender of the apartment and started marketing it. She attaches a copy of the rental listing (NYSCEF Doc. No. 12). She complains that plaintiff's counsel emailed the complaint to the managing partner at her law firm for no reason other than to harass and intimidate her.

Defendants contend that because the lease does not end until October, this claim is premature. They also argue that plaintiff can use the security deposit (equal to one month's rent) to pay the rent for June 2020. They rely on an executive order signed by Governor Cuomo permitting such action.

In opposition, plaintiff complains that the defendants question the ethics of the founding partner of its firm. It notes that the executive order permitting the use of the security deposit does not apply in this case because there is no evidence that defendants are receiving unemployment insurance or are in a dire financial situation because of Covid. Plaintiff emphasizes that defendants were paying $22,000 per month. It argues that it can sue under the theory of anticipatory breach.

In reply, defendants insist that this case cannot be maintained because the amount of damages cannot be ascertained given that the lease does not expire until the end of October 2020. They argue that under new the new housing law passed in 2019, landlords have a duty to mitigate damages.

Discussion

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally

and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

"In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez,* 84 NY2d 83, 88, 614 NYS2d 972 [1994]).

The Court denies the motion. Plaintiff has clearly stated a cause of action. The lease provides that a default can occur if the "Tenant and other legal occupants of the Apartment permanently vacate the Apartment prior to the termination date of the Lease" (NYSCEF Doc. No. 10, ¶ 17[4]). Plaintiff contends and defendants concede that they vacated the apartment in May 2020 and defendants attach a copy of a document stating that they are vacating the apartment (NYSCEF Doc. No. 11). There is no evidence attached demonstrating an agreement was reached to terminate the lease before it expired. Clearly, this states a cause of action for breach of the lease.

The parties' dispute about damages is just that—a dispute about the amount of damages plaintiff might be able to recover. That does not prevent plaintiff from maintaining this action. Assertions about plaintiff's purported duty to mitigate damages under the HSTPA, its listing of the apartment and what has happened since this case began will be litigated during the pendency of this action.

Nothing argued or cited by defendants demonstrates definitively that plaintiff cannot bring this case. To be clear, this is not a question of anticipatory breach because the allegation in the complaint is that there already was a breach (the vacating of the apartment prior to the

expiration of the lease). And the Executive Order discussed by the parties does not compel a different outcome. That order permits landlords to enter into a written agreement to use the security deposit for rent owed and that it applies to tenants "who so request it that are eligible for unemployment insurance or benefits under state law or federal law or are otherwise facing financial hardship due to the COVID-19 pandemic" (NYSCEF Doc. No. 19). Defendants did not submit anything to show that they met any of these qualifications or that plaintiff declined to use the security deposit when requested.

Summary

The Court observes that defendants' focus on the unrelated prior suspension of an attorney at counsel for plaintiff's firm is misplaced. This Court deals with facts and is not swayed by character assaults. Defendants' claim that counsel for plaintiff is essentially not credible is not a convincing argument to succeed on a motion to dismiss a client's case. The First Department ordered a four-month suspension; that time period is over and this Court finds it wholly irrelevant to this case.

However, the Court notes that the email sent from counsel for plaintiff's paralegal to the managing partner of defendant Moskowitz's employer attaching the summons and complaint (NYSCEF Doc. No. 14) was completely inappropriate and unprofessional. This email was sent about two weeks after Moskowitz had been personally served. There is no reason to send the commencing documents to a litigant's boss after that litigant was served. That type of obnoxious and mean-spirited behavior will not be tolerated as this case proceeds.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied and defendants shall answer pursuant to the CPLR.

Remote Conference: November 30, 2020.

8/19/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE