

**Marwell v Holzer**

2023 NY Slip Op 31781(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 156847/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. PAUL A. GOETZ **PART** **47**

*Justice*

-----X

EVAN MARWELL

Plaintiff,

- v -

ROBERT HOLZER,

Defendant.

-----X

**INDEX NO.** 156847/2020

**MOTION DATE** 12/19/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 53, 54, 55, 56, 57, 59

were read on this motion to/for JUDGMENT - SUMMARY.

In this landlord-tenant action arising out of an unpaid rent dispute, plaintiff-landlord Evan Marwell moves for summary judgment, pursuant to CPLR § 3212, for: (1) a money judgment against defendant-tenant Robert Holzer for rent arrears in the amount of \$14,448.97; (2) a money judgment against defendant for use and occupancy in the amount of \$24, 240.67; and (3) attorneys’ fees. Plaintiff also moves, pursuant to CPLR § 3211 (b), to dismiss defendant’s affirmative defenses of failure to properly terminate the lease, failure to serve proper termination notice, defective complaint, failure to provide a rent stabilized lease, and failure to register the property with DHCR as well as defendant’s counterclaim for attorneys’ fees. Defendant opposes the motion, but the opposition will not be considered as it is untimely.<sup>1</sup>

<sup>1</sup> Defendant failed to oppose plaintiff’s motion initially when it was marked submitted on July 27, 2022. Defendant then moved to vacate the submission of the motion and requested another chance to file an opposition (mot seq no 002, NYSCEF Doc No 40). By decision and order dated November 29, 2022 (NYSCEF Doc No 52), defendant’s motion was granted and a new date for opposition due was set for December 9, 2022. Defendant did not file his opposition until January 10, 2023 (NYSCEF Doc Nos 53, 54), over a month late and without timely seeking permission from the court for another extension to file his opposition.

## DISCUSSION

“It is well settled that ‘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 demonstrate the absence of any material issues of fact.’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action.” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility.” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

### *Rent*

Pursuant to section 3 of the lease renewal agreement, defendant was obligated to pay plaintiff monthly rent in the amount of \$9,750.00 from August 1, 2019 until July 31, 2020

(NYSCEF Doc No 14, ¶ 3). Defendant was also obligated to pay additional rental charges as they came due (Rider to Lease of Apartment, ¶¶ 11, 15, NYSCEF Doc No 13 [*i.e.*, late fees, Con Ed, telephone cable television, alarm services, and common utility charges]). Between January 1, 2019 and July 31, 2020, defendant failed to pay rent in the amount of \$31,948.97, representing \$20,995.08 in base rent and \$10,953.89 in additional rent of utility charges and late fees (NYSCEF Doc No 15; Marwell Aff, ¶ 13, NYSCEF Doc No 11). After applying defendant's security deposit (\$17,500) to the outstanding arrears, pursuant to section 12 of the rider to the lease, plaintiff was still owed outstanding rent in the amount of \$14,448.97 (NYSCEF Doc No 13, ¶¶ 4, 12). Accordingly, plaintiff will be granted summary judgment on his claim for unpaid rent and awarded the amount of \$14,448.97 from defendant.

#### *Use and Occupancy*

Real Property Law (RPL) § 220 provides that a landlord “may recover reasonable compensation for use and occupation of real property.” The court has broad discretion to award use and occupancy *pendente lite* (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]). An award of use and occupancy *pendente lite* accommodates the parties' competing interests by preserving the status quo until final resolution (*MMB Assocs. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991]). Recovery for use and occupancy allows a landlord to recover only “reasonable compensation” of the fair market value of the premises after the lease expires (*see Mushlam Inc. v Nazor*, 80 AD3d 471, 471 [1st Dept 2011]). The rent value under the lease is probative in determining the reasonable value (*id.*).

Here, section 17 of the lease provides that defendant is obligated to pay plaintiff for his use and occupancy of the premises after the lease expiration date through the date which defendant vacates the premises (NYSCEF Doc No 13, ¶ 17). Use and occupancy is defined as

rental obligations under the lease (*id.*). Between August 1, 2020 and October 27, 2020, defendant failed to pay use and occupancy in the amount of \$31,990.67, consisting of base rent in the amount of \$29,250.00, gas and electric charges in the amount of \$608.14, water and sewage charges in the amount of \$100.52, and painting costs in the amount of \$2,032.01 (*see* NYSCEF Doc Nos 15-17). In accordance with the lease, plaintiff applied the prepaid last month's rent to the outstanding balance, leaving \$23,240.67 due. Accordingly, plaintiff will be granted summary judgment on his claim for use and occupancy and awarded the amount of \$23,240.67 from defendant

#### *Attorneys' Fees*

Section 17 of the lease permits plaintiff to be paid expenses for attorneys' fees if the lease is ended by plaintiff due to defendant's default (NYSCEF Doc No 13, § 17 [c] [3]). Since defendant is in default under the lease, plaintiff will be entitled to attorneys' fees. Accordingly, plaintiff will be granted summary judgment on his claim for attorney's fees from defendant.

#### *Defendant's Affirmative Defenses and Counterclaim*

Defendant's affirmative defenses and counterclaim for attorneys' fees will also be dismissed.

Defendant's first affirmative defense that plaintiff failed to properly terminate the tenancy prior to the commencement of this action is unavailing since the parties entered into a fixed-term leasehold expiring on July 31, 2020. Landlords are not required to give notice prior to the expiration of a fixed-term leasehold (*see Adam v City of Cohoes*, 127 NY 175 [1981]; *see also 206 W. 121<sup>st</sup> St. HDFC v Jones*, 53 Misc 3d 149[A] [App Term 2016]).

Defendant's second affirmative defense that plaintiff failed to serve predicate notice under RPL § 226-c is unavailing because RPL § 226-c does not apply. RPL § 226-c only applies

when (1) a landlord intends to offer a lease renewal with a rent increase equal to or greater than five percent above the current rent or (2) the landlord does not intend to renew the tenancy. Here, plaintiff did intend to renew and the offer to renew included the same terms as the prior lease.

Defendants' fourth and fifth affirmative defenses, respectively, that plaintiff failed to provide defendant with a rent stabilized lease and plaintiff failed to register the premises with DHCR are unavailing because plaintiff substantially altered the previous rent-stabilized premises with a newly created duplex apartment complex.<sup>2</sup> "Once the perimeter walls of the apartment have been substantially moved and changed where the previous apartment, essentially, ceases to exist, the apartment is no longer rent stabilized thereby rendering its rental history meaningless, and entitling the owner to 'first rent' within the meaning" of the Rent Stabilization Code (*Dixon v 105 W. 75<sup>th</sup> St. LLC*, 2015 NY Slip Op 31506[U], \*3 [Sup Ct, NY County 2015], *aff'd* 148 AD3d [1st Dept 2017] [internal quotations omitted]). Therefore, even if the premises was rent stabilized prior to its complete transformation, the premises' rent-stabilization status no longer applies. Therefore, defendant's third affirmative defense that plaintiff failed to plead the apartment's rent-stabilized status is inapplicable to the apartment occupied by defendant.

Lastly, defendant is not entitled to attorneys' fees since he is not the prevailing party of this action (*Graham Ct. Owner's Corp. v Taylor*, 24 NY3d 742, 752 [2015] [internal citation omitted] ["only a prevailing party, who has achieved 'the central relief sought,' is entitled to attorneys' fees"]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR § 3212, is granted and plaintiff is entitled to recover from defendant the amount of \$14,448.97 in rent

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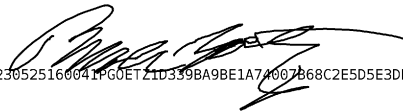
<sup>2</sup> Defendant's fifth affirmative defense is mislabeled in his answer as a "fourth" affirmative defense, but will be addressed as defendant's fifth affirmative defense herein.

arrears and the amount of \$23,240.67 in use and occupancy plus statutory interest from January 1, 2019, plus costs and disbursements and the Clerk shall enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall submit via NYSCEF and email to [bweisman@nycourts.gov](mailto:bweisman@nycourts.gov) (with copy to all parties) an affirmation with supporting exhibits in support of its request for attorneys' fees; and it is further

ORDERED that any opposition to the attorneys' fees affirmation is due within 10 days; and it is further

ORDERED that defendant's affirmative defenses and counterclaim for attorneys' fees are dismissed.

  
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5/25/2023  
DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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