

Shaheid v Sam

2022 NY Slip Op 32513(U)

January 25, 2022

Supreme Court, Queens County

Docket Number: Index No. 722656/2020

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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SHAMEER SHAHEID & NALINI SHAHEID, **BY: McDONALD, J.**

Plaintiffs, Index No.: 722656/2020

- against - Motion Date: 1/20/22

YVONNE SAM & COLIN SAM, JANE DOE and Motion No.: 36

JOHN DOE, Motion Seq.: 1

Defendants.

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The following electronically filed documents read on this motion by plaintiff for an Order granting plaintiffs immediate possession of the premises and issuing a warrant to remove defendants from possession of the premises; directing the Sheriff of Queens County or a New York City Marshal to eject defendants from premises; awarding money judgment in favor of plaintiffs in the amount of \$62,900.00 plus interest from November 1, 2017, plus unpaid rent or use and occupancy from November 1, 2020 to the date of judgment, plus interest; and awarding plaintiffs the costs of this action, including reasonable attorney's fees incurred in bringing this action:

| | <u>Papers</u> <u>Numbered</u> |
|---|----------------------------------|
| Notice of Motion-Affirmation-Affidavit-Exhibits- | |
| Memo. of Law..... | EF 8 - 16 |
| Affirmation in Opposition-Affidavit-Exhibits..... | EF 17 - 20 |
| Memo. of Law in Reply..... | EF 21 |

This is an action to eject defendants from the premises known as and located at 123-12 Inwood Street, Jamaica, New York. Plaintiff also seeks a money judgment and use and occupancy.

Plaintiff commenced this action by filing a summons and verified complaint on November 24, 2020. Defendants Yvonne Sam and Colin Sam (collectively hereinafter defendants) joined issue by service of a verified answer with counterclaim on December 28, 2020. Plaintiff filed a reply to counterclaim on February 6, 2021. Plaintiff now moves for summary judgment.

In support of the motion, plaintiff Shameer Shaheid submits an affidavit, affirming that on June 26, 2020, he and his wife purchased the subject property from Marsha Giscombe. Annexed to the Complaint is a copy of the Deed for the subject premises dated June 26, 2020 between Marsha Giscombe, as Executrix of the Estate of Arlington Williams a/k/a Arlington A. Williams, and plaintiffs. An Assignment and Assumption of Leases Agreement was also executed between Marsha Giscombe and plaintiffs. The defendants are listed as the tenants. Schedule A of the Assignment indicates that to the best of Marsha Giscombe's knowledge, the tenants have not paid rent since at least November 2017. A copy of the Durable Power of Attorney of Arlington Alexander Williams, appointing Marsha Giscombe to serve as his attorney-in-fact is also annexed to the motion papers. Defendants have never tendered or paid any rent to them. On July 31, 2020, they served defendants with a 90-Day Notice of Termination. Defendants failed to vacate the premises upon termination of their tenancy. On November 5, 2020, they served defendants with a 14-Day Notice of Failure to Receive Rent. Defendants have failed to pay the unpaid rent or surrender the premises. Defendants did not make any improvements to the property.

Plaintiffs also submit copies of the 90-Day Notice of Termination dated July 30, 2020 and the 14-Day Notice of Failure to Receive Rent Payment dated October 7, 2020. An Affidavit of Service of the 14-Day Notice was also submitted and indicates that defendants were served with the Notice on November 5, 2020 by nail and mail service.

Based on the evidence submitted, plaintiffs established that they are the owners of the subject premises, and defendants have failed to vacate the premises and pay rent since November 2017.

In opposition, Colin Sam submits an affidavit, affirming that he does not believe that plaintiffs ever served him adequately with any 14-day or 90-day notice. He has been a tenant of the subject premises. He has made numerous improvements to the property. The property was in a state of disrepair because the landlord, Mr. Williams, had health problems. He replaced the plumbing, floors, bathroom, and ceiling in the subject premises. The subject premises has a problem with rats and mice. Therefore, the premises are uninhabitable.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing

evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, plaintiffs established that they served the 90-day notice, defendants' tenancy ended, and defendants failed to vacate or surrender the premises at the end of the term. Defendant Colin Sam's mere statement that he does not think plaintiffs properly served the notices is insufficient to establish that the notices were not properly served. This Court notes that defendant Colin Sam does not deny receipt of the Notices.

In opposition, defendants failed to raise a triable issue of fact regarding plaintiffs' entitlement to immediate possession of the subject premises. A breach of the warranty of habitability is not a valid defense to an ejectment claim (see Aponte v Santiago, 165 Misc.2d 968 [Civ. Ct. Bronx Cnty. 1995]). However, defendants may seek recovery of rent abatement credits due to the breach of the warranty of habitability (see id.; Carcione v Rizzo, 193 NYS2d 152 [App. Term, 2nd Dept. 1992]). Based on such, defendants raised a triable issue of fact as to whether they were and are entitled to rent abatement credits. Moreover, since no discovery has taken place, those branches of the motion seeking a judgment and use and occupancy are premature.

Regarding that branch of the motion seeking dismissal of the counterclaims, defendants' first counterclaim alleges that defendants violated General Business Law 349(a). Under General Business Law 349(a), a plaintiff must prove that the challenged conduct was consumer-oriented, the conduct or statement was materially misleading, and damages (see Stutman v Chemical Bank, 95 NY2d 24 [2000]). Here, the challenged conduct is not consumer-oriented. Rather, the conduct is a private dispute. Therefore, defendants failed to sufficiently allege a claim under General Business Law 349(a).

"The elements for the imposition of a constructive trust are (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance on that promise, and (4) unjust enrichment" (Silberstang v Biderman-Gross, 134 AD3d 693, 694-95 [2d Dept. 2015]). Here, defendants do not allege the existence of a confidential or fiduciary relationship between them and plaintiffs. Accordingly, defendants failed to establish the elements of a constructive trust.

The third counterclaim alleges that plaintiffs damaged the cameras that they installed on the property. However, defendant Yvonne Sam has already filed a lawsuit in New York City Civil

Court alleging the same damage. Therefore, pursuant to CPLR 3211(a)(4), this counterclaim shall be dismissed (see Mazzei v Kyriacou, 139 AD3d 823, 824 [2d Dept. 2016] ["a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same"]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that the motion is granted to the extent that plaintiffs are awarded partial summary judgment, the counterclaims are dismissed, and plaintiffs are entitled to immediate possession of the premises and a warrant to remove defendants from possession of the premises; and it is further

ORDERED, that those branches of the motion seeking a money judgment plus unpaid rent or use and occupancy are denied; and it is further

ORDERED, that the branch of the motion for attorneys' fees is denied as plaintiff failed to establish its entitlement to such.

Submit Judgment on NYSCEF by filing the proposed judgment as document type "Judgment (Proposed) "Submit Judgment" Per Judge's Decision" along with a copy of this memorandum decision, and an affidavit detailing the amount of damages incurred due to defendant's trespass and nuisance.

Dated: Long Island City, NY
January 25, 2022

Robert J. McDonald
ROBERT J. McDONALD
J.S.C.