

14 E. 4th St. Unit 509 LLC v Toporek

2021 NY Slip Op 32890(U)

July 15, 2021

Supreme Court, New York County

Docket Number: Index No. 150250/2021

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

Order and Decision of Justice Lynn R. Kotler, dated July 15, 2021 pages 7 to 11
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

14 EAST 4TH STREET UNIT 509 LLC

INDEX NO. 150250/2021

- v -

MOT. DATE

MICHAEL TOPOREK

MOT. SEQ. NO. 001

The following papers were read on this motion to/for and cross-motion sj _____	
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS Doc. No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS Doc. No(s). _____
Replying Affidavits	ECFS Doc. No(s). _____

Plaintiff 14 East 4th Street Unit 509 LLC (14 East 4th Street) moves for partial summary judgment on its first and fourth causes of action, for breach of contract for unpaid rent and attorney's fees, respectively, as well as to dismiss defendant Michael Toporek's affirmative defenses and counterclaim. Defendant Toporek (Toporek or tenant) opposes the motion and cross-moves for summary judgment on all plaintiff's causes of action and on its counterclaim. Issue has been joined, but note of issue has not yet been filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted and the cross-motion is denied.

In its complaint, plaintiff alleges that it entered a lease with defendant for Unit 509 located at 14 East 4th Street, New York, New York for two years commencing October 23, 2017 and ending on October 31, 2019 (the "Lease"). Pursuant to the lease, defendant was obligated to pay base rent in the amount of \$17,500.00 per month for the first year and \$18,000 per month for the second year. In or about August 23, 2019, plaintiff entered a renewal lease with defendant for the unit for one year commencing November 1, 2019 and ending on October 31, 2020 (the "Renewal Lease"). Pursuant to the Renewal Lease, defendant was obligated to pay base rent in the amount of \$17,000.00 per month beginning on November 1, 2019. In or about May 2020, defendant informed plaintiff that he could not pay the rent, that he would be vacating the apartment and that he would be applying the security deposit toward the rent. In June 2020, defendant vacated the apartment and surrendered possession of the premises. Plaintiff alleges that defendant failed to cure his default under the lease and that \$102,000 remains due and owing to plaintiff.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary

Dated: 7/15/21



HON. LYNN R. KOTLER, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff argues that it is entitled to summary judgment on its first cause of action, breach of contract, because the submission of the lease and proof of non-payment by defendant establish its entitlement to judgment and on its fourth cause of action, attorneys fees. Finally, plaintiff seeks dismissal of the defendants' 13 affirmative defenses and counterclaim.

Defendant opposes the motion and argues that plaintiff failed to meet its burden of establishing compliance with RPAPL 227-e and that if the court disagrees with defendant's arguments, defendant should be given the opportunity for discovery to support its affirmative defense of mitigation.

This is an action for breach of lease against the tenant Toporek. A lease is a contract. The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Here, plaintiff's motion is supported by the affidavit of its owner and landlord, Erin Isakov, who has personal knowledge of the underlying facts, as well as copies of the lease and lease renewal between plaintiff and tenant Toporek, rental log and communications between the parties. It is undisputed that tenant failed to make the full payment due under the lease from May through October 2020 at the monthly rent of \$17,000.00. (See, Isakov affidavit).

Under RPL § 227-e, a landlord has a duty to mitigate its damages. Landlords "shall, in good faith and according to the landlord's resources and abilities, take reasonable and customary actions" to re-rent a residential unit at fair market value or at the agreed rate during the remaining tenancy term, "whichever is lower". Here, plaintiff has established through the affidavit of Isakov with supporting documentation, that plaintiff listed the apartment after tenant vacated on multiple online rental websites such as StreetEasy, Zillow, Trulia and Naked Apartments, maintained a log of over 60 inquiries potential renters, virtual and in-person showings and conducted "nearly a dozen video walkthroughs and over three dozen live showings of the apartments" until the apartment was ultimately rented in February 2021 for a rental amount within the fair market value when compared to comparable listings.

Moreover, defendant vacated and surrendered possession of the premise in June 2020 and then unilaterally elected to have the security deposit applied to the monthly rent in contravention of the lease terms, which provides that "security deposit shall not be used by tenant towards any rent".

Based upon plaintiff's showing, it has established *prima facie* entitlement to summary judgment on its first cause of action, breach of the lease against the tenant in the sum of \$102,000.00.

Plaintiff moves for summary judgment on its fourth cause of action, attorneys' fees. The lease requires defendant to reimburse plaintiff for its reasonable attorney's fees. However, plaintiff's request for a hearing on attorney's fees is denied without prejudice to renewal within 90 days upon another motion supported by an affirmation attesting to plaintiff's reasonable legal fees incurred in connection with the prosecution of this action and its rights under the lease Plaintiff's failure to renew its application for attorney's fees within 90 days shall be deemed an unreasonable failure to prosecute and that branch of plaintiff's claim will be severed and dismissed pursuant to CPLR § 3216.

Next, plaintiff moves to dismiss defendant's 13 affirmative defenses on the ground that the "defenses are not stated and lack merit" and to dismiss the counterclaim for attorney's fees.

CPLR 3211 (b) provides in part that, "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In a pleading, statements, including those supporting an affirmative defense, must be "sufficiently particular to give the court and parties notice of the transactions, occurrences of series of transactions or occurrences intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). An affirmative defense which fails to set forth no factual basis supporting it, must be dismissed. *Robbins v. Growney*, 229 AD2d 356, 645 N.Y.S.2d 791 [1st Dept 1996]

Defendants' answer asserts general denials and thirteen affirmative defenses alleging that plaintiff failed to mitigate its damages, the Covid-19 pandemic and its effect on the lease created a force majeure, frustration of purpose, breach of duty of good faith and fair dealing, doctrine of unclean hands, unjust enrichment, "plaintiff's causes of action are barred, in whole or in part, because Defendant did not damage Plaintiff in the sum or manner alleged, or in any sum or manner at all", "Plaintiff's claims are barred...insofar as Defendant's actions or omissions were not the proximate cause of any alleged injury, loss and/or damages...", and estoppel and waiver. In addition, defendant asserts a counterclaim for attorney's fees.

As to defendant's first affirmative defense, mitigation of damages, plaintiff has properly mitigated its damages under RPL 227-e by taking actions to re-rent the apartment. The affidavit of Erin Isakov outlines her efforts to not only re-let the apartment and documentation to support that showing. In turn, other than defendant's conclusory statement, he has failed to raise a triable issue of fact to preclude summary judgment.

The balance of defendant's affirmative defenses contained in his answer are not only conclusory, but also fail to include any supporting facts. None of the purported defenses put plaintiff on notice as to what the defenses actually are/allege. Accordingly, the affirmative defenses are dismissed. In light of the foregoing, defendant's counterclaim for attorney's fees is dismissed.

Defendant's cross-motion for summary judgment to dismiss the complaint is denied. "A defendant moving for summary judgment [seeking an order dismissing plaintiff's complaint] has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit". *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 498 NYS2d 786 [1985]; *Anghel v Ruskin Moscou Faltischek, P.C.*, 190 AD3d 906, 907, 141 N.Y.S.3d 92 [2d Dept 2021] Defendant has woefully failed to provide any evidence to support his motion for summary judgement. Moreover, his application is only supported by an attorney affirmation which is insufficient under CPLR 3212(b).

Accordingly, it is hereby **ORDERED** that plaintiff's motion is granted to the following extent:

[1] plaintiff's motion for partial summary judgment on its first cause of action, breach of the lease, against the tenant is granted; and it is further

ORDERED that plaintiff's motion for reimbursement of its reasonable attorney's fees is denied without prejudice to renewal within 90 days upon another motion supported by an affirmation attesting to plaintiff's reasonable legal fees incurred in connection with the prosecution of this action and its rights under the lease and guaranty; and it is further

ORDERED that defendants' affirmative defenses and counterclaim are severed and dismissed; and it is further

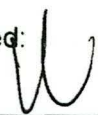
ORDERED that defendant's cross-motion for summary judgment is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

7/15/21
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.