BLDG Mgt. Co., Inc. v Kreloff

2023 NY Slip Op 34498(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 156412/2021

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. 156412/2021

BLDG MANAGEMENT CO., INC.,
Plaintiff,

MOTION SEQ. NO. 001

- v -

DECISION + ORDER ON MOTION

SHAWN KRELOFF,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20

were read on this motion to/for **SUMMARY JUDGMENT**.

In this action sounding in breach of contract, plaintiff alleges that defendant rented an apartment at the premises located at 435 East 79th Street, Apt 2JK, pursuant to a lease dated September 1, 2010. Said lease was for a term of one year and was renewed annually, at a monthly rent amount of $8,925.00. Plaintiff asserts that defendant defaulted by failing to remit the monthly payment from March 1, 2020, through January 31, 2021, accruing arrears in the amount of $103,831.25 (first cause of action) and it also seeks $34,610.00 for legal fees in accordance with ¶19(a)(5) of the lease (second cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

In his answer, defendant denies the allegations and asserts the following affirmative defenses: failure to state a cause of action (first affirmative defense); lack of personal jurisdiction (second affirmative defense); moratorium on rent collection by the NY State Governor during the COVID-19 pandemic (third affirmative defense); failure to join indispensable parties (fourth affirmative defense); failure to mitigate damages (fifth affirmative defense); equitable estoppel (sixth affirmative defense) (NYSCEF Doc. No. 5, *answer*).

Plaintiff now moves the court, pursuant to CPLR 3212, for an order granting summary judgment on both causes of action and pursuant to CPLR 3211(b), together with interest, costs and disbursements, and dismissing defendant's affirmative defenses (NYSCEF Doc. No. 6, *notice of motion*). Plaintiff argues that defendant remains liable for all charges accrued upon default of the terms of the lease agreement and it submits the affidavit of Ashley Innamorato, its property manager of the premises, who affirms that defendant owes the amount alleged, and that defendant has not disputed the rent ledger reflecting the balance due (NYSCEF Doc. No. 7, *Innamorato's affidavit*). According to plaintiff, defendant has not provided proof of his compliance with the lease or a meritorious defense for the breach thereof. Concerning the affirmative defenses, plaintiff contends that the complaint states a cause of action for breach of contract and attorneys fees; that service was effectuated on defendant in accordance with CPLR 313; that there was never a moratorium declared by the New York State Governor on payments

of rent duly owed; that Victoria Corn[1] is not an indispensable party, and in fact, is not a necessary party; that there are no damages accruing that ought to be mitigated because defendant continued in possession of the premises through at least December 2020 and plaintiff is not seeking recovery of any rent beyond January 31, 2021; and that there is no meritorious basis for the defense of equitable estoppel, as there is no evidence plaintiff ever led defendant to believe the right to enforce the lease for collection of arrears would not be enforced (NYSCEF Doc. No. 8, *attorney's affirmation and memo of law*).

Through his affidavit, defendant contends in opposition that summary judgment is not appropriate because, even though his family remained in the apartment after he left the premises in June 2018, he was never served with a rent ledger demonstrating the outstanding rent at his Connecticut residence. Defendant claims that his family was constructively evicted from the apartment because, in contravention of state and federal laws, plaintiff's agents called incessantly, persons knocked on the apartment doors both day and night, and affixed letters to the door which could be seen by all the neighbors, and that all these actions are tantamount to harassment. According to defendant, plaintiff's conduct violated the state and federal moratorium on evictions because his family was constructively evicted and thus, he is entitled to discovery on this issue because such a finding would excuse the payment of rent for that period when the constructive eviction occurred. Furthermore, defendant asserts that plaintiff did not make every effort to re-let the apartment. Defendant likewise argues, through his attorney's affirmation, that there are issues of fact with respect to the renewal leases which were purportedly signed by the parties because plaintiff does not attach the original documents, but only the copies whose legal sufficiency cannot be tested by defendant. Defendant posits that the only way to test the legal sufficiency of the documents proffered is to engage in meaningful discovery. Defendant also argues that there is an issue of fact as to whether plaintiff engaged in "predatory conduct in an attempt to force defendant's family from the apartment" and, if discovery reveals that plaintiff attempted to force defendant's family out of the apartment, then the court should assess damages for breach of the warranty of habitability. Lastly, defendant contends that the rent ledger contains unexplained charges (NYSCEF Doc. No. 17, *affirmation in opposition*). Therefore, defendant request that the motion for summary judgment be denied in its entirety and that defendant be permitted to engage in discovery (NYSCEF Doc. No. 18, *affidavit in opposition*).

In reply, plaintiff maintains that defendant's defenses are meritless in that the renewal leases are provided in Exhibit A of its motion papers, and same itemizes each and every charge, which includes base rent in the monthly amount of $8,925.00 for each and every month from March, 2020 through September, 2020 and categorized as "Use & Occupancy" for each and every month after the expiration of the lease that the apartment remained occupied from October 2020 through January 2021. Lastly, plaintiff posits that defendant's breach of the warranty of habitability claim is unavailing because it was not raised at any point prior to the commencement of this action.

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*

[1] Ms. Corn was allegedly an occupant of the premises.

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 has established its *prima facie* entitlement to summary judgment 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 through Innamorato's affidavit (see *Thor Gallery At S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498, 498 [1st Dept 2016]). As the burden shifts, defendant has failed to establish the existence of a material issue of fact precluding summary judgment on the breach of lease claim. 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 defendant alleges breach of the warranty of habitability, he fails to adduce any evidentiary proof in admissible form sufficient to demonstrate any of the conditions that allegedly existed in the premises. Moreover, defendants do not allege or provide any evidence that plaintiff had notice of same (see *Matter of Moskowitz v Jorden*, 27 AD3d 305, 306 [1st Dept 2006]). Additionally, the claim that defendant is entitled to discovery is without merit as defendant has failed to demonstrate that information essential to justify opposition to the motion are within plaintiff's exclusive knowledge or that discovery might lead to facts relevant to the issues (see *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 418 [1st Dept 2009]). To avail oneself of CPLR 3212(f) to defeat or delay summary judgment, "a party must demonstrate that the needed proof is within the exclusive knowledge of the moving party that the claims in opposition are supported by something other than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof" (*Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [1st Dept 2007].) Here, there is no such showing. The court notes that defendant neither asserts constructive eviction nor landlord harassment as affirmative defenses, and hence does not raise a triable issue of fact.

Turning to the affirmative defenses, defendant's unsubstantiated claim of non-receipt of service (second affirmative defense) is belied by the proof. "An affidavit of service constitutes prima facie evidence of proper service and the 'mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service'" (*Jones v Grooms*, 209 AD3d 584, 584 [1st Dept 2022], quoting *Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008]). According to the affidavit of service, after three unsuccessful attempts, to wit: July 12, 2021, July 13, 2021, and July 14, 2021) to serve defendant personally at his Connecticut residence, he was served pursuant to CPLR 308(4) (NYSCEF Doc. No. 16, *corrected affidavit of service of summons and complaint*). Next, defendant's reliance on the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, Regulations to control communicable diseases [42 USCS § 264] and 42 CFR 70.2 to argue that plaintiff is not entitled to collect rent (third affirmative defense) is misplaced, as defendant does not point to any provision(s) in the law evincing that such collection is unlawful.

Similarly, defendant's claim for estoppel (sixth affirmative defense) has no basis. The party invoking a defense of equitable estoppel must establish "(1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts" (*757 3rd Ave. Assoc., LLC v Patel*, 117 AD3d 451, 453 [1st Dept 2014]). Defendant simply does not provide any basis for how this defense applies in this matter. Furthermore, the fourth affirmative defense is 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) **2, 2-3 [Sup Ct, NY County 2023]). Concerning the fifth affirmative defense, defendant's bald assertion that plaintiff had a duty to mitigate, standing alone cannot defeat summary judgment, insofar as defendant does not demonstrate that his family was not living in the apartment during the dates for which plaintiff is seeking rent arrears (see *Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002]).

Considering now 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(a)(5) 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) in the principal sum of $103,831.25 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 defendant for the principal sum of $103,831.25 plus interest, costs and disbursements; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment seeking attorney fees incurred in this action (second 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 defendant's affirmative defenses 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 defendant. , 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.

December 20, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[X]	**REFERENCE**