Alan J. Waintraub, PLLC v 97-17 Realty, LLC
2020 NY Slip Op 34502(U)
June 22, 2020
Civil Court of the City of New York, Queens County
Docket Number: L&T 61348/19
Judge: Sally E. Unger
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CIVIL COURT OF THE CITY OF NEW YORK **Index No. L&T 61348/19**
COUNTY OF QUEENS: PART 52
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ALAN J. WAINTRAUB, PLLC,

Petitioner,

-against-

97-17 REALTY, LLC,

Respondent.

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DECISION AND ORDER
AFTER TRIAL

Petitioner commenced the instant illegal lockout proceeding by order to show cause and verified petition dated May 23, 2019 (hereinafter "O/S/C"). The petitioner seeks a judgment: a) awarding and restoring the petitioner to possession of the 3rd floor of 97-17 64th Road, Rego Park, New York (hereinafter "subject premises"); b) granting a warrant of eviction; and c) awarding treble damages pursuant to RPAPL §853, together with costs and disbursements. The Court has had an opportunity to review all the testimony as well as the documentary evidence and to assess the credibility of the witnesses. After trial, the Court's decision and order is as follows:

Procedural Background

The petitioner, Alan J. Waintraub, PLLC, as tenant law firm (hereinafter "petitioner"), and respondent, 97-17 Realty, LLC as landlord (hereinafter "respondent"), entered into a 5-year lease of the subject premises, commencing January 15, 2015. Alan J. Waintraub (hereinafter "Waintraub"), is an attorney as well as the president and managing member of the petitioner. At or about the time the lease commenced, the petitioner was issued five electronic key cards for entry into 97-17 64th Road, Rego Park, New York (hereinafter "subject building") and for other areas in the subject building where the subject premises is situated. The petitioner allegedly was locked out of the subject building, and consequently the subject premises, on April 15, 2019.

On May 29, 2019, the Court conducted an inquest in this matter, based upon the order to show cause filed by petitioner. At its issuance, the Court permitted two alternate methods of service of the papers, i.e. overnight courier or personal service. Petitioner served the order to show cause by FedEx upon the respondent at the notice address in the lease, i.e. the subject building. Despite the fact that this was technically the correct location for service of notices, it is an address where apparently, Waintraub was aware the respondent did not maintain an office. As a result, FedEx returned the order to show

cause to petitioner. Although Waintraub had respondent's email address at least as early as January 2019, petitioner did not apprise the Court of Waintraub's knowledge.

During the inquest, Waintraub testified that in January 2019, he advised the respondent his firm would be vacating the subject premises at the end of March. Under the terms of the lease, the petitioner and Waintraub individually were financially obligated to pay rent for six months from the time of notice by the petitioner to the respondent of an impending vacatur. According to Waintraub's testimony and the correspondence admitted into evidence at the inquest, Waintraub wanted to pay rent for a lesser period of time, but the respondent insisted it was entitled to the full six months of rent under the lease terms. The respondent would not allow petitioner to fall short of its obligations.

At the inquest, Waintraub testified in the present tense that "We have our office at 97-17 64th Road, 3rd Floor." He maintained his law firm had been locked out by respondent as early as April 14, 2019. He testified that when he went to his office on that date, an individual he identified as respondent's employee, would not give him access to the subject premises until she obtained permission from respondent's principal, Aron Burokhov (hereinafter "Burokhov"). Waintraub took some of his belongings and left the respondent's purported employee with a housekeeper at the subject premises. Although Waintraub wanted to create the impression that the petitioner was maintaining and using the subject premises, the firm had located and substantially moved to new office space at 125-10 Queens Boulevard in Kew Gardens.

Respondent's alleged means of locking out petitioner was by deactivating petitioner's electronic key cards. According to Waintraub, when he returned the following day of April 15th, there were two individuals associated with respondent who were present in the subject premises. Waintraub did not elaborate on what occurred when he allegedly returned that day. Waintraub also recalled he went to the subject premises again on April 29th and by that time respondent had installed their computers and an internet system, had a printer and two full time employees. Waintraub did not offer a reason for the nearly month long delay of petitioner's submission of the order to show cause, i.e. from April 29th to May 23rd.

After inquest on May 29, 2019, the Court granted petitioner an order restoring it to possession (hereinafter "restoration order"). Although Waintraub testified that, once reminded by the respondent of petitioner's six month obligation to pay rent he acquiesced without objection, Waintraub requested a provision in the restoration order whereby petitioner would not be obligated to pay rent until it was restored to possession. That relief was granted as well. Petitioner was permitted to utilize the NYPD if there was difficulty in obtaining access to the subject premises.

While the terms of the default restoration order required personal service, petitioner only served it by mail service and addressed the envelope to an improper address. Perhaps this explains why the respondent's motion by order to show cause was not submitted to the Court for signature until June 19, 2019. In that application, the respondent sought to vacate the default restoration order and conduct a trial on the merits. After review of the

motion papers and oral argument on July 3, 2019, the Court issued an order vacating the restoration order and setting the matter down for trial.

The trial in this matter was conducted on August 1 and 6, September 17, November 14, 2019 and January 14, 2020. The petitioner produced three witnesses to testify on its behalf, including Waintraub, respondent's representative, Burakhov and Ilya Blokh, another tenant in the subject building, who was called as a rebuttal witness. The respondent produced four witnesses, Jennifer Forte, an assistant to the petitioner, Burokhov, and records witnesses from both utilities providers, Con Edison of New York, Inc. and National Grid. On August 6, 2019, the parties agreed that without prejudice to their respective claims and defenses, the petitioner tendered and the respondent accepted the petitioner's surrender of the subject premises effective on that date.

Factual Background

When the petitioner took occupancy of the subject premises in 2015, respondent provided several pieces of office furniture for use during petitioner's tenancy. Waintraub also executed what is known in the industry as a "Good Guy Guaranty" (hereinafter "Guaranty"), in which Waintraub accepted personal liability under the lease, with certain conditions. During the last year of the lease, the monthly rent amount was $6,078.00.

Under §1a) of the Guaranty, Waintraub could limit both his personal liability and the liability of the professional limited liability company petitioner after the 3rd anniversary of the lease, by giving notice of the petitioner's intention to surrender the subject premises on a specific date. However, the Guaranty required 180 days' notice in advance of the actual surrender. As with other guaranties of this sort, the petitioner was required to be current with all financial obligations under the lease. Therefore, the petitioner and Waintraub individually, were liable for the equivalent of 6 months' rent from the time of notice of the intent to surrender, regardless of whether the surrender occurred prior to the expiration of the 6 months. This limited liability was also contingent upon petitioner's compliance with all other terms in the lease.

Although §16.1 of the lease requires any notice to the respondent must be served by any one of three methods, none of which was service by email, on January 15, 2019, Waintraub sent an email to the respondent in which he announced that his firm would be vacating the subject premises on or about March 31, 2019, 105 days shy of the required 180 days' notice under the Guaranty. In that email, Waintraub suggested respondent could show the subject premises to potential tenants, at reasonable hours and while the petitioner or staff was present. Waintraub also stated he intended the $10,000.00 security deposit on hand with the respondent to be credited as a rent offset for the months of February and March 2019.

It would be particularly beneficial to petitioner if another tenant could be obtained by the respondent, because this would limit both Waintraub's and the petitioner's liability for rent. In the event that the subject premises became vacant and the respondent re-let the subject premises, pursuant to §14.1 and §14.4 of the lease, the petitioner's rent as

well as the respondent's damages and expenses, would be offset by any money received for the rest of the lease term.

In response later on January 15th, Burokhov reminded Waintraub of the 180 day notice requirement of the Guaranty. Burokhov advised him that, provided his law firm was in compliance with all other lease terms, which according to Burokhov it was not, Waintraub would be responsible for the rent through the end of July 2019. (If petitioner was not in compliance, neither Waintraub nor petitioner would be released from their ongoing liability for rent.) Burokhov also told Waintraub that since his firm would be vacating the subject premises prior to the natural lease expiration, the petitioner's security deposit would be forfeited and would not be credited toward the rent. Pursuant to §3 of the Guaranty, in the event of a default under the lease, the respondent was not required to exhaust the petitioner's security deposit before looking to Waintraub as guarantor of the payment of rent.

In late March, Waintraub and Alex Tverd, the respondent's representative, were in communication by text messaging regarding the respondent's furniture in the subject premises, as well as access to the subject premises for the purpose of showing it to a potential tenant. Waintraub was not quickly responsive to Mr. Tverd. When Mr. Tverd made his second request for access, Waintraub's April 1st response was "We are no longer open in 64th. Please tell me when you need access and I will try to get you in."

Thereafter, on April 3, 2019, Waintraub persisted in laying claim to his security deposit. On that date, he sent Burokhov an email in which he stated,

> Please confirm that the condition of the unit as it is currently, after I remove the items that remain in the unit that are mine, is sufficient to have the security deposit returned in full. There are no other major items that need to be removed from the unit and the remaining furniture is yours except for the coffee machine, water cooler, fridge and microwave.

This text message and email have particular significance, because they speak to the issue of vacatur and possible surrender as of April 3rd. The email of April 3rd is also in direct contradiction to a later correspondence from Waintraub at the end of the same month. In the subsequent letter of April 29, 2019, Waintraub accused the respondent of locking petitioner out of the subject premises and stealing the petitioner's possessions. In his conclusion of that letter, he said "Please further note that the Tenant has items of significant value in the Premises. Due to the actions of the Landlord, the Landlord has stolen these items from the Tenant." The Court also notes that while Waintraub attempted to mislead this Court to believe through photographs and video that the subject premises had been taken over and fully occupied by respondent, in actuality, the bulk of the photographed furnishings were provided by respondent to petitioner at the commencement of its lease for use by petitioner in the subject premises.

Although prior communications between the petitioner and respondent were made by email and text message, on April 29, 2019, petitioner suddenly felt compelled to

communicate in accordance with the notice provision of the lease and sent its formal letter correspondence that day by overnight mail. In that letter, petitioner alleged its rent was paid through April 2019. Additionally, the petitioner proclaimed that the respondent had illegally locked the petitioner out of the subject premises as of April 15, 2019, by disabling the key card (singular) of the petitioner and thereby thwarting its means of access from that date forward. The petitioner also accused the respondent of illegally moving its representatives into the subject premises as of April 14, 2019. Waintraub then demanded the return of his firm's security deposit. Finally, Waintraub threatened to bring an illegal lockout proceeding and attempted to use the very existence of the instant proceeding as leverage for the respondent to return the security deposit.

The letter of April 29th is also significant, because throughout the inquest and the trial, Waintraub testified that he visited the subject premises on April 29th and videotaped his visit on that date when he found two women in the subject premises, allegedly employees of respondent. And yet, there is no mention of this purported April 29th visit anywhere in the correspondence of even date. Moreover, there is no objective evidence demonstrating that such a visit occurred on April 29th. The respondent's records do not show any entry on April 29th and the video tape entered into evidence by petitioner is not date stamped. Rather, it seems Waintraub went to the subject premises two weeks earlier, on the April 15th visit and decided to complain about what he saw on April 15th as late as April 29th.

In his letter of April 29th, Waintraub also references §14 of the lease and accuses respondent of failing to follow notice procedures for, and prior to, the respondent's entry into the subject premises. However, those notice provisions only apply in the instance of a lease violation and after the respondent's lease termination. By Waintraub's own statement, the rent for his firm was paid through April 2019. Based upon the evidence presented at trial, petitioner was not yet in violation of the lease and the lease had not been terminated. Actually, the lease was never terminated by the respondent. Therefore, the notice provisions of §14 had not been triggered.

On April 30, 2019, Waintraub sent yet another letter to Burokhov. In that correspondence, Waintraub once again failed to even mention his purported attempted access of just one day earlier, something which presumably would have been foremost in his mind, had it occurred. Instead, rather than cite this specific alleged thwarted access effort, he merely repeated his generalized claim of being locked out of the subject premises. Waintraub used this purported lockout as a justification to refuse to pay rent for the month of May 2019.

On May 7, 2019, Burokhov responded to Waintraub's letter of April 29th and noted the sudden change in Waintraub's method of communication from phone calls or electronic transmission to hard copy correspondence sent to a location where Waintraub knew the letters would not be retrieved immediately. Burokhov refuted the various contentions of petitioner. He also recounted the various ways Waintraub attempted to obtain a rent reduction for his firm over the prior couple of years, including an allegation that the subject premises was too narrow and that the HVAC system was allegedly

malfunctioning. Burokhov reminded Waintraub of his rent obligations under the Guaranty, repeated the reason the security deposit would not be returned and advised him that he continued to have unrestricted access to the subject premises.

More than three weeks after Waintraub's April 30th correspondence, the petitioner submitted its order to show cause to this Court.

Discussion

In commercial proceedings, when a landlord tenant relationship sours, unfortunately on occasion a landlord resorts to self-help by changing the locks and retaining the keys. That conduct operates as an eviction. The act of the landlord entering into the premises by changing the locks deprives the tenant of its use of the premises sufficient to terminate the lease, *Constitutional Realty Corp. v. Puder,* 54 AD2d 537, 387 NYS2d 1 (1st Dept.1976).

Furnishing a key is the symbol of possession. *See American Tract Socy. v. Jones,* 76 Misc. 236, 134 NYS 611 (AT 1 1912). Therefore, when a landlord arbitrarily refuses to provide its tenant with a key, this conduct is considered so hostile to the landlord tenant relationship and shows such willful disregard of the tenant's rights, as well as the unreasonable interference with the tenant's enjoyment of the lease premises, that it is viewed in law as an eviction. *American Tract Socy. v. Jones, supra.* It has long been held that changing locks on the premises and preventing access by the tenant amounts to a wrongful eviction. *3855 Broadway Laundromat, Inc. v. 600 West 161 Street Corp.,*156 AD2d 202, 548 NYS2d 461 (1st Dept.1989); *Barash v. Pennsylvania Terminal Real Estate Corp.,* 26 NY2d 77, 308 NYS2d 649(1970); *Mitchell v. City of New York,*154 Misc2d 222, 584 NYS2d 277 (NYC Civ 1992).

Here, however, the respondent did not physically change the locks. The petitioner contended that the respondent simply deactivated the petitioner's electronic key cards, which in today's electronic world is tantamount to changing locks. The petitioner alleged that the respondent did this on April 14, 2019, resulting in petitioner's inability to access the subject premises. Ms. Forte and Waintraub's testimony, the text message of Waintraub dated April 1, 2019, the email from Waintraub dated April 3, 2019 and the evidence of both utility companies, all demonstrated that the move out of the subject premises and into 125-10 Queens Boulevard had been effectuated at the end of March. This was in accordance with Waintraub's initial notice to Burokhov in January 2019.

Despite the fact that all the evidence pointed to the petitioner's vacatur in March 2019, Ms. Forte and Waintraub testified Waintraub continued to meet with clients at the subject premises. The electronic key card access logs (hereinafter "logs") tell another story. The parties stipulated that the Court would review the logs only for the time frame of April 1 – June 30, 2019 (hereinafter "relevant period"). According to the objective empirical evidence of the logs for the relevant period, no one from petitioner's office even attempted to gain access between April 23, 2019 and June 30, 2019, (with the exception of June 13th when the parties had a pre-arranged meeting and Ms. Forte

gained access into the subject building and premises without her use of an electronic key). The Court discredits the petitioner's testimony regarding his purported attempt to gain access on April 29th.
The logs show that on April 1, 2019 someone used Waintraub's electronic key by making two attempts at access. They were able to unlock, but not lock. On April 2nd, someone using Waintraub's electronic key attempted four accesses; three were successful in unlocking the access point. Only one attempt was unsuccessful in locking it. On April 4th, someone using Waintraub's electronic key made six access attempts, five of which were successful. On April 8th, there was only one access attempt made by someone using Waintraub's key, and it was successful. On April 10th, four access attempts were made by someone using Waintraub's electronic key: two to unlock were successful, two to lock were unsuccessful.

Of the five key cards issued to Waintraub's office, only one key card was used in an attempted access on April 15, 2019, the date of the alleged illegal lock out, and it is inconclusive whether it was Waintraub. The key issued to Katherine Marchino, a former employee of Waintraub, was used to make access on that date. Based on the logs, someone using that key obtained access at 8:50 am, but they were unsuccessful in using that key at 5:49 pm. On April 22nd, the same key was used and the individual using it was able to gain access. Of the eight access attempts made on that date, the individual was denied access on only one occasion.

The inconsistency of successful access bespeaks of a faulty system or a user who isn't always able to utilize the key card properly. This does not rise to the level of a lockout. Evidently, the petitioner believed he could contrive an illegal lockout scenario and that the respondent would not be able to obtain the necessary records to disprove petitioner's claim. The Court notes that even after having obtained the May 29th restoration order, during the remainder of the relevant period, no one on the petitioner's behalf even attempted to obtain access to the subject building using the electronic keys.

The logs also showed that there were numerous instances with various individuals, other than Waintraub or his employees, attempting to gain access at the subject building and their access was denied. The petitioner's own witness, Mr. Blokh testified that when his staff had a problem with the key card entry, they simply contacted the management office and the situation was resolved. Although he remembered this only occurred once, the logs demonstrate that his access was denied on seven days in the month of June 2019 alone. His faulty memory made his testimony less than reliable. Moreover, as anyone who stays in hotels knows, the electronic key cards are less than perfect as an alternative to metal keys. They frequently malfunction and require recoding and replacement.

If the petitioner truly wanted access to the subject premises and had difficulty obtaining it, the petitioner could have easily emailed the respondent, texted Mr. Tverd or simply phoned the respondent's office. Apparently, these were Waintraub's historical methods of resolving issues concerning his tenancy, some of which were mentioned in Burokhov's correspondence to Waintraub of May 7, 2019. Instead, the petitioner used

the inconsistent electronic key functioning as a means to contrive a ruse of a fake lockout scenario. Clearly, Waintraub could not have expected the respondent would have detailed logs of all the successful, as well as unsuccessful, access attempts at the subject building. While the electronic key(s) may have not functioned 100% of the time, petitioner failed to prove that the respondent locked out the petitioner with or without force.

Furthermore, the utilities records as well as the witnesses from Con Edison of New York, Inc. and National Grid demonstrated that the gas and electric companies sent final bills to the petitioner after closing their accounts at the end of March 2019. No reputable attorney would meet with their clients in an office without lights and electricity. This would preclude them from making coffee to serve their clients and make it impossible to photocopy, etc. The notion is as absurd as the petitioner's false claim that the gas was turned off annually as a means of saving money, because the heating season was over and therefore it was unnecessary to have a functioning gas account. The testimony of the utilities' witnesses and their records proved that the accounts were only turned off once during the petitioner's entire tenancy and that was when the petitioner's office contacted them for a final bill.

Much was made of the fact that Waintraub never relinquished all the keys to the subject building or the subject premises prior to the commencement of this proceeding. The petitioner's position seems to be that only the key delivery would have any significance with respect to effectuating a surrender of the subject premises. Following this to its logical conclusion, petitioner's position would have to be that it did not surrender until it turned over the electronic key cards in open court on August 6, 2019. The respondent's position is that by virtue of the advance notice of its intent to vacate the subject premises, the actual admitted vacatur of the subject premises and the termination of utilities services, the petitioner surrendered the subject premises at the end of March 2019.

With respect to petitioner's alleged surrender of the subject premises to respondent, which Waintraub vehemently denied, the burden of proving a surrender rests upon the party seeking to establish it or relying upon such surrender. 74A NY Jur2d §921, and cases cited therein. The Court finds that respondent has not met this burden. Burokhov testified and the documentary evidence demonstrated that in January 2019, Waintraub gave him notice of petitioner's intended surrender of the subject premises in March 2019. However, when Burokhov insisted on petitioner's lease compliance regarding the ongoing rent for the subject premises for the full six months, Waintraub had a change of heart. The petitioner did not completely relinquish the subject premises. Although not necessary under the terms of the lease (discussed *infra)*, both parties at least initially behaved as though they believed permission was necessary for respondent to obtain access to show the subject premises for leasing purposes.

The respondent acknowledged the petitioner still retained possession of the subject premises by its language in Burokhov's May 7th correspondence in which he states that petitioner continues to have unfettered access. Additionally, the language of his May

17th notice of default addressed to the petitioner threatens that the respondent will terminate petitioner's lease. In that notice, Burokhov quotes §14.1 of the lease which discusses lease cancellation and quitting the subject premises based upon the failure to pay rent. Moreover, in his letter of May 7, 2019 and throughout Burokhov's testimony, he repeatedly said the petitioner continued to have unrestricted access. This militates against respondent's contention of petitioner's prior surrender.

Based upon the law and the facts of this case, neither of the parties is entirely correct as to the timing of the surrender. A surrender by operation of law takes place when the parties to a lease behave in some way that so conflicts with the landlord tenant relationship as to demonstrate their intent to consider the lease terminated. *See Ford Coyle Properties, Inc. v. 3029 Avenue V Realty, LLC*, 63 AD3d 782, 881 NYS2d 146 (2nd Dept 2009). For a surrender to be effectuated, there must be both an act or acts in contravention of the landlord tenant relationship by the tenant and the acceptance of the intended surrender by the landlord. There must be mutuality of the parties. Mere delivery of the key(s) would not accomplish a surrender as a matter of law; while key delivery would be some evidence of an intent to surrender, the weight of such an act varies with the circumstances in each case. See *Matter of Barnes,* 37 Misc2d 833, 237 NYS2d 183 (Sur NY Co 1962); *Dagett v. Champney,*122 App Div 254, 106 NYS 892 (3rd Dept 1907); 2 Rasch *Landlord & Tenant* §869; 34 NYJur §397.

The Court finds that surrender of the subject premises was most certainly intended when Waintraub first advised Burokhov in January 2019 that the petitioner would be vacating at the end of March. However, once Waintraub realized he was going to remain personally liable for the ongoing rent for the subject premises, (in accordance with the lease provision for the full six months from the time he gave notice to respondent in January 2019), he wanted to find a way to extricate himself from the financial obligation of paying rent at two office spaces and to obtain the return of the security deposit.

Additionally, the credible testimony demonstrated that while Burokhov was going to hold Waintraub and petitioner to their obligations, Burokhov also agreed to help them mitigate the potential financial liability by having the space shown to potential tenants by his broker. The respondent was not under any obligation to benefit petitioner or Waintraub in this way. *Holy Properties, Limited, L.P. v. Kenneth Cole Productions, Inc.*, 87 NY2d 130, 637 NYS2d 964 (1995). This was suggested by Waintraub in the first place and would have benefitted him considerably. To further the goal of reletting to a new tenant by assisting Burokhov in his marketing efforts, Waintraub gave Burokhov one of the keys issued to his firm. The temerity of Waintraub to fabricate this scheme of the petitioner's alleged lock out by respondent and take over of the subject premises in the face of this act of generosity is astounding.

While Waintraub insisted that respondent had moved into the subject premises, installed a computer network, with employees working there full time, none of this was proven. The lack of presence at the subject premises by petitioner or any of his employees during the relevant period, necessitates a finding that the petitioner does not

have personal knowledge of the extent of respondent's occupation inside the subject premises. Moreover, petitioner did not offer any objective evidence of the existence of a computer network installed by respondent in the subject premises. At most, petitioner showed respondent's agents' presence during petitioner's few brief visits between April 14, 2019 and June 30, 2019. Furthermore, §15 of the lease specifically provides:

> Landlord and Landlord's agents shall have the right to enter the Leased Premises …. (v) to show the Leased Premises to prospective purchasers, tenants or mortgagees of the Building, and (vi) to make such installations, repairs, alterations, improvements or additions and to do such maintenance as the Landlord deems necessary or desirable. Tenant or its agents need not be personally present for Landlord to enter the Leased Premises. During the six (6) months prior to the expiration of the term of the Lease, Landlord may exhibit the Leased Premises to prospective tenants for the Leased Premises and place upon the premises "For Rent" signs. If, during the last thirty (30) days of the term of this Lease, Tenant shall have removed all or substantially all of its property from and no longer is conducting business in the Leased Premises, Landlord may enter the Leased Premises and begin to remodel, alter, and renovate the Leased Premises for future tenants; such activities shall not affect the sums due or Tenant's obligations hereunder or require any compensation to Tenant….

Therefore, while Waintraub may have thought he could control the frequency, time and extent of the respondent's presence after petitioner had removed substantially all of its property, he was mistaken. By Waintraub's own admission in the April 1st text to Alex Tverd, the petitioner was no longer conducting business at the subject premises. Further, by his April 3rd email to Burokkhov, Waintraub admitted petitioner had substantially removed all of its property from the subject premises wherein he stated all that remained of his firm's belongings were the coffee machine, water cooler, fridge and microwave. The Court finds respondent was acting within its rights under the Lease when it entered, cleaned and had its real estate agent and intern working to market and show the subject premises to prospective tenants.

The Court now directs its attention to petitioner's claim under RPAPL §853, which provides:

> If a person is disseized, ejected, or put out of real property in a forcible *or unlawful* manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence *or by unlawful means,* he is entitled to recover treble damages in an action therefor against the wrongdoer.

In an alleged illegal lockout, the use of unusual force or threat thereof was determined to be an essential element by the Court of Appeals in earlier cases of this nature and that standard was followed for many years. *Randall-Smith, Inc. v. 43rd St. Estates,*17

NY2d 99, 268 NYS2d 306 (1966); *Drinkhouse v. Parka Corp.,* 3 NY2d 82, 164 NYS2d 1 (1957); *Statement, Inc. v. Pilgrim's Landing, Inc.,* 49 AD2d 28, 370 NYS2d 970 (4th Dept. 1975); *Chapman v. Johnson,* 39 AD2d 629, 331 NYS2d 184 (4th Dept 1972); *Pisano v. Nassau County,* 41 Misc2d 844, 246 NYS2d 733 (NY Sup Nass 1963), *aff'd.* 21 AD2d 754, 252 NYS2d 22 (2nd Dept. 1964); *Brande v. de Kosenko,* 57 Misc2d 574, 293 NYS2d 489 (AT 1 1992); *Launikitis v. Garcia,*18 Misc2d 409, 189 NYS2d 751 (NY Co. 1959).

Then, in 1981, the Legislature enacted a significant change which made the statute more inclusive by providing relief to a tenant when they are kept out without the use of force or threat of force. The Legislature, in enacting this amendment in 1981, manifested the intent to provide broader and expanded coverage to allow recovery in cases where no force or threat thereof is employed but a lock-out or other wrongful eviction takes place. *See Carter v. Andriani* 84 AD2d 513, 443 NYS2d 157 (1st Dept.1981).

Therefore, a tenant is not required to prove "forcible" eviction to come within the provisions of RPAPL §853. They must only prove that the eviction was unlawful or that unlawful means were used. In the instant case, the petitioner failed to demonstrate that any eviction occurred. The petitioner had every intention of terminating its lease as of March 31, 2019, as demonstrated by Waintraub's communications with the respondent, its vacatur of the subject premises and its closing of both utilities accounts. The logs demonstrate the respondent maintains a faulty electronic key system, in that access is occasionally denied to rightful users. They do not substantiate petitioner's claim in the least. Moreover, the petitioner gave respondent permission (though unnecessary) to access the subject premises for the purpose of showing it to potential tenants.

Findings of Fact and Conclusions of Law

Accordingly, the Court concludes that the petitioner's testimony was not credible. Waintraub orchestrated the scenario in which he would claim that petitioner was evicted as a means to obtain the return of the $10,000.00 security deposit and escape his personal and business financial liability for the four months of rent, i.e. May through August 2019 for the subject premises. The petitioner has not proven an illegal lockout, and certainly not an entitlement to the treble damages provided for in RPAPL §853. On the contrary, the respondent did not lock out the petitioner. The intermittent denial of access was unintentional and easily remediated, since it was due to the faulty electronic system. Moreover, the petitioner had substantially moved out and the respondent was acting within its rights under the lease to have it agents enter and show the subject premises to prospective tenants. However, the respondent did not demonstrate a surrender occurred in March 2019.

An actual and complete surrender was not manifested at any point up to August 6, 2019 in open court. The Court determines that the respondent is the prevailing party and the petitioner surrendered no earlier than August 6, 2019. It is unfortunate that petitioner was able to hoodwink its attorney, a gentleman of integrity and impeccable reputation, to maintain this proceeding.

What was proven was that while the petitioner did not surrender the subject premises until August 6, 2019, it did grant a qualified, though unnecessary, license to the respondent. The license was provided as a means to assist the petitioner in mitigating its potential financial liability. The respondent was rewarded for its act of kindness by the petitioner attempting to engage this Court in its charade and false claim of an illegal lockout. Such frivolous litigation cannot be tolerated. As a consequence, the respondent is awarded attorney's fees pursuant to §18.7 of the Lease and §130-1.1(a) of the Rules of the Chief Administrative Judge to be paid by petitioner and Waintraub. The amount of the fees shall be determined after a hearing if the parties are unable to agree upon an amount. A settlement conference will be conducted via Skype for Business on July 22, 2020 at 2:30 pm.

This constitutes the Decision and Order of this Court. The parties' exhibits are being returned under separate cover.

June 22, 2020

SALLY E. UNGER, J.C.C./A.J.S.C.