

3660 Broadway BCR, LLC, v Saad

2023 NY Slip Op 33715(U)

October 10, 2023

Supreme Court, New York County

Docket Number: Index No. 651553/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

suffers from asthma, but that plaintiff has failed to provide reasonable accommodation such as a proper elevator service to the 6th floor for approximately two years.

In its reply to the counterclaims, plaintiff asserts the following affirmative defenses: the counterclaims fail to state a cause of action (first affirmative defense); plaintiff did not cause defendant Saad to suffer any injuries and the alleged violations are irrelevant to the ADA, FHAA, and Administrative Code requirement (second affirmative defense); defendant Saad's claims are barred because the claimed violations are de minimis and non-actionable since they do not impair defendant's use of the area (third affirmative defense); defendant Saad's claims are barred because the remedy sought pursuant to the ADA, FHAA, and Administrative Code are not "readily achievable", easily accomplishable and able to be carried out without much difficulty or expense within the meaning of 42 USC § 12181(9) (fourth affirmative defense). As for the fifth affirmative defense, plaintiff claims that it has made good faith efforts to and reasonably believed it was compliant with the ADA, FHAA, and Administrative Code, and therefore, any violation or deviation, if mandated by law, are de minimis. Plaintiff also asserts the following: that it did not have knowledge of Saad's alleged disability (sixth affirmative defense); that it lacked knowledge or notice of the alleged conditions that serve as the basis for the warranty of habitability claims (seventh affirmative defense); that defendants solely caused any damages alleged as a result of failing to comply with the provisions of the lease (eighth affirmative defense); and, that the counterclaims are barred by documentary evidence (ninth affirmative defense).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and against defendants for rent arrears (first cause of action) and use and occupancy (second cause of action) pursuant to the residential lease in the total amount of \$99,692.80, plus interest from November 1, 2021; reasonable attorney fees and costs (third cause of action); and dismissing the affirmative defenses and counterclaims. Plaintiff asserts that defendants' liability for the amount sought is based on the lease, and that defendants' affirmative defenses and counterclaims, as asserted, either lack merit or have not been properly pleaded. Specifically, plaintiff argues that the first, fifth, sixth, and seventh counterclaims are duplicative in that they re-state a warranty of habitability claim separately for each defendant (NYSCEF Doc. No. 21, *memo of law*, pg 7). Plaintiff further posits that the first, fifth, sixth, and seventh counterclaims alleging a breach of the warranty of habitability should be dismissed because defendants have, without plaintiff's consent, elected to remain in possession and occupancy of the premises despite the lease having expired. Similarly, plaintiff contends that the second, third, and fourth counterclaims based on defendant Saad's alleged disability that he has asthma and that there was an alleged lack of elevator service on the 6th floor of the premises are meritless because plaintiff was not provided notice of the alleged disability (NYSCEF Doc. No. 21 at pg 7). Plaintiff articulates that if the second counterclaim is related to the alleged lack of elevator service, then it has meritorious defenses in that "removal of the alleged barriers is not readily achievable; modifications would impose an undue burden on the defendant; removal of the alleged barriers would fundamentally alter the nature of defendant's public accommodation." As for the affirmative defenses, plaintiff articulates that the third affirmative defense claiming that the complaint fails to state a cause of action is meritless because defendants breached the lease by failing to pay rent when due. Plaintiff furnishes the affidavit of Kobi Zamir, the managing

member of plaintiff, wherein he states that defendants owe plaintiff \$99,692.80 for failure to pay rent, and that defendants have refused to vacate the premises at the expiration of the lease term and remain in possession and occupancy of the premises without plaintiff's permission and consent (NYSCEF Doc. No. 14, *Zamir affidavit*). Plaintiff likewise proffers a tenant ledger detailing the charges (NYSCEF. Doc. No. 20, *rent ledger*). Plaintiff argues that, although defendants assert in their second affirmative defense that they have paid all amounts due to plaintiff, that the claim is rebutted by the tenant ledger and Zamir's affidavit establishing the amounts owed and sought. Lastly, plaintiff asserts it is entitled to attorneys' fees incurred in enforcing the lease.

In opposition, defendants argue that summary judgment should be denied because plaintiff is not entitled to the alleged use and occupancy amounts in connection with the subject apartment since plaintiff has continually breached the warranty of habitability. They maintain that Real Property Law § 235-b, provides for an implied warranty of habitability which requires landlords of residential premises to keep them fit for human habitation and free of conditions that are dangerous to the life, health, or safety of the tenants. To this point, defendants submit an affidavit in which they assert that plaintiff breached Real Property Law § 235-b because for a period of not less than two years, *inter alia*, the apartment suffered from the following defects: holes and leaks in the ceiling; rodent infestation, insufficient and sporadic heat and hot water; and that plaintiff failed to provide elevator service to the 6th floor of the apartment building (NYSCEF Doc. No. 23, *defs' affidavit in opposition*). Furthermore, they maintain that plaintiff violated the FFHA, ADA, and other state and local laws because defendant Saad suffered from asthma and plaintiff failed to make reasonable accommodations for him. Defendants contend that they are entitled to damages, which is "the difference between the fair market value of the premises in good repair, as measured by the agreed rent, and their value during the period of the breach as determined by the trier of fact" (NYSCEF Doc. No. 26, *opposition*, pg. 4).

In reply, plaintiff sets forth that defendants do not challenge the essential allegations of plaintiff's *prima facie* case. Therefore, it is entitled to summary judgment because the lease, terms of the tenancy, defendants' breach of lease, and the amount sought to be recovered is not challenged, plaintiff contends. The opposing affidavit, according to plaintiff, fails to provide any evidence of the alleged defects in the apartment, or that plaintiff had notice of same. Plaintiff likewise argues that defendants fail to provide any evidence of defendant Saad's alleged disability or that plaintiff had notice of any such disability (NYSCEF Doc. No. 25, *reply*).

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 landlord seeking summary judgment against a tenant for breach of rental obligations satisfies its *prima facie* evidentiary burden by proving the existence of a lease, landlord's performance under the lease, tenant's nonpayment of rent, the total debt due, and a description of how the amounts due were calculated (see *Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]).

Here, the court finds that plaintiff has established its *prima facie* entitlement to summary judgment on its breach of lease claim asserted insofar as it has attached a copy of the lease. Plaintiff has demonstrated performance, defendants' non-payment of rent, and has proffered a rent ledger describing how the amount due and sought was calculated.

Although the burden shifts to defendants to raise the existence of a material issue of fact precluding summary judgment on the breach of lease claim, they fail to do so. It has been held that "[t]enants alleging breach of the warranty of habitability must provide evidence sufficient to support their claims" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 113 [1st Dept 2010]). While defendants allege breach of the warranty of habitability, they fail to adduce any evidentiary proof in admissible form sufficient to demonstrate any of the conditions that allegedly existed in the premises. Defendants likewise do not allege or provide any evidence that plaintiff had notice of same (see *Matter of Moskowitz v Jordan*, 27 AD3d 305, 306 [1st Dept 2006]). Furthermore, defendants do not proffer any evidence to substantiate their claim that they have paid all rents/use and occupancy amounts due to plaintiff. Defendants self-serving statements standing alone are insufficient to raise a triable issue of fact (see *Beaubrun v N.Y. City Transit Auth.*, 9 AD3d 258, 259 [1st Dept 2004]). Therefore, the court grants that branch of plaintiff's motion seeking a money judgment in its favor and against defendants for \$99,692.80, plus interest from November 1, 2021.

Addressing now the remainder of the affirmative defenses and counterclaims, plaintiff seeks dismissal of these arguing that they are conclusory. This court agrees. Insofar as defendants do not proffer evidence sufficient to establish the existence of material issues of fact, the remainder of defendants' affirmative defenses and counterclaims are dismissed (See *Wing Hon Precision Indus. Ltd. v Diamond Quasar Jewelry, Inc.*, 154 AD3d 550, 551 [1st Dept 2017]; *Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2017]; *Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014].)

Turning next to that branch of the motion seeking attorneys' fees and expenses, "[u]nder the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). Here, ¶19 of the lease provides for plaintiff's recovery of attorney's fees and disbursement (NYSCEF Doc. No. 19, *Lease*, ¶19). Thus, the issue with respect to attorney's fees shall be determined by a special referee. All other arguments have been considered and are either without merit or need not be addressed. Accordingly, it is hereby

ORDERED that that branch of plaintiff’s motion seeking rent arrears (first cause of action), and continuing use and occupancy from June 1, 2021, through November 1, 2021, plus interest and late fees from November 1, 2021, together with costs and disbursements (second cause of action) in the principal sum of \$99,692.80, is granted; and it is further

ORDERED and **ADJUDGED** that the Clerk of Court shall enter a money judgment in favor of plaintiff and against defendants jointly and severally for the principal sum of \$99,692.80, plus interest from November 1, 2021; and it is further

ORDERED that the branch of plaintiff’s motion for summary judgment seeking attorney fees incurred in this action (third cause of action) is granted and shall be referred to a special referee to hear and determine; and it is further

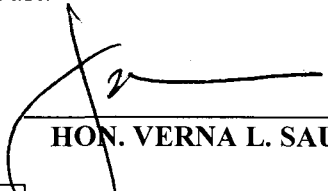
ORDERED that that branch of plaintiff’s motion seeking dismissal of defendants’ affirmative defenses and counterclaims is granted; and it is further

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 defendants, as well as upon the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court and the Special Referee Clerk 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 at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

October 10, 2023



HON. VERNA L. SAUNDERS, JSC

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"/>	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 checked="" type="checkbox"/>	REFERENCE