

Lai v Muamba
2021 NY Slip Op 32112(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 154278/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 154278/2021

DAVID LAI,

Plaintiff,

MOTION SEQ. NO. 001

- v -

CONSTANTIN MUAMBA, DENA MULLER, JOHN DOE, and
JANE DOE,

**DECISION, ORDER, and
JUDGMENT**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for

SUMMARY JUDGMENT

In this action seeking, inter alia, declaratory relief, plaintiff/landlord David Lai moves, pursuant to CPLR 3212, for summary judgment against defendants/tenants Constantin Muamba and Dena Muller. Defendants oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a dispute between plaintiff, the owner of a residential building located at 33 West 127th Street in Manhattan ("the premises") and defendants, who took possession of apartment 3 at the premises pursuant to a one-year lease dated May 15, 2012. Doc. 1 at par. 2; Docs. 9-10. The lease term commenced on June 1, 2012 and expired May 31, 2013. Doc. 10. The lease provided, *inter alia*, that:

- 1) Defendants were required to pay rent for the entire lease term and, after the lease expired, they were required to pay "use and occupancy" ["U&O"] until they "actually move[d] out" (Doc. 10 at par. 18 [a]);

- 2) Defendants were required to pay “[a]ny legal fees and disbursements for legal actions or proceedings brought by [plaintiff] against [defendants] because of a lease default by [defendants] or for defending lawsuits brought against [plaintiff] because of [defendants’] actions” (Doc. 10 at par. 20 [5]); and
- 3) Defendants were required to pay plaintiff for any “fees and expenses incurred by [plaintiff] because of [their] failure to obey any other provisions of [the] lease” (Doc. 10 at par. 20 [7]).

After the lease expired in May 2013, defendants remained in possession of the apartment and continued to pay rent. Doc. 8 at par. On December 21, 2020, plaintiff served defendants with a “Ninety (90) Day Notice of Termination and Non-Renewal” dated December 16, 2020 (“the 90-day notice”). Doc. 11. The 90-day notice advised defendants that they were required to vacate the apartment on or before March 31, 2021 or plaintiff would commence proceedings to remove them and that he would also seek U&O, costs, and attorneys’ fees if they refused to leave. Doc. 11. Defendants did not vacate the apartment by March 31, 2021, and they have remained in possession to date. Doc. 8 at pars. 10, 17.

On May 3, 2021, plaintiff commenced the captioned action by filing a summons and complaint against defendants. Doc. 1.¹ In his complaint, plaintiff alleged, among other things, that: 1) defendants’ month to month tenancy was terminated pursuant to the 90-day notice as of March 31, 2021; 2) he has not accepted U&O from defendants since the termination of the month to month tenancy; and 3) he has not received any COVID-19 related hardship declaration from defendants “other than CDC Declaration form OMB Control No. 0920-1303, which expired on December 31, 2020.” Doc. 1 at par. 10; Doc. 17.²

As his first cause of action, plaintiff alleged a cause of action for ejectment. Doc. 1 at pars. 11-13. As his second cause of action, plaintiff sought a judgment declaring that defendants’ lease

¹ Plaintiff also named as defendants “John Doe” and “Jane Doe” who, upon information and belief, are unknown individuals also living in the apartment. Doc. 1 at par. 6.

² CDC is an abbreviation for The Centers for Disease Control. Doc. 17.

was terminated as of March 31, 2021. Doc. 1 at pars. 14-18. As a third cause of action, plaintiff sought recovery of unpaid rent, from the date of the termination of the lease until the entry of judgment, in an amount to be determined by this Court and not less than \$23,250, plus interest. Doc. 1 at pars. 19-23. As a fourth cause of action, plaintiff sought costs and legal fees pursuant to paragraph 20 (5) of the lease in an amount to be determined by this Court. Doc. 1 at pars. 24-27.

Defendants joined issue by their answer, filed June 11, 2021, in which they denied all substantive allegations of wrongdoing and asserted as a defense that this Court lacks subject matter jurisdiction over this dispute.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants on the complaint. Docs. 7-19. In support of the motion, plaintiff submits an affidavit setting forth the facts giving rise to this claim (Doc.8) and annexing as exhibits, *inter alia*: the deed establishing that plaintiff owns the apartment (Doc. 9); defendants' lease (Doc. 10); the 90-day notice (Doc. 11); the pleadings (Docs. 12, 15); a statement of defendants' arrears from April 1, 2020 through the end of June 2021 (Doc. 16); and hardship declarations filed with the CDC by Muamba on December 3, 2020 and May 5, 2021 (Docs. 17 and 18, respectively).

In an affidavit in support of the motion, plaintiff, who attests that he is owner of the premises (Doc. 8 at par. 4), argues that the motion must be granted because defendants remain in possession after their lease was legally terminated as of March 31, 2021; defendants have failed to pay rent, as detailed in the rent ledger (Doc. 16), since April 1, 2020 and have failed to pay U&O since April 1, 2021; and that he is entitled to costs and attorneys' fees pursuant to the lease. Doc. 8 at pars. 16-22. With respect to the hardship declarations submitted by defendants, plaintiff maintains "I dispute the validity of the claims made therein." Doc. 8 at pars. 14-15. Additionally, plaintiff argues that, despite the hardship declarations, the branch of his motion seeking a judgment

of possession and writ of assistance can still be granted and that any actual eviction should be stayed until the expiration of any eviction moratorium currently in effect. Doc. 8 at par. 23.

In opposition, defendants argue, *inter alia*, that the complaint must be dismissed because this Court lacks subject matter jurisdiction over this action. Doc. 23 at par. 4. They further assert that, since they continued to pay rent after the expiration of the lease in May 2013, and plaintiff accepted the payments, the lease was renewed for another one-year period, and continued to be renewed on a yearly basis. Doc. 23 at pars. 5-6. Defendants also assert that, since plaintiff terminated the lease “before the expiry of the renewed term, [he] has rendered himself liable to the [d]efendants for all rent owed for the unexpired portion of the [l]ease.” Doc. 23 at par. 6; see also Doc. 23 at par. 16. Additionally, defendants assert that they cannot be directed to pay outstanding rent and U&O or be evicted at this time given their submission of CDC hardship declarations as well as a New York State moratorium on residential evictions. Doc. 23 at pars. 7-9.

In a reply memorandum of law, plaintiff’s counsel asserts that plaintiff has established his *prima facie* entitlement to summary judgment and, since defendants have failed to submit an affidavit of an individual with personal knowledge, they have not raised a material issue of fact warranting denial of the motion. Doc. 25 at par. 4. Plaintiff’s counsel further asserts that: defendants do not deny that they have failed to pay rent and U&O as alleged and that they owe plaintiff such monies (Doc. 25 at par. 5); defendants’ lease was not renewed for a one-year term after it expired in May 2013, but rather became a month-to-month tenancy pursuant to Real Property Law (“RPL”) § 232-c (Doc. 25 at par. 11); this Court has jurisdiction over the captioned action (Doc. 25 at par. 16); and that, although defendants filed hardship declarations, a judgment of eviction should be granted “with enforcement being subject to any applicable restrictions and

moratoriums in effect at the relevant time.” Doc. 25 at pars. 21, 23. Finally, plaintiff reiterates his argument that he is entitled to legal fees and costs.

LEGAL CONCLUSIONS

Summary Judgment Standard

On a motion for summary judgment, the moving party bears the burden of making “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020]). If the moving party fails to make such a showing, the motion must be denied “regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). However, where “the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

Here, plaintiff’s affidavit and the exhibits annexed thereto establish his prima facie entitlement to summary judgment on his claims seeking monetary damages and a declaratory judgment against defendants.

Outstanding Rent/U&O

Initially, plaintiff demonstrates that defendants remained in possession of the apartment after the expiration of their one-year lease on May 31, 2013 and continued to pay rent as month to

month tenants until March 31, 2020, but did not pay rent from April 1, 2020 until the lease was terminated on March 31, 2021. Doc. 8 at par. 13, Doc. 16. Nor did they pay U&O from the date the lease was terminated at the end of March 2021 until the present. Therefore, plaintiff is entitled to payment of this outstanding rent and U&O.

Defendants' argument that their payment of rent after the expiration of the lease in 2013 gave rise to a one-year renewal of the agreement by operation of law is without merit. Although renewal by operation of law was the common-law rule, this was changed by statutory enactment over 60 years ago. RPL 232-c, enacted in 1959, provides, in pertinent part, that:

Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over * * * unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of * * * rent shall be a tenancy from month to month...

RPL 232-c "was enacted to change the common-law rule regarding tenancies created by operation of law as a result of the tenant's holding over (1959 Report of N. Y. Law Rev. Comm., p. 139 et seq.; N. Y. Legis. Doc., 1959, No. 65[D]; *Jaroslow v. Lehigh Val. R. R. Co.*, 23 N Y 2d 991)" (*Bay West Realty Co. v Christy*, 61 Misc2d 891, 894 [Civ Ct, New York County 1970]). "[T]he only tenancy that can now be created by operation of law as a result of the acceptance of rent from a holdover tenant is a periodic tenancy from month to month and 'no longer the tenancy from year to year implied at common law by operation of law' (*28 Mott St. Co. v. Summit Import Corp.*, 62 Misc 2d 345, 347)." (*Bay West Realty Co. v Christy*, 61 Misc2d at 894). Thus, defendants' counsel relies on authority which has not been recognized since the 1950's.³

³ The same is true with respect to defendants' contention that, since plaintiff terminated the lease "before the expiry of the renewed term, [he] has rendered himself liable to the [d]efendants for all rent owed for the unexpired portion of the [l]ease", as this argument also lacks legal support.

Since defendants remained in possession of the apartment after the expiration of their lease on May 31, 2013 and continued to pay rent, and plaintiff accepted the rent, plaintiff created a month to month tenancy on the same terms, and subject to the same covenants, as the expired lease (*See Stephen LLC v Zazula*, 171 AD3d 488, 488 [1st Dept 2019] [citations omitted]).

Defendants paid rent pursuant to the month to month tenancy from June 1, 2013 until the beginning of April 2020. Thus, defendants owe plaintiff rent pursuant to the month to month tenancy from April 1, 2020 until the lease was terminated on March 31, 2021.⁴

Defendants also owe plaintiff U&O for the period of April 1, 2021 until the present. “The obligation to pay for [U&O] does not arise from an underlying contract between the landlord and the occupant[,] [but] [r]ather, an occupant's duty to pay the landlord for its [U&O] of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties’ (*Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, 559-560 [2d Dept 1999] [internal quotation marks and citation omitted]).” (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511 [1st Dept 2015]). Since defendants occupied the apartment during a period in which no lease was operative, they are required to pay plaintiff U&O as compensation for their use of the apartment during that time at the rate of \$3,100 per month, the amount of their monthly rent at the time the lease was terminated.

As of the date plaintiff’s motion was filed, defendants owed \$23,250 in unpaid rent and \$9,300 in U&O through the end of June 2021, for a total of \$32,550. Doc. 8 at par. 13; Doc. 16. Since this motion is being decided at the end of October 2021, defendants owe an additional \$12,400 for U&O from July-October 2021 (\$3,100 x 4), increasing the total owed to \$44,950.

⁴ The termination of the lease is addressed in further detail below.

Declaratory Relief

RPL 232-a provides that:

No monthly tenant, or tenant from month to month, shall hereafter be removed from any lands or buildings in the city of New York on the grounds of holding over the tenant's term unless pursuant to the notice period required by subdivision two of section two hundred twenty-six-c of this article, or for a tenancy other than a residential tenancy at least thirty days before the expiration of the term, the landlord or the landlord's agent serve upon the tenant, in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy and that unless the tenant removes from such premises on the day designated in the notice, the landlord will commence summary proceedings under the statute to remove such tenant therefrom.

Although this statute, by its terms, applies to summary proceedings, the 30-day notice requirement therein has been held to apply to the termination of a month to month tenancy (*See Weiden v 926 Park Ave. Corp.*, 154 AD2d 308, 308-309 [1st Dept 1989]; *see also 430 Broome St. Realty Corp. v Bonnouvrier*, 17 Misc3d 1128(A) (Sup Ct New York County 2007 [York, J.] citing, *inter alia*, *Alleyne v Townsley*, 110 AD2d 674 [2d Dept 1985]). Here, plaintiff provided defendants not with 30, but with 90 days' notice of his intention to terminate the lease and he thus properly terminated the lease and is entitled to a judgment declaring that the lease was terminated as of March 31, 2013.

Ejectment/Judgment of Possession

Defendants argue that, under the COVID Emergency Eviction and Foreclosure Prevention Act (CEEFPA), L 2020, ch. 381, this Court may not consider any part of plaintiff's motion. In enacting CEEFPA, which imposed a moratorium on most residential eviction proceedings, the Legislature stated that its intent was "to avoid as many evictions and foreclosures as possible for people experiencing a financial hardship during the COVID—19 pandemic" (Ch 381, § 3). However, in August 2021, the U.S. Supreme Court enjoined CEEFPA, holding that its limits on a landlord's ability to challenge certifications of financial hardship submitted by tenants violated due

process (*See Chrysafis v. Marks*, ___ U.S. ___, 210 L Ed 2d 1006, 2021 U.S. LEXIS 3635 [Aug. 12, 2021]).

On September 2, 2021, the Legislature enacted L 2021 ch 417, which restored a moratorium on most residential eviction proceedings. Among other things, L 2021, ch 417 allows tenants in residential eviction matters to file a hardship declaration representing that they experienced financial hardship during, or due to, the COVID-19 pandemic. As this Court explained in its well-reasoned decision in *Casey v Whitehouse Estates, Inc.*, 2021 NY Slip Op 21245, 2021 NY Misc LEXIS 4898 (Sup Ct New York County 2021 [Lebovits, J.]), “Chapter 417, part C, subpart A, § 4 provides that if the tenant provides a hardship declaration to the court in any pending ‘eviction proceeding in which an eviction warrant or judgment of possession or ejectment has not been issued,’ the ‘eviction proceeding shall be stayed until at least January 15, 2022.’”

However, noted Justice Lebovits:

The balance struck by the Legislature in chapter 417 turns on whether a residential tenant is or is not suffering hardship due to COVID-19 (*see* L 2021, ch 417, pt C, subpart A, §§ 4, 10); and, if she is suffering hardship, whether her eviction proceeding nonetheless should be permitted to continue because the tenant is alleged to have significantly damaged the property or to be engaging in persistent objectionable or nuisance-type behavior (*see id.* § 7).

(*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245 at *3 [2021]).

Additionally, noted Justice Lebovits, an exception set forth in section 10(a) of the statute allows a court to deny or vacate a stay if it “finds the respondent’s hardship claim invalid.” (*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245 at *3). However, Justice Lebovits further stated that “a landlord’s challenge to the tenant’s claim of hardship should be brought by motion” in which the landlord sets forth its “good faith belief that the respondent[s] ha[ve] not experienced a hardship” (*Id.*). Here, plaintiff does not allege that defendants damaged the premises or that they engaged in any nuisance-type activity envisioned by § 7. Although plaintiff states in his motion

that he “dispute[s] the validity of the claims” set forth in defendants’ hardship declarations, he has set forth absolutely no basis for this contention, much less a “good faith belief” for his representation, and thus cannot establish that § 10 (a) is applicable herein. Therefore, defendants are entitled to the protection of the statute until January 15, 2022 (or such future date to which the moratorium may be extended).

Justice Lebovits held that, despite the foregoing protection against eviction, ch 417 “does not stay, or otherwise limit, the award of money judgments for unpaid rent or U&O” and here, as in *Casey*, defendants acknowledged in their hardship declaration that, despite any eviction moratorium, a money judgment could still be rendered against them for any unpaid rent and/or U&O owed, as well as any fees, penalties, and interest (*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245, at *6). Therefore, defendants are required to pay the outstanding rent and U&O they owe plaintiff at this time even if plaintiff cannot evict them.

Subject Matter Jurisdiction

Although defendants assert that this Court lacks subject matter jurisdiction over this action, this contention is without merit. The “Supreme Court has unlimited general jurisdiction over all plenary real property actions, including those brought by a landlord against a tenant” (*See Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011] [citations omitted]). Although the Supreme Court has “discretion [to] decline to review an action it considers appropriately brought in Civil Court,” it is not required to do so (*Id.*). Additionally, the Supreme Court is specifically vested with the authority to grant declaratory relief such as that sought by plaintiff (*See CPLR 3001; Lex 33 Assocs., L.P. v Grasso*, 283 AD2d 272 [1st Dept 2001]).⁵ Even assuming,

⁵ The Civil Court may grant declaratory relief under very limited circumstances not applicable herein (*See CCA 212-a*).

arguendo, that this Court did not have jurisdiction over this matter, it could not dismiss the action since defendants did not move or cross-move for such relief. (See CPLR 2214; CPLR 2215; CPLR 3211[a][2]).

Attorneys' Fees

Although the lease entitles plaintiff to recover attorneys' fees from Muamba and Muller, the precise amount of such fees cannot be determined at this time. This is because the amount of fees, if any, to be incurred in evicting Muamba and Muller remains to be determined. Thus, this branch of the motion is denied without prejudice as premature (*See generally Greenway Mews Realty, L.L.C. v Liberty Ins. Underwriters, Inc.*, 2021 NY Slip Op 30118[U] [Sup Ct New York County 2021 [Engoron, J.]]).

Accordingly, it is hereby:

ORDERED that the branch of the motion by plaintiff David Lai seeking a judgment of possession and writs of assistance as against defendants Constantin Muamba and Dena Muller is denied without prejudice to re-file when the current moratorium/stay on evictions expires; and it is further

ORDERED that the branch of the motion by plaintiff David Lai seeking reimbursement from defendants Constantin Muamba and Dena Muller for attorneys' fees he incurred in this action is denied without prejudice to re-file after such fees, if any, are incurred in connection with the eviction; and it is further

ORDERED and ADJUDGED and DECREED that the lease between plaintiff David Lai and defendants Constantin Muamba and Dena Muller, dated May 15, 2012, was terminated as of March 31, 2021; and it is further

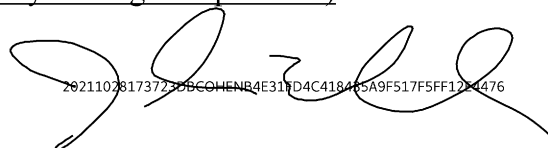
ORDERED that the branch of plaintiff David Lai's motion seeking a money judgment against defendants Constantin Muamba and Dena Muller is granted, and plaintiff is awarded a judgment against Muamba and Muller, jointly and severally, in the total amount of \$44,950, representing unpaid monthly rent from April 1, 2020 (the date on which defendants stopped paying rent) until March 31, 2021 (the day the defendants' lease was canceled) in the amount of \$23,250, as well as use and occupancy from April 1, 2021 until October 31, 2021, in the amount of \$21,700, plus pre-judgment interest from April 1, 2020, costs, and disbursements to be calculated by the Clerk; and it is further

ORDERED that defendants Muamba and Muller must pay plaintiff the sum of \$44,950 by December 1, 2021, and, commencing November 1, 2021, shall pay use and occupancy to plaintiff in the amount of \$3,100 per month on a foregoing basis, *pendente lite*, and such payments shall be due by the 10th of each month; and it is further

ORDERED that the payment by defendants Muamba and Muller for outstanding rent and use and occupancy due December 1, 2021, as well as all future use and occupancy payments commencing November 1, 2021, shall be paid to plaintiff by either certified check, bank check, or wire transfer and, if mailed to plaintiff, must be sent to 15 East 127th Street Apt. A, New York, NY 10035 (the address on the lease), unless defendants have been provided with a more recent address for plaintiff, and shall copy counsel for plaintiff, Romer Debbas, LLP, 275 Madison Avenue, New York, New York 10016, on any such correspondence to plaintiff; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



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10/28/2021

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE