

591 Realty LLC v Curanaj

2023 NY Slip Op 34261(U)

December 8, 2023

Supreme Court, New York County

Docket Number: Index No. 152711/2022

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

591 REALTY LLC,

Plaintiff,

- v -

KATRINA N. CURANAJ, J. DOE #1, J. DOE #2

Defendant.

-----X

INDEX NO. 152711/2022

MOTION DATE 08/07/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 38, 39, 40, 41, 42

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

Upon the foregoing documents, it is

Defendant moves for a money judgement for attorney’s fees as the prevailing party in this matter. Plaintiff opposes the motion arguing that an award of attorney’s fees is not appropriate in this case. Plaintiff also cross moves to stay the case as an appeal is pending of the decision and order on motion sequence 002, denying the plaintiff’s motion to strike defendant’s answer and granting defendant’s cross motion for summary judgement dismissing the complaint (NYSCEF Doc No 31).

DISCUSSION

This case arose out of an ejectment action filed by plaintiff on March 29, 2022 (NYSCEF Doc No 1). Plaintiff owns an apartment building located at 5 West 91st Street, New York, NY, 10024, where defendant rents one of the units (*Id.*). Plaintiff alleged that defendant has not maintained the rented unit as her primary residence and since the unit is subject to the Rent Stabilization Law of 1969, that it may terminate defendant’s lease subject to NYCRR § 2524.4(c) (*Id.*). As a third cause of action in its complaint plaintiff alleged that defendant would

be liable for legal fees incurred by plaintiff in this action under the terms of the lease between plaintiff as landlord and defendant as tenant (*Id.* at ¶ 29-32).

“[T]he ‘American Rule,’ ... precludes a prevailing party from recouping legal fees from the losing party except where authorized by statute, agreement or court rule” (*Brill Physical Therapy, P.C. v Leaf*, 82 AD3d 413, 414 [1st Dept 2011]). NY REAL PROP § 234(1) provides that:

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease.

“The overriding purpose of the statute is to provide a level playing field between landlords and tenants, by creating a mutual obligation that is an incentive to resolve disputes quickly and without undue expense” (*Graham Ct. Owner's Corp. v Taylor*, 115 AD3d 50, 56 [1st Dept 2014]).

“Statements made in a pleading verified by a person with personal knowledge of the content of the statements are formal judicial admissions, which dispense with the production of evidence and concede, for the purposes of the litigation in which the pleading was prepared, the truth of the statements” (*Roxborough Apartments Corp. v Kalish*, 29 Misc 3d 41, 42 [App Term 2010]). “[T]o constitute a judicial admission, the statement must be one of fact” *IS Chrystie Mgt. LLC v ADP, LLC*, 205 AD3d 418, 419 [1st Dept 2022]. In contrast “statements made in a pleading ‘upon information and belief’ do not constitute judicial admissions” (*Roxborough*, 29

Misc 3d at 43). If a party amends their complaint “the original allegations are simply informal judicial admissions, entitled to evidentiary weight but not dispositive” (*Upfront Megatainment, Inc. v Thiam*, 215 AD3d 576, 578 [1st Dept 2023]). However, if a party submits later testimony which contradicts previous testimony without amending the complaint or explaining the contradiction a court is still bound by the judicial admission in the complaint. (*Victor RPM First, LLC v Charles Condominiums, LLC*, 217 AD3d 617 [1st Dept 2023]).

Plaintiff’s complaint states that “[t]he lease agreement provides that Katarina N. Curanaj is liable to plaintiff for any legal fees and disbursements for the preparation and service of legal notices; legal actions or proceedings brought by plaintiff because of any default under the lease agreement” (NYSCEF Doc No 1 ¶ 30). The complaint was verified by Vinko Zadrina who is the managing member of defendant (*Id.* at 9). In the verification Zadrina states “I have read the foregoing complaint and know the contents thereof; that the same is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief” (*Id.*). Since the existence of a clause in a lease agreement relating to attorney’s fees is one of fact, and since plaintiff alleges this as fact and does not state it “upon information and belief” this statement is a formal judicial admission.

Plaintiff now states in its opposition papers that “a review of the lease indicates there is no legal fees provision” (NYSCEF Doc No 40 ¶ 11). If plaintiff discovered that the admission made in the complaint regarding the legal fee provision was not correct, it should have moved to amend the complaint. Since plaintiff did not amend the complaint, did not offer an explanation for this contradiction, nor did it submit a copy of the lease as an exhibit the court is bound by the admission in the complaint.

Furthermore, pursuant to NY REAL PROP § 234(1) if a provision in a lease allows a landlord to seek attorney's fees if it prevails in litigation, then a tenant is also able to collect attorney's fees if they prevail. Since plaintiff stated by judicial admission that such a provision is in the lease between the parties then defendant is also entitled to collect attorney's fees if she is the prevailing party in the litigation.

Plaintiff also argues that defendant is not entitled to attorney's fees because this case was dismissed on jurisdictional grounds and therefore defendant did not prevail on the merits. "Only [the] prevailing party is entitled to attorney's fees and to be considered prevailing party, there must be success with respect to central relief sought" (*25 E. 83 Corp. v 83rd St. Assoc.*, 213 AD2d 269, 269 [1st Dept 1995]). Plaintiff cites *25 E. 83 Corp.* in their Opposition Affirmation claiming, "defendant's request for legal fees was denied because the court's decision was not on the merits" (NYSCEF Doc No 40 ¶ 10). Notwithstanding plaintiff's understanding to the contrary *25 E. 83 Corp.* held that because plaintiff's cause of action was dismissed "defendant must be regarded as the prevailing party ... [and the court] therefore remand[ed] for a hearing to determine the appropriate award of defendant's counsel fees" (*25 E. 83 Corp.*; 213 AD2d at 269).

"[A] tenant is entitled to recover fees 'when the ultimate outcome is in his favor, whether or not such outcome is on the merits'" (*Isaly-Liceaga v Pickarski*, 199 AD3d 413 [1st Dept 2021] [quoting *Centennial Restorations Co. v. Wyatt*, 248 A.D.2d 193, 197 [1st Dept. 1998]]). A requirement for an ejectment action for non-primary residence is that notice is given to the tenant "at least 90 and not more than 150 days prior to the expiration of the lease term" (9 NYCRR § 2524.2(c)(3)). When a landlord accepts checks after the predicate non-renewal notice is served, the acceptance effectively vitiates the notice (*Roxborough Apt. Corp. v Becker*, 177 Misc 2d 408, 410 [Civ Ct 1998]). While this dismissal is on procedural grounds the critical question as to

whether the ultimate outcome is in tenant's favor allowing them to collect attorneys then becomes whether the landlord may commence a new non-primary action against them (*Id.* at 822).

Here, the court ruled that by accepting the rent checks prior to service of process plaintiff vitiated the notice of termination (NYSCEF Doc No 31). The expiration date of the lease was January 31, 2022 (NYSCEF Doc No 21). Pursuant to 9 NYCRR § 2524.2(c)(3) notice for an ejectment action would have been required to be given to the defendant at least 90 days before the January 31, 2022 date. Since the only notice given was vitiated by the acceptance of the rent checks, plaintiff cannot commence a new ejectment action against defendant based on the lease that expired on January 31, 2022 since the notice period has expired. Therefore, despite the ruling in defendant's favor not being on the merits, the outcome is still in defendant's favor entitling her to reasonable attorney's fees.

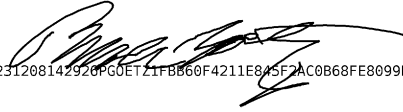
Accordingly, it is

ORDERED that defendant's motion is granted; and it is further

ORDERED that a determination as to the amount of attorney's fees awarded to defendant will be held in abeyance pending resolution of plaintiff's appeal (NYSCEF Doc No 36); and it is further

ORDERED that within 30 days of resolution of the appeal or expiration of plaintiff's time to perfect with plaintiff having failed to perfect, defendant shall submit via NYSCEF and email to SFC-Part47-Clerk@nycourts.gov an affirmation in support of her request for attorney's fees; and it is further

ORDERED that opposition thereto is due 10 days thereafter.


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12/8/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE