

Rhumb W 21 LLC v Wolfe

2023 NY Slip Op 31906(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 155848/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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RHUMB W 21 LLC		INDEX NO.	<u>155848/2022</u>
	Plaintiff,	MOTION DATE	<u>05/11/2023</u>
	- v -	MOTION SEQ. NO.	<u>004</u>
WILLIAM TRAVIS WOLFE,			
	Defendant.		

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 55, 56, 58, 59, 60, 61
were read on this motion to/for VACATE.

Defendant's motion to vacate the Court's decision dated March 24, 2023 is granted and defendant's affirmative defenses and counterclaim are severed and dismissed.

Background

This matter arises out of an alleged breach of a written lease. Plaintiff claims that defendant failed to pay rent for three months in 2016 (July, August, and September). In his answer, defendant asserted six affirmative defenses and one counterclaim.

In motion sequence 001, plaintiff moved to dismiss the affirmative defenses and counterclaim, which was granted without opposition on January 24, 2023 (NYSCEF Doc. No. 20). Defendant moved to vacate this Court's decision, and the Court granted the vacatur, adding that defendant shall pay plaintiff's filing fee to bring a new motion to dismiss, stating "the Court will only consider defendant' opposition if it is accompanied by proof that he reimbursed plaintiff for the filing fee," (NYSCEF Doc. No. 31).

On March 24, 2023, this Court issued another decision dismissing defendant's affirmative defenses and counterclaim after counsel for defendant failed to prove he paid the filing fee for plaintiff's second motion to dismiss, as it was defendant's clerical mishaps that required plaintiff to file its motion for a second time. He did not, and this Court granted plaintiff's motion, but stated defendant could make a motion to vacate so long as he attached proof that he paid the filing fee.

Motion Sequence 004

Defendant now moves to vacate this Court's decision and permit defendant to reargue the merits of plaintiff's motion to dismiss certain affirmative defenses. This time, defendant attached proof of payment he made to plaintiff for the filing fee and insists his own "errors or oversights and law office failures" are to blame (NYSCEF Doc. No. 52 at 1). Defendant contends the Court did not assess his client's legal arguments and new facts are before the Court that were not available before—namely the proof of reimbursement to plaintiff's counsel.

In opposition, plaintiff argues the Court did not overlook or misapprehend any facts in determining the prior motion as defendant reimbursed plaintiff after the Court's decision was issued. Plaintiff contends defendant has not provided a reasonable excuse as to why the reimbursement was not previously made. Plaintiff maintains vacating the Court's decision and rearguing the merits of the motion would be a waste of judicial resources.

In reply, defendant argues he possessed no ill-will and contends the matter should be decided on the merits. The fact the reimbursement was not made timely was an oversight by defendant's counsel, and states that he is willing to pay attorney's fees to plaintiff's counsel for the time his transgressions caused.

Discussion

“To vacate a default, a party must demonstrate both a reasonable excuse and the existence of a meritorious defense” (*Terrapin Indus., LLC v Bank of New York*, 137 AD3d 569, 570, 27 NYS3d 153 [1st Dept 2016]).

In the previous decision, this Court invited defendant to make a motion to vacate or oppose any motion made by plaintiff so long as defendant provided proof of the filing fee reimbursement. Counsel for defendant did as he was directed and paid the filing fee, albeit belatedly after he apparently got caught. In accordance with the strong policy of this state, disputes should be decided on the merits. Because this issue has been fully briefed, and there is no need to force the parties to engage in motion practice for a fourth time on this issue, the Court issues its decision on defendant’s affirmative defenses and counterclaim herein.

Affirmative Defenses and Counterclaim

“In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481, 19 NYS3d 13 [1st Dept 2015] [internal quotations and citations omitted]).

Defendant only addressed one of its affirmative defenses in its opposition brief, and failed to preserve the others. Therefore, his first, second, fourth, fifth, and sixth affirmative defenses are severed and dismissed. The only affirmative defense remaining is the third one—

which contends that this case involves a consumer debt transaction that is governed by a three-year statute of limitations.

The Court finds that this case, which concerns unpaid rent, is not a consumer debt transaction matter. Pursuant to 22 NYCRR § 202.27-a (1), “a consumer credit transaction means a revolving or open-end credit transaction wherein credit is extended by a financial institution, which is in the business of extending credit, to an individual primarily for personal, family or household purposes.” Defendant fails to cite to any caselaw or legislative history that shows that landlord tenant disputes are governed by consumer credit laws and are thereby governed by a three-year statute of limitations.

Breaching a lease is not an issue typically characterized as a consumer debt dispute. A lease is not governed like a secured transaction. Instead, leases operate under the plethora of landlord tenant laws applicable in this state. Unpaid rent does not function like an unpaid credit card and a landlord is not in the business of extending credit—a landlord offers housing in exchange for payments.

Moreover, because this is not a consumer debt matter, the statute of limitations is not three years. Pursuant to CPLR 213, a cause of action for a breach of contract must be commenced within six years. While the statute of limitations would ordinarily run out under these circumstances by July 1, 2022, the COVID toll, which took effect from March 20, 2020 to November 3, 2020, added 228 days to the statute of limitations (*see* 9 NYCRR § 8.202.8; *Brash v Richards*, 195 AD3d 582, 582, 149, NYS3d 560 [2nd Dept 2021] [holding that the executive orders relating to the effects COVID-19 on statute of limitations constituted a toll of filing deadlines in New York courts]). To be clear, the executive orders operated as a toll (meaning it

added days) rather than as a mere suspension of the limitations period. Thus, plaintiff's complaint is timely as it had until February 14, 2023 to file this claim.

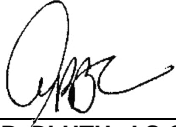
As for defendant's counterclaim, there is no basis for the tenant to win attorney's fees pursuant to the Fair Debt Collection Practice Act because, stated above, this is not a consumer debt collection case.

Accordingly, it is hereby

ORDERED that defendant's motion to vacate the Court's decision dated March 24, 2023 is granted; and it is further

ORDERED that defendant's affirmative defenses and counterclaim are severed and dismissed.

See NYSCEF Doc. No. 57 concerning the next conference.

<u>6/5/2023</u> DATE					 ARLENE R. BLUTH, 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"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	