

Kamfar v Fudge Green, LLC

2021 NY Slip Op 34147(U)

June 30, 2021

Supreme Court, New York County

Docket Number: Index No. 156897/2020

Judge: Shawn Timothy Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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RAMIN KAMFAR

Plaintiff,

- v -

FUDGE GREEN, LLC,

Defendant.

INDEX NO. 156897/2020

MOTION DATE 02/22/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. SHAWN TIMOTHY KELLY:

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

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Plaintiff moves for an order pursuant to CPLR § 3212(e), seeking partial summary judgment on Plaintiff’s Third Cause of Action of the Amended Verified Complaint in the amount of \$75,000, which arises from Defendant’s unlawful retention of Plaintiff’s security deposit of \$37,500 in willful violation of New York General Obligations Law § 7-108.

Plaintiff contends that On September 9, 2020, Plaintiff and his family vacated the premises located at 6 Polo Court, Bridgehampton, New York 11932 (herein the “Premises”) and requested the expeditious return of all advances and/or deposits relating to the Premises, including the security deposit and a “Utility and Service Deposit” of \$18,000. On September 15, 2020, Defendant, through its counsel, asserted that it was entitled to retain the “Utility and Service Deposit” because the “utility and service” charges purportedly totaled \$24,696.61.

On September 24, 2020, Plaintiff’s counsel sent a letter to Defendant’s counsel demanding the return of the security deposit. The letter states in pertinent part:

156897/2020 KAMFAR, RAMIN vs. FUDGE GREEN, LLC
Motion No. 001

[B]ecause neither you nor your client have provided us with a “written statement itemizing the reasons for retaining all or a portion of the” \$37,500.00 Security Deposit, your client forfeited the right to retain any portion of said Security Deposit. If this money is not returned by September 30, 2020, then we will deem your client’s conduct as a willful violation of New York General Obligations Law § 7-108 and will seek appropriate relief, including without limitation amending our filed Complaint.

(NYSCEF Doc. No. 4, ¶ 42; see also NYSCEF Doc. No. 16).

In opposition, Defendant alleges that Plaintiff vacated the premises on September 9, 2020, which was a week after the termination of the lease by its terms, and that on September 15, 2020, Defendant through its counsel, asserted that it was entitled to retain the ‘Utility and Service Deposit’ of \$18,000 because the ‘utility and service’ charges purportedly totaled \$24,696.61. Defendant contends that Plaintiff concedes that Defendant’s counsel sent a letter explaining that the total expenses for the term of the Plaintiff’s possession was \$24,000, which exceeds the \$18,000 deposit, and attaching an itemized description of the charges (NYSCEF Doc. No. 15).

Analysis

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing

the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Pursuant to New York General Obligations Law § 7-108 (1-a) (e), for a landlord to withhold any portion of a deposit or advance, the landlord is required to provide a written itemized statement within fourteen (14) days after the tenant vacates the premises “indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant.” This section of the General Obligations Law further provides that a landlord that “fails to provide the tenant with the statement and deposit within fourteen days, the landlord shall forfeit any right to retain any portion of the deposit.” Further, pursuant § 7-108 (1-a) (g), “any person who violates the provisions of this subdivision shall be liable for actual damages, provided a person found to have willfully violated this subdivision shall be liable for punitive damages of up to twice the amount of the deposit or advance”.

As both parties concede, Plaintiff vacated the premises on September 9, 2020, which gave Defendant until September 23, 2020 to provide a written itemized statement as to any portion of the security deposit it retained. Contrary to Defendant’s position, the only written itemized statement pertained to the Utility and Service Deposit. The Utility and Service Deposit is clearly defined in the lease and distinguished from the Security Deposit (NYSCEF Doc. No. 3). The lease further states, that “within forty-five (45) days following expiration of the lease term, Landlord shall return the security deposit to Tenant, adjusted for any damages or outstanding bills, with copies of bills for any deductions from the security deposit” (NYSCEF Doc. No. 3).

The Legislature's intent in adopting New York General Obligations Law § 7-108 (1-a) (e), was to provide tenants with specific knowledge if the landlord believed the rented property was damaged and whether the cost of those damages would be deducted from the security deposit (*see Diaz v Cunningham*, 68 Misc 3d 319, 123 NYS3d 807, 327 [Middletown City Ct. 2020]). In the absence of a written, itemized statement from the landlord to the tenant showing what amount, if any, would be deducted from the security deposit and why, that section of the General Obligations Law generally would require a landlord to return the security deposit to the tenant (*Elena v Milio Mgmt. LLC*, 71 Misc 3d 1204(A), 142 NYS3d 788 [NY City Ct 2021]). Defendant's failure to provide any written notice to Plaintiff in regards to the security deposit, which is distinct and separate from the Utility and Service deposit, is a clear violation of GBL § 7-108 (1-a) (e).

The Plaintiff has established his *prima facie* entitlement to judgment as a matter of law on the cause of action alleging breach of the lease for failing to return the security deposit (*see* General Obligations Law § 7-103). The evidence established that the Plaintiff paid the Defendant a security deposit and in opposition, the landlord failed to raise a triable issue of fact. Moreover, the Defendant failed to submit any evidentiary proof that the tenant damaged the apartment or any other justification for withholding the security deposit (*see Pezzo v 26 Seventh Ave. S., LLC*, 144 AD3d 778, 779, 41 NYS3d 62, 63-64 [2016]).

As to Plaintiff's allegation that Defendant willfully violated GBL § 7-103, there remains a question of fact as to whether Defendant willfully retained Plaintiff's security deposit. The correspondence between counsel as well as Plaintiff's alleged holdover and Defendant's contention that the utility bills far exceeded the Utility and Service deposit all raise a question of

fact as to whether Defendant's actions are sufficiently willful to allow the award of punitive damages.


Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on Plaintiff's Third Cause of Action is granted to the extent that Defendant unlawfully withheld Plaintiff's security deposit; and it is further

ORDERED that Defendant is found liable to Plaintiff on the Third Cause of Action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the remaining causes of action; and it is further

ORDERED that counsel are directed to appear for a remote preliminary conference on September 9, 2021 at 10:30 AM.

<u>6/30/2021</u> DATE	 SHAWN TIMOTHY KELLY, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT