

Mingsen Chen v Low Emissions Resources Corp
2022 NY Slip Op 32754(U)
August 8, 2022
Supreme Court, New York County
Docket Number: Index No. 150630/2021
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERA L. SAUNDERS, JSC PART 36M

Justice

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INDEX NO. 150630/2021

MINGSEN CHEN and SHUIGUN CHEN,
Plaintiffs,

MOTION SEQ. NO. 002

- v -

LOW EMISSIONS RESOURCES CORP,
FERNANDO ALVAREZ,
SANDRA MIGUEL VALLES ALVAREZ,
DERON PEARSON,
JOHN DOE and JANE DOE,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiffs move the court pursuant to CPLR 3211(b) seeking dismissal of the affirmative defenses asserted by defendants, Fernando Alvarez and Sandra Miguel Valles Alvarez and pursuant to CPLR 3212 seeking summary judgment against said defendants, for an order ejecting them from the subject premises, and judgment in the amount of \$257,545.90 (NYSCEF Doc. No. 17, *Notice of Motion*).

As an initial matter, insofar as plaintiffs have informed the court that they have regained full possession of the premises, the branch of the motion seeking an order of ejectment is now moot. The remaining relief sought will be addressed and considered herein.

The facts as alleged by plaintiffs are as follows: Plaintiffs own the subject premises located at 10 West Street, Unit PHIC, New York, York 10004 and leased said premises to defendant Low Emission Resources Corp. ("LERC"). Pursuant to the one-year residential lease, defendant LERC was to pay \$18,000.00 in monthly rent, as well as, utilities from March 22, 2019 through March 21, 2020. Defendants tendered rent in accordance with the lease, through January 21, 2020 and failed to pay rent or utilities thereafter. Plaintiffs served a sixty-day notice of termination on defendants, however despite the lease expiration on March 22, 2020, defendants refused to surrender possession of the premises or tender use and occupancy.

As to plaintiffs' motion seeking a dismissal of defendants' affirmative defenses, plaintiffs assert that defendants' "one sentence statement for each of their affirmative defenses is mere conclusion of law, bereft of any factual details" and thus, insufficiently pleaded.

With respect to the branch of the motion seeking summary judgment in the amount of \$257,545.90, representing use and occupancy at \$18,000.00 per month from March 2020 through May 2021 and gas and electricity in the amount of \$2,575.90, plaintiffs argue that in an ejectment

action, a landlord may seek damages for the value of use and occupancy even if the occupants are not the named tenants under the lease as the lack of privity of contract does not prevent the court from ordering use and occupancy. Furthermore, plaintiffs contend that they are entitled to use and occupancy under the theory of unjust enrichment as defendants were enriched by enjoyment of the premises at plaintiffs' expense. Lastly, plaintiffs aver they are entitled to pre-judgment interest at a rate of nine percent per annum from March 2020 through the date of judgment as well as attorney's fees in the amount of \$7,925.00. In support of its contentions, plaintiffs annex the deed, the lease, the Notice of Termination and an affidavit authored by Caihong Chen, agent for plaintiffs, who assert that despite termination of the lease, defendants refused to tender possession of the premises, taking advantage of the eviction moratorium occasioned by the COVID-19 pandemic, and refused to pay use and occupancy or utilities. (NYSCEF Doc. Nos. 19-23).

Defendants oppose the motion, arguing that all of the individually named defendants are listed as permitted occupants but that the named tenant, Low Emissions Resources Corp., paid the rent and any other agreed upon expenses directly to plaintiffs. They further assert they never received details regarding the terms of the lease. However, defendants concede that on February 26, 2020 they were served with the sixty-day notice that the lease would not be renewed, but that in March 2020 New York City was shut down due to the COVID-19 pandemic and as such, defendants were not able to move out of the apartment. Defendants submit that they made several financial offers to pay use and occupancy past the lease term, but their offers were rejected by plaintiffs. Defendants note that it was not clear what the "actual market value" of the premises was at the time. Defendants aver that issues of fact remain as to use and occupancy and whether any agreement existed between plaintiffs and defendants, that the motion is premature as discovery has not yet commenced, and that an appraisal is required to determine the value of use and occupancy owed. Defendants also argue that their affirmative defenses are properly pleaded and should not be stricken.

In reply, plaintiffs counter that the motion is not premature simply because discovery has not been completed, that defendants fail to address their failure to plead their defenses with supporting facts, that there is no dispute as to defendants' occupancy of the premises, and that defendants fail to raise any material dispute regarding its obligation to pay use and occupancy.

CPLR 3211(b) allows for dismissal of one or more defenses when that defense is not stated or has no merit. Wholly conclusory affirmative defenses, such as those which state the name of a legal theory but provide no facts, will be dismissed. However, a defense which looks like it will fail, but has colorable merit will not be dismissed on such a motion. See, *Kim v Witkoski*, 2009 NY Misc. LEXIS 2633 [Sup Ct, NY County July 10, 2009, No. 79742/08] citing *South Park Estates Co. v Serocki*, NYLJ December 23, 1998, at p 26, col 2 (Civ Ct NY Co).

A movant seeking summary judgment in its favor must make *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." (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The evidentiary proof tendered must be in admissible form. (see *Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence.'" (*Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743 [1986].)

In the case at bar, the court finds that all six of the affirmative defenses pleaded, stating only a legal theory, are wholly conclusory and devoid of the necessary supporting facts. Accordingly, dismissal of the defenses is warranted under CPLR 3211(b).

As for plaintiffs' motion for summary judgment seeking use and occupancy, plaintiffs have demonstrated entitlement to the relief sought and defendants, in their opposition, have failed to demonstrate the existence of a triable issue of fact. Plaintiffs are entitled to use and occupancy from the defendants despite defendants not being signatories of the lease. Real Property Law § 220 provides that a landlord may recover reasonable compensation for the use and occupancy of rental premises. Furthermore, it is well-settled that a landlord's entitlement to receive use and occupancy is not contingent upon privity of contract. An occupant has a duty to pay for its use and occupancy under the theory of quantum *meruit*. (see *Trump CPS LLP v Meyer*, 249 AD2d 22 (1st Dept 1998) (landlord entitled to use and occupancy where undisputed that tenants' family members resided in the subject joined apartments); see also *Eighteen Assocs., LLC v Nanjim Leasing Corp.*, 257 AD2d 559 (2nd Dept 1999) (the absence of privity of contract is not a bar to a cause of action to recover damages for use and occupancy.)

Defendants concede that they resided in the apartment past the lease expiration and even acknowledge owing and attempting to negotiate the amount of use and occupancy to be paid, arguing only that the value of use and occupancy had not been determined due to the pandemic. Rather than failing to tender use and occupancy for close to two years as a result of a disagreement regarding the fair market value of the property, defendants could have surrendered possession, deposited use and occupancy payments into an escrow account until an amount was agreed upon, or tendered use and occupancy in the amount of the monthly rent detailed in the lease and commenced a legal proceeding seeking reimbursement for overpayment. Even if the court were to credit defendants' claim that they were unable to vacate the premises in March 2020 due to the shutdown occasioned by COVID-19, defendants remained in possession well into 2021. In their papers, defendants fail to articulate any basis for remaining in the property after the emergency shutdown mandates. Further, defendants do not claim financial hardship, illness, or any basis for their extensive delay in surrendering possession or tendering use and occupancy. An unjust enrichment claim "is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another" and in order to adequately plead such a claim, "the plaintiff must allege that the other party was enriched, at that party's expense, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered". (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012].) Here, plaintiffs have demonstrated the elements of its claim of unjust enrichment and a summary determination is warranted. While the rent paid under the lease is not conclusive as to the reasonable and fair market value of the use and occupancy, it is probative. (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]; *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730 [1st Dept 1984].) Accordingly, the motion is granted to the extent that plaintiffs are entitled to use and occupancy from March 2020 through May 2021¹ at a rate of \$18,000.00 per month. Insofar as plaintiffs have failed to annex documentary evidence regarding the utility bills and other damages alleged, the motion is denied, without prejudice, as to those sums. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Based on the foregoing, it is hereby

¹ The date of the filing of the motion for summary judgment.

ORDERED that, plaintiffs' motion seeking an order of ejectment is denied as moot; and it is further

ORDERED that, plaintiffs' motion seeking dismissal of Fernando Alvarez and Sandra Miguel Valles Alvarez's affirmative defenses is granted and said defenses are dismissed and stricken; and it is further

ORDERED, ADJUDGED and DECLARED that, the branch of plaintiffs' motion seeking summary judgment is granted and plaintiffs' are entitled to judgment, as against defendants Fernando Alvarez and Sandra Miguel Valles Alvarez, in the amount \$252,000.00 (representing \$18,000.00 in use and occupancy from March 2020 through May 2021), plus statutory interest from March 22, 2020 and the Clerk of the Court is directed to enter judgment as against said defendants; and it is further

ORDERED that, plaintiffs request for an award of attorney's fees in the amount of \$7,925.00, together with costs, and disbursements is granted and plaintiffs are directed to submit the pertinent invoices along with an appropriate bill of cost to be taxed by the clerk of the court; and it is further

ORDERED that, the balance of the action is severed and continued; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

ORDERED that service upon the Clerk of the Court 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).

This constitutes the decision and order of this court.

August 8, 2022


HON. VERNAL L. SAUNDERS, JSC

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: