

436 & 442 E. 13th St. Owner LLC v Kfoury
2021 NY Slip Op 31097(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 654527/2020
Judge: Arlene P. Bluth
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**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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436 AND 442 EAST 13TH STREET OWNER LLC,

Plaintiff,

- v -

ANDREA KFOURY, SIMON MILLER

Defendant.

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INDEX NO. 654527/2020

MOTION DATE 04/05/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment dismissing defendant Kfoury’s counterclaim and affirmative defenses, partial summary judgment on its first cause of action, and partial summary judgment on its fourth claim for legal fees is granted. The cross-motion by Kfoury for summary judgment to dismiss the complaint and for a stay is granted in part and denied in part.

Background

Plaintiff rented an apartment to defendant Kfoury in December 2019. The lease provided that Kfoury would not have to pay rent for the first six months, except for paying a security deposit and the first month’s rent (two \$12,500 payments). Then, she was required to start making the \$12,500 monthly rent payments on May 15, 2020 and continue until the lease ended on June 30, 2021. It is undisputed that the only payments that Kfoury made were the security deposit and first month’s rent (both payments were made in December 2019).

Kfoury claims that she was laid off from her job because of the pandemic and could no longer afford the rent. She claims that she vacated the apartment on August 31, 2020 and that she signed a surrender agreement.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Defendant Simon Miller

Kfoury cross-moves to dismiss all claims against Miller; she points out that he was her boyfriend but was not a party to the lease. Plaintiff does not object to this relief. Therefore, this defendant is dismissed from this case.

The Second and Third Causes of Action

Kfoury also cross-moves to dismiss these quasi-contract causes of action and plaintiff does not object; therefore, these claims are also severed and dismissed.

Unopposed Affirmative Defenses/Counterclaim

Plaintiff moves to dismiss all of Kfoury's affirmative defenses and her counterclaim. In opposition, Kfoury only addresses the fifth, seventh, fifteenth and sixteenth affirmative defenses. Therefore, the remaining affirmative defenses and the counterclaim are dismissed.

First Cause of Action—Breach of Contract

The Court grants the portion of plaintiff's motion that seeks summary judgment on the first cause of action for breach of contract. There is no dispute that defendant Kfoury failed to make the required rent payments. Plaintiff explains that after Kfoury vacated, it was able to find a new tenant to take over the apartment—the new lease runs from January 1, 2021 to March 31, 2022. Plaintiff contends that as part of the negotiations with the new tenants, it permitted them to occupy the apartment starting on October 1, 2020 but no rent was due until January 2021. It also claims that it charged \$10,600 per month in the new lease.

Plaintiff explains that it seeks damages from Kfoury for the monthly rent until January 2021 and then seeks the \$1,900 deficiency (the difference between her rent and the new tenant's rent) until the end of the lease in June 2021. Plaintiff also requests a \$8,833 brokerage fee for

renting out the apartment and deducted Kfoury's security deposit and first month's rent from the total sought.

Kfoury makes numerous arguments about why plaintiff cannot recover. She contends that plaintiff did not mitigate its damages, that she wants documents about the commission charges and that plaintiff is unconscionably charging for three months in which the new tenants were living in the apartment but were not paying rent.

The Court finds that plaintiff properly mitigated damages pursuant to Real Property Law § 227-E. The undisputed facts are that the lease with the new tenants is dated September 26, 2020 (less than a month after Kfoury vacated) and that the rent was comparable to Kfoury's rent. Of course, Kfoury would have preferred that plaintiff find a new tenant willing to pay the same rent and that they start paying immediately. But there is nothing in Real Property Law § 227-E that states specifically what a plaintiff's efforts to mitigate damages must entail. Here, plaintiff moved swiftly to find new tenants and, accordingly, Kfoury only has to pay a fraction of the rent from January 2021 to the end of her lease to cover the difference (Kfoury only has to pay \$1,900 of a \$12,500 monthly rent). In fact, plaintiff's actions are an example of the purpose of this law; it was intended to encourage a landlord to find a new tenant instead of charging the defaulting tenant the total remaining on the lease.

The Court dismisses Kfoury's fifth affirmative defense (breach of obligation of good faith and fair dealing) and seventh affirmative defense (failure to mitigate) based on this same analysis. Plaintiff made substantial efforts to quickly find a new tenant at a significant monthly rent. Ideally, the new tenants would have had to start paying in October 2020 (when they moved in) and would have paid the same rent as Kfoury. But the statute directs a landlord to mitigate

damages, not eliminate damages. And the free rent does not indicate any bad faith, especially when plaintiff also gave free rent to Kfoury as an incentive for her to sign her lease.

The Court also grants plaintiff's request to recover the broker's commission. The commission—\$8,883—on a lease for \$10,600 per month is entirely reasonable and appropriate. This is not a case where the Court is concerned that plaintiff is racking up damages because it knows it can recover it from the defaulting tenant; the commission here is less than a month's rent for the new tenants.

Certificate of Occupancy

Kfoury's fifteenth and sixteenth affirmative defenses contend that plaintiff was not permitted to recover rent because there was no valid certificate of occupancy when she moved in. Plaintiff points out that it never charged for the time when there was no certificate of occupancy and points to the early occupancy rider, which permitted Kfoury to live in the unit without paying rent for the first six months (NYSCEF Doc. No. 19). It also argues that while the temporary certificate of occupancy was not renewed from December 7-14, 2020, that should not make a difference because the liability for rent accrued on the first of each month.

The Court dismisses these affirmative defenses. There is no dispute that Kfoury lived in the apartment during the time in which she claims there was no certificate of occupancy and that she paid no rent during this time period. This is not a case where the tenant refused to move in because there was no certificate of occupancy and the landlord tries to recover rent for that period. Mr. Popkin, a member of plaintiff, claims that plaintiff intends to continually renew the temporary certificate of occupancy.

The Court finds that notwithstanding the apparent failure to renew the certificate of occupancy from December 7-14, 2020, there is nothing that shows that plaintiff made a false

misrepresentation about the apartment (the fifteenth affirmative defense) or that plaintiff coerced Kfoury into entering the lease. These claims are severed and dismissed.


Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted, defendant Kfoury's affirmative defenses and counterclaim are severed and dismissed, the Clerk is directed to enter judgment in favor of plaintiff and against defendant Kfoury only in the amount of \$88,983.00 plus interest from September 17, 2020 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable attorneys' fees (plaintiff's fourth cause of action) is severed and shall be determined at a hearing (the hearing will be scheduled by the Clerk of this part); and it is further

ORDERED that the cross-motion by Kfoury is granted only to the extent that plaintiff's claims against defendant Miller and plaintiff's second and third causes of action are severed and dismissed, and denied as to the remaining relief requested.

4/6/2021
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE