

<b>Bouderau v 319 Bowery NY LLC</b>
2022 NY Slip Op 31727(U)
May 26, 2022
Supreme Court, New York County
Docket Number: Index No. 655603/2018
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

-----X

RAYMOND BOUDERAU

Plaintiff,

- v -

319 BOWERY NY LLC,

Defendant.

-----X

INDEX NO. 655603/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 007 008

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 218, 221, 223, 224, 225<sup>1</sup>

were read on this motion to/for AMEND ANSWER.

**BACKGROUND**

Plaintiff commenced this lawsuit seeking damages because after he entered a lease for apartment 3 at 319 Bowery, New York, New York (Subject Premises) he was advised that defendant could not deliver possession as agreed because no certificate of occupancy had been obtained for the Subject Premises. Plaintiff sought the return of his security deposit and related fees as well as other damages. Plaintiff also asserts a cause of action for breach of warranty of habitability. Defendant has counterclaimed for breach of contract.

<sup>1</sup> NYSCEF Docs 217 and 22 were not considered by the court as the full memorandum of law in support of the motion to amend was not filed until after plaintiff had filed its reply papers.

### **PENDING MOTIONS**

On August 12, 2020, defendant moved for summary judgment.

On September 25, 2020, defendant moved to amend its answer to include a claim for attorneys' fees.

Recently, the motions were assigned to this Court for determination.

For the reasons set forth below, the motion for summary judgment is denied and the motion to amend the answer is granted.

### **ALLEGED FACTS**

On or about June 8, 2018, the parties entered into a written lease agreement for the Subject Premises. The effective lease term was to be from July 2, 2018 to June 30, 2019. To secure the unit, Plaintiff paid a deposit of \$24,075. On June 27, 2018, prior to plaintiff taking possession of the apartment, defendant notified plaintiff that the apartment did not have its certificate of occupancy and therefore the move-in could not occur as scheduled. However, the parties entered into an oral agreement, pursuant to which plaintiff was permitted to store some belongings in the Subject Premises pending the issuance of a certificate of occupancy. Plaintiff put his belongings in the Subject Premises on June 29, 2018.

Paragraph 2 of the lease provides in pertinent part:

Landlord shall not be liable for failure to give Tenant possession of the Apartment on the beginning date of the Term. Rent shall be payable as of the beginning of the Term unless Landlord is unable to give possession. Rent shall then be payable as of the date possession is available. Landlord must give possession within a reasonable time, if not, Tenant may cancel and obtain a refund of money deposited. Landlord will notify Tenant as to the date possession is available.

Plaintiff terminated the lease on July 2, 2018.

Defendant advised plaintiff it had obtained a temporary certificate of occupancy on or about August 3, 2022. On August 7<sup>th</sup>, 2022, plaintiff removed his belongings from the Subject premises and returned the keys to defendant.

Despite pre-suit demands, plaintiff's deposit was not returned until 6 months later, around the time plaintiff commenced this action.

### **DISCUSSION**

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers ( *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324).

“[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not

to determine the merits of any such issues”], *citing Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Defendant has failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

There are material questions of fact precluding summary judgment including whether or not the delay in being able to afford plaintiff possession of the apartment was “reasonable”. What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case (*Ben Zev v. Merman*, 73 N.Y.2d 781, 783). This is a question of fact for trial. Based on the foregoing the motion for summary judgment is denied.

The lease does contain a provision that provides for attorneys’ fees.

It is well settled that “[l]eave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay” (*McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757[1983], *quoting* CPLR 3025 [b]).

The court should consider how long the party seeking the amendment was aware of the facts upon which the motion is predicated and whether a reasonable excuse for the delay was offered (*Yong Soon Oh v. Hua Jin*, 124 A.D.3d 639, 640; *Caruso v. Anpro, Ltd.*, 215 A.D.2d 713, 713). "Where, however, an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious" (*T & V Constr., Inc. v. Calapai*, 90 A.D.3d 908, 909).

In this action, the note of issue was filed in December 2019. The motion to amend was filed in September 2020. Given the pandemic and other factors the court does not find this delay so extensive that denial of the amendment is warranted. Additionally, given that plaintiff also

seeks attorneys' fees in this action there can be no claim of undue prejudice by virtue of the amendment.

Based on the foregoing the motion to amend the answer to add a counterclaim for attorneys' fees is granted.

### **CONCLUSION**

WHEREFORE it is hereby:

ORDERED that defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiff shall serve an answer to the amended complaint and counterclaim or otherwise respond thereto within 20 days from the date of said service; and it is further

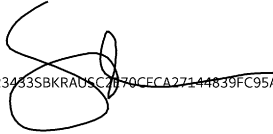
ORDERED that counsel are directed to appear for a virtual settlement conference on August 9, 2022 at 11 AM; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

  
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5/26/2022  
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE