

Mensah v Emanuel

2023 NY Slip Op 32292(U)

June 14, 2023

Supreme Court, New York County

Docket Number: Index No. 650996/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

1, 2018, and expiring November 31, 2019. Plaintiff claims that tenant executed and entered into a surrender agreement with plaintiff, whereby he extended his lease and was to vacate from the premises by March 31, 2020, failure of which would trigger a monthly use and occupancy in the amount of \$25,000.00. Plaintiff sets forth that defendant remained in the premises starting from April 1, 2020, until October 8, 2020, and thus, owes her \$156,250.00 for use and occupancy. She reiterates that defendant owes her an additional amount of \$500.00 for a New York City Department of Buildings violation for failure to have a permit for the “Black Ink Tattoo Studio” awning. (NYSCEF Doc. No. 22, *affidavit of facts*). Plaintiff maintains that defendant has failed to make payments after she has demanded same. She further asserts that defendant benefitted from the commercial tenancy without making payments and has therefore been unjustly enriched at her expense. Hence, plaintiff seeks a judgment granting her \$156,750.00, plus interest at a rate of 9% from October 8, 2020, in addition to court costs, attorney’s fees, and disbursement pursuant to the terms of the agreement.

In opposition, tenant argues that summary judgment should be denied because he vacated from the premises on or before March 31, 2020, and in fact, his shop manager, Leon Humphries conducted the walk through with plaintiff. (NYSCEF Doc. No. 34, *affidavit of David Emanuel*). Leon Humphries, in his affidavit, avers that he left the keys, vacated from the premises on March 31, 2020, vacant of all occupants and property, after conducting the walk-through with plaintiff’s property manager. (NYSCEF Doc. No. 33, *affidavit of Leon Humphries*).

In reply, plaintiff argues that defendant surrendered the keys to the premises on or about October 8, 2020. To this point, plaintiff references the affidavit Benjamin Mensah, her property manager, who attests in support of plaintiff’s motion that he did not conduct a walkthrough of the premises with Leon Humphries or any agent of tenant on or before March 31, 2020, and the keys were likewise not returned on that date. (NYSCEF Doc. No. 39, *affidavit of Benjamin Mensah*).

This court notes that, although defendant filed a sur-reply (NYSCEF Doc. No. 44, *sur-reply affirmation*), he is not entitled to a sur-reply as of right and, thus, it shall not be considered in the court’s determination of this motion. (see *Allied World Assur. Co. (U.S.) Inc. v Greater N.Y. Mut. Ins. Co.*, 2023 NY Slip Op 31698(U) **3 [Sup. Ct, NY County 2023]).

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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that “facts essential to justify opposition may exist but cannot [now] be stated.” (CPLR 3212 [f]; see *Zuckerman*, 49 NY2d at 562).

A lease may be surrendered by express surrender or surrender by operation of law. “A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated.” (*Riverside Research Inst. v KMG A, Inc.*, 68 NY2d 689, 691-692 [1986]; *Ctr. for Specialty Care*,

Inc. v CSC Acquisition I, LLC, 187 AD3d 46, 54 [1st Dept 2020].) “As distinguished from an express surrender, a surrender by operation of law is inferred from the conduct of the parties.” (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d at 692). Furthermore, “[g]enerally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender” (*Spinelli's Pizza, Inc. v G&T1 Corp.*, 208 AD3d 420 [1st Dept 2022].) “Therefore, to relieve him of liability for future rents, the tenant bears the burden of proving that the landlord has accepted a surrender” (*Pollack v Ovadia*, 2019 NY Slip Op 31688[U] **4 [Sup Ct, NY County 2019].) “Whether a landlord has accepted a tenant’s abandonment so as to result in a surrender depends on the landlord’s intent” (*id.*)

“To state a cause of action for unjust enrichment, plaintiff must allege: 1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Gans v Wilbee Corp.*, 199 AD3d 564, 566 [1st Dept 2021]).

Here, upon the review of the record, summary judgment is denied insofar as issues of fact remain with respect to the claim for breach of the surrender agreement. Although plaintiff and her property manager aver in their respective affidavits that defendant failed to vacate and surrender the premises by March 31, 2020, thereby damaging plaintiff, the document plaintiff relies on to claim purported communication between her property manager and tenant about when keys to the premises were to be returned lacks proper authentication. (*NYSCEF Doc. No. 41, text messages; see Coleman v Maclas*, 25 Misc3d 1229(A), 2008 NY Slip Op 52700[U], ****5 [Sup Ct, NY 2008]). Moreover, the affidavit of tenant’s shop manager, Leon Humphries, also raise an issue of fact as to defendant’s date of surrender, inasmuch as he affirms that plaintiff vacated and surrendered the premises on or prior to March 31, 2020. (*NYSCEF Doc. No. 47, affidavit in opposition*). Given the conflicting claims in the competing affidavits, any determination would be based upon the credibility of the parties, which is to be resolved at trial, not on a motion for summary judgment. (See *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept, 2013]).

Turning next to that branch of the motion seeking unjust enrichment (third cause of action), the court finds that plaintiff has not established her *prima facie* entitlement to summary judgment on the said cause of action insofar as it is well-established that “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (see *Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005].) Given that the amount sought for use and occupancy is governed by the surrender agreement, there is no valid claim for unjust enrichment.

This court finds that plaintiff has established its entitlement to summary judgment, on liability, on its claim that it is owed \$500.00 relating to the New York City Department of Buildings violation for defendant’s failure to have a permit for the “Black Ink Tattoo Studio” awning. Tenant does not dispute the violation; however, he raises an issue of fact with respect to the amount owed insofar as he tenders a document from “NYC CityPay” reflecting a balance due of \$200.00 (*NYSCEF Doc. No. 36, NYC CityPay document*). Therefore, even though liability has been established, the amount owed shall be determined at trial.

As to the affirmative defenses pleaded in defendant's answer, defendant only addressed that he vacated from the premises prior to April 1, 2020 (fourth affirmative defense). As such, the following affirmative defenses: statute of frauds (first affirmative defense); failure to state a cause of action (second affirmative defense); failure to plead privity of contract (third affirmative defense); and the terms of contract was impossible to perform due to the COVID-19 pandemic shelter in place order in New York City (fifth affirmative defense) are deemed abandoned insofar as defendant failed to raise specific legal arguments in support of same. (see *Acres Loan Origination, LLC v 170 E. 80th St. Mansion, LLC*, 2023 NY Slip Op 30258(U) **5 [Sup Ct, NY County 2023]).

In view of the foregoing, plaintiff's motion for court costs, attorney's fees, and disbursement is denied. (see *Nestor v McDowell*, 81 NY2d 410, 416 [1993]). All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 3212, for summary judgment against defendant is denied as to the breach of contract claim (first cause of action); and it is further

ORDERED that plaintiff's unjust enrichment claim (third cause of action) is hereby dismissed; and it is further

ORDERED that plaintiff's second cause of action is granted only as to liability, and damages shall be determined at trial; and it is further

ORDERED that defendant's first, second, third and fifth affirmative defenses are dismissed; and it is further

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

This constitutes the decision and order of the Court.

June 14, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE