

Harlington Realty Co. LLC v Campbell

2023 NY Slip Op 33188(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 150691/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 150691/2021
HARLINGTON REALTY CO. LLC,
Plaintiff, MOTION SEQ. NO. 001

- v -

KELLY CAMPBELL,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for

SUMMARY JUDGMENT

This action stems from claims that defendant breached a residential lease for an apartment located at 103 Fifth Avenue, New York, NY (“premises”). Plaintiff asserts a breach of contract claim relating to defendant’s failure to pay rent and additional rent pursuant to the terms of the lease and extension of lease agreement in the principal amount of \$83,585.18, plus rent and additional rent accruing during the litigation through the end of the lease term on April 30, 2021 (first cause of action); as well as, \$14,950.00 in additional expenses plaintiff incurred, together with attorney’s fees (second cause of action) (NYSCEF Doc. No. 2, *complaint*). Defendant interposed an answer in this action, wherein she asserts several affirmative defenses, as well as a counterclaim, claiming that plaintiff fraudulently assessed utility bills to defendant causing her financial loss in an amount to be proven at trial (NYSCEF Doc. No. 4, *answer*).

Plaintiff now moves, pursuant to CPLR 3212, for an Order entering judgment against defendant on its first and second causes of action and awarding it \$105,515.18 in damages, plus interest from October 15, 2020, and reasonable attorney’s fees. Plaintiff also seeks to dismiss defendant’s counterclaim on the ground that it may not be properly interposed in this action and is, in any event, without merit (NYSCEF Doc. No. 7, *notice of motion*). Defendant opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment in her favor or, in the alternative, dismissal of the complaint pursuant to CPLR 3211(a)(1) (NYSCEF Doc. No. 24, *notice of cross-motion*).

In support of its motion, plaintiff submits, *inter alia*, the affidavit of David Magier, a member of plaintiff, who affirms, in relevant part, that defendant took possession of apartment No. 4 at the premises on or about May 1, 2016. According to Magier, the parties extended the term of the lease pursuant to several lease extensions, the final lease extension being on or about March 11, 2020, which extended the lease term from May 2020 through April 2021. Magier avers that plaintiff failed to make payments of rent under the lease, beginning April 2020, and continuing thereafter under the extension. Defendant surrendered possession of the premises on August 1, 2020, and the apartment was re-let in January 2021. Magier maintains that defendant is liable for the rent differential (\$1,745.00) from January 1, 2021, through April 31, 2021. He also maintains that plaintiff is entitled to costs incurred in engaging a real estate broker to find

the new tenant (\$10,250.00 paid as commission), as well as, costs for the repair of the apartment (\$4,700.00 in repair costs). According to Magier, defendant is liable for \$83,585.18 for unpaid rent under the lease from April 1, 2020, through December 31, 2020; \$6,980.00 for the rent differential from January 1, 2021, through April 30, 2021; and \$14,950.00 for costs relating to re-letting the premises.

Plaintiff also submits the original lease agreement from April 2016 (NYSCEF Doc. No. 9, *lease agreement*), together with the lease extensions (NYSCEF Doc. Nos. 10-11, *lease extensions*). Additionally, it proffers the lease agreement entered into with the new tenant in December 2020 for the period commencing in January 2021 and ending in December 2022 (NYSCEF Doc. No. 12, *lease agreement with new tenant*). Annexed to the moving papers is also a check to Compass, dated March 8, 2021, for \$10,250.00, purportedly representing the amount paid in commission (NYSCEF Doc. No. 13, *check*). Lastly, plaintiff furnishes a ledger representing an outstanding balance of \$90,565.18, which Magier avers does not include the costs associated with re-letting the premises.

By memorandum of law, plaintiff argues that it has established its *prima facie* entitlement to summary judgment on its claims because the lease and extension unambiguously set forth defendant's obligation to make monthly payments of rent, which she failed to do. Given that there is no question of fact as to whether defendant breached the lease and given defendant's failure to raise a bona fide defense in this action, plaintiff argues the motion should be granted. There is also, according to plaintiff, no viable counterclaim because said claim is expressly prohibited by ¶ 35 of the lease, wherein defendant waived her right to interpose counterclaims in this action. Plaintiff contends that defendant's counterclaim is nevertheless lacking in merit because defendant was not charged for utility usage, nor is there a line item for utility charges reflected in the tenant ledger. Thus, plaintiff argues that dismissal of the counterclaim is warranted pursuant to CPLR 3211(a)(6).

In opposition to plaintiff's motion and in support of its cross-motion, defendant references the original lease, the 2017 lease renewal, the 2018 lease renewal, and the 2019 lease renewal, which were all signed by both defendant and her husband, Dilan Siritunga ("Siritunga"). The 2020 lease renewal, however, was signed only by defendant. Defendant maintains that "[p]ursuant to the relevant law, [d]efendant was not able to execute the renewal option without [Siritunga]'s accompanying signature as both of them had entered into the Lease together as co-tenants." Defendant argues that, without Siritunga's signature, the 2020 renewal was not exercised as a matter of law and, thus, defendant is not bound by its terms.

Additionally, defendant asserts that there was no meeting of the minds because e-mails between Siritunga and plaintiff from March 2020 establish that Siritunga refused to sign the lease extension and, thus, on behalf of himself and defendant, made clear that they did not intend to be bound by the documents pending negotiations on the terms of the lease renewal (NYSCEF Doc. No. 32, *-emails*).

Annexed as an exhibit is the affidavit of defendant. She affirms that when she signed the 2020 lease renewal, negotiations regarding the lease extension were still ongoing. Defendant avers that she signed the 2020 renewal with the understanding that her signature alone could not

have executed the document since it also required the signature of her husband, Siritunga. She and Siritunga were allegedly experiencing a great deal of financial difficulties due to the COVID-19 pandemic, causing them to leave New York City. Siritunga's business suffered considerably, a fact he brought to plaintiff's attention in emails when discussing a possible rent abatement. Defendant asserts that they were not prepared to renew the lease based on the terms proposed given their financial situation. Defendant also argues that the 2020 renewal lease explicitly states that "[e]ach tenant on the original lease must sign." (NYSCEF Doc. No 5, *2020 lease renewal*). Insofar as this was not complied with, the lease renewal did not go into effect (NYSCEF Doc. No. 34, *defendant's affidavit*). Siritunga submits an affidavit that corroborates the assertions raised by defendant in her affidavit (NYSCEF Doc. No. 35).¹

In opposition to the cross-motion and in further support of the motion, plaintiff argues that defendant signed the lease renewal and, therefore, is responsible for paying rent. Plaintiff argues, "[t]o the extent it is relevant, Harlington waived the requirement that each prior tenant sign the new lease." According to plaintiff, the lease renewal went into effect once it was signed and delivered by defendant to plaintiff and then countersigned by plaintiff. The caselaw cited by defendant in support of her application, claims plaintiff, is without legal basis and should be rejected (NYSCEF Doc. No. 36, *memorandum of law in reply*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

Here, plaintiff's motion for summary judgment is denied. The Court of Appeals has held that "no one who is in possession of a lease or a particular interest in a lease which is affected with any sort of equity for third persons can renew the same for his own use only, but such renewal must be considered a graft upon the old stock." (*Thayer v Leggett*, 229 NY 152 [1920], quoting *Mitchell v Reed*, 61 NY 123, 131 [1874]; see also *Rosenthal v Mahler*, 141 AD2d 625, 627 [2d Dept 1988]; *Zazzara v Cassata*, 275 AD 615, 617-618 [4th Dept. 1949]). It is undisputed that the original lease agreement identifies defendant and Siritunga as co-tenants under the lease, and it is documented that, prior to the 2020 lease renewal, both tenants signed the prior lease extensions. In fact, the 2020 lease extension explicitly states that "[e]ach tenant on the original Lease must sign" the document; however, it is uncontested that Siritunga did not sign said agreement. To the contrary, e-mail correspondence from March 2020 reflects his refusal to execute the same as presented. Although plaintiff argues that it waived the requirement of both signatures, giving effect to the lease renewal, no such reservation of right is memorialized in the writing and plaintiff has not tendered any binding authority to support said argument. And, while it is not lost on this court that a claim for use and occupancy may lie as against defendant for her alleged use of the premises through the date of her surrender on August 1, 2020 (NYSCEF Doc. No. 9, *original lease* ¶ 20), no such claim is asserted here. To the extent

¹ This court notes that the last page of Siritunga's affidavit, containing his signature, is largely illegible.

plaintiff seeks unpaid rent for April 2020 in the amount of \$12,300.00, which falls within the 2019 lease extension, that request is denied insofar as the ledger for April 2020 appears to reflect a balance of \$11,350.00 at the end of April 2020. Given this discrepancy and a lack of explanation thereof, the motion seeking summary judgment on its first cause of action is denied. That branch of the motion seeking summary judgment on the second cause of action for expenses incurred, which relies, in part, on the existence of the 2020 lease extension, is also denied.

As it relates to the dismissal of the counterclaim for fraudulent utility bills, this court rejects the argument that the counterclaim is precluded by the lease. Although ¶ 35 of the lease states that “[i]n the event that the [l]andlord commences any *summary proceeding* for non-payment of rent, the [t]enant hereby agrees not to interpose any counter claim or whatever nature or description in such proceedings” and that “[a]ny claim of the [t]enant must be an independent action at law” (emphasis added), it fails to demonstrate the applicability of said provision to counterclaims in this plenary proceeding. Notwithstanding the foregoing, the affidavit of Magier, relying on the ledger attached, confirms that plaintiff did not charge defendant for utility usage, an argument defendant does not refute in opposition. Therefore, defendant’s counterclaim is dismissed.

Furthermore, the cross-motion seeking dismissal of the complaint is granted solely to the extent it seeks dismissal of claims premised on breach of the 2020 lease renewal, and it is otherwise denied. Accordingly, it is hereby

ORDERED that plaintiff’s motion is seeking summary judgment is denied; and it is further

ORDERED that that branch of the motion seeking dismissal of the counterclaim is granted; and it is further

ORDERED that defendant’s cross-motion for summary judgment seeking dismissal of the complaint is granted solely to the extent set forth above and is otherwise denied; and it is further

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

ORDERED that the parties are directed to appear for a preliminary conference on November 8, 2023, details which shall be provided by the court no later than November 6, 2023.

September 8, 2023


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER