

Carex Real Prop., L.P. v McShea
2023 NY Slip Op 30134(U)
January 13, 2023
Supreme Court, New York County
Docket Number: Index No. 158193/2021
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE **PART** **63M**

Justice

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CAREX REAL PROPERTY, L.P.,

Plaintiff,

- v -

SARA D. MCSHEA, MICHAEL GILROY, JOHN DOE, JANE
DOE

Defendant.

-----X

INDEX NO. 158193/2021

MOTION DATE 08/19/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents and after oral argument held August 19, 2022, plaintiff's motion for summary judgment is decided as follows:

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d 331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can

be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion for summary judgment, plaintiff submits the affidavit of Alexandra Herbst, the principal of Carex Property, L.P. together with a copy of the relevant deed, original and most recent renewal leases, the pleadings and the prior order of this Court. Plaintiff asserts causes of action for ejectment, and attorney's fees. Said documents establish as follows: Plaintiff is the owner in fee and the landlord of the premises located at 100 West 119th Street, Apt. 7B a/k/a PHB, New York, NY 10026. On September 29, 2014, Defendants Sarah D. McShea and Michael Gilroy entered into a written lease agreement to rent the Premises for a term expiring October 31, 2016. The lease was renewed for a period through November 6, 2018 at a rate of \$5,300.00 per month. Lease and Renewal. After the lease expired on November 6, 2018, Defendants remained in possession of the Premises as month-to-month tenants. On or about October 27, 2020, Plaintiff personally served Sarah D. McShea with a combined Ninety (90) Day Notice of Intent Not to Renew Tenancy and Notice of Termination pursuant to RPL 226-c and 232-a ("Notice of Non-Renewal"), which expired on February 6, 2021. Defendants remained in possession of the Premises without permission of Plaintiff after expiration of the lease and Notice of Non-Renewal until July 16, 2022.

As defendants have vacated, the portion of this action seeking ejectment is moot, leaving the issue of attorney's fees and use and occupancy under *Carex v. McShea et al.*, Index No. 651144/2021 before this Court.. It is well settled law that where a lease has an attorneys' fees provision, the prevailing party in a holdover proceeding is entitled to be reimbursed for its

attorneys' fees, costs and expenses. *Cier Industries Co. v. Hessen*, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dep't 1988); *245 Realty Assoc. v. Sussis*, N.Y.L.J., June 1, 1998, p. 25, col. 3 (1st Dep't); *Soho Village Realty Inc. v. Gaffney*, N.Y.L.J., March 4, 2001, p. 18, col. 1 (1st Dep't); *Duell v. Roberts*, 232 A.D.2d 301, 648 N.Y.S.2d 916 (App. Div. 1st Dep't 1996) stating "tenant was on notice that the losing party could be assessed the legal fees of the prevailing party given the terms of the parties' last lease".

Defendants assert that plaintiff is not entitled to attorney's fees under the lease as plaintiff is not the "prevailing party" as defendants voluntarily vacated the premises on July 16, 2022. Contrary to defendants' assertion, plaintiff has prevailed in this action at every juncture and defendants only vacated the premises after plaintiff's victory in this action was fully assured. There is no requirement that there be a judicial determination to be a prevailing party. As such, plaintiff is entitled to use and occupancy at a rate of \$5,300.00 per month and attorney's fees.

ORDERED that plaintiff's motion is GRANTED in its entirety; and it is further


ORDERED that an assessment of damages against defendants SARA D. MCSHEA, MICHAEL GILROY is directed on the issue of use and occupancy and attorney's fees, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office, who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office 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].

1/13/2023
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
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"/>	REFERENCE