

Elsayed v Sunset U.S. Corp.

2024 NY Slip Op 30152(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 158410/2021

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART 18

Justice

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LAMIA ELSAYED SALEM ELSAYED, NOUR MOHAMED
TAREK MOHAMED ZAHER, INDJI MONSEN ABDEL EL
HENAWY, AND YASSIN TAREK EL SAYED,

Plaintiffs,

- v -

SUNSET U.S. CORPORATION AND CARINI GROUP LLC,

Defendants.

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INDEX NO. 158410/2021

MOTION DATE 07/06/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 75, 79, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 118, 119

were read on this motion to/for JUDGMENT - SUMMARY

This dispute arises out of the residential lease of unit 4W (the Premises) in a condominium building located at 46 Mercer Street, New York, New York. Plaintiffs Lamia Elsayed Salem Elsayed (Lamia), Nour Mohamed Tarek Mohamed Zaher (Nour), Indji Monsen Abdel El Henawy (Indiji), and Yassin Tarek El Sayed (Yassin) move, pursuant to CPLR 3212, for summary judgment on the third and fourth causes of action in the complaint. Defendant Sunset U.S. Corporation (Sunset) opposes the motion. Defendant Carini Group LLC (Broker) opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment dismissing the third and fourth causes of action as against it.

Background

Cousins Nour and Yassin, from Toronto, Canada, attend college in New York City on F-1 student visas (NY St Cts Elec Filing [NYSCEF] Doc No. 42, Yassin aff, ¶¶ 6-7 and 9). Lamia is

Nour's mother, and Indji is Yassin's mother (*id.*, ¶ 6). Sunset, the owner of the Premises (NYSCEF Doc No. 45, Yassin aff, exhibit A), retained Broker to lease the unit (NYSCEF Doc No. 98, Alex Carini [Carini] aff, ¶ 5).

On August 16, 2021, plaintiffs, as lessees, and Sunset, as owner/lessor, executed a written lease for the Premises for a term commencing August 20, 2021, and extending through May 31, 2022 (NYSCEF Doc No. 48, Yassin aff, exhibit D at 1). The Lease set rent at \$15,000 per month and required the payment of a \$15,000 security deposit, which would be returned unless plaintiffs failed to carry out the terms of the Lease (*id.*). The Premises was leased fully furnished, with plaintiffs agreeing to take "good care of the furniture and furnishings" and "surrender [same] ... in the same condition as on the date this Lease commenced, subject to ordinary wear and tear" (*id.* at 5). Plaintiffs agreed to pay for any damage caused to the furniture and furnishings, apart from ordinary wear and tear (*id.*). Although the Lease stated that rent was due on the first of every month (*id.* at 7), plaintiffs paid Sunset all rent due under the Lease in advance by way of three certified checks:

1. check no. 9812353845 dated August 20, 2021 for \$67,500;
2. check no. 84077941-4 dated August 25, 2021 for \$67,500;
3. check no. 84108368-2 dated August 26, 2021 for \$15,000.

(NYSCEF Doc No. 51, Yassin aff, exhibit G). Shortly after moving into the Premises, defendants allegedly embarked on a campaign of harassment and threatened to evict plaintiffs (NYSCEF Doc No., Eric N. Pitter affirmation, exhibit O, ¶¶ 13-17).

Plaintiffs commenced this action on September 13, 2021, asserting five causes of action for: (1) an order permanently enjoining defendants from evicting, removing, or locking plaintiffs out from or denying them access to the Premises; (2) an order permanently enjoining defendants from harassing plaintiffs in violation of Administrative Code of the City of NY § 27-2005(d) and

Real Property Law § 235-d; (3) actual damages for an alleged violation of General Obligations Law § 7-108 (1-a) (a); (4) punitive damages under General Obligations Law § 7-108 (1-a) (g); and (5) attorneys' fees under Real Property Law § 234. Defendants served a joint answer asserting four counterclaims for: (1) prima facie tort; (2) civil conspiracy; (3) attorneys' fees; and (4) ejectment for breach of the Lease.

On September 16, 2021, plaintiffs obtained an order temporarily restraining and enjoining defendants from evicting, removing, or locking them out from or denying them access to the Premises and from engaging in any harassment (the TRO) (NYSCEF Doc No. 16). Plaintiffs were then granted a preliminary injunction enjoining defendants from removing them from possession of the Premises without a proceeding or action, or otherwise locking them out of or denying them access to the Premises, and enjoining defendants from engaging in any form of harassment as that term is defined in Administrative Code § 27-2004 and as barred by Real Property Law § 235-d (NYSCEF Doc No. 76). The part of plaintiffs' application for an order directing defendants to return \$120,000 in prepaid rent was denied without prejudice (*id.*). By order to show cause signed October 7, 2021, plaintiffs moved to hold defendants in civil contempt for violating the TRO (NYSCEF Doc No. 27). Plaintiffs had alleged that Sunset had attempted to retrieve two paintings from the Premises (NYSCEF Doc No. 21, Nour aff, ¶ 8). The motion was denied (NYSCEF Doc No. 77). This motion and cross-motion for summary judgment on the third and fourth causes of action now follow.

The Parties' Contentions

Plaintiffs claim they are entitled to recover actual and punitive damages and attorneys' fees from both Sunset and Broker, as Sunset's agent, for their willful violation of General Obligations Law § 7-108 (1-a) in collecting more than one month's rent in advance. Plaintiffs rely on Yassin's

affidavit, among other exhibits, in support. Yassin avers plaintiffs contacted Broker after they found a rental listing for the Premises (NYSCEF Doc No. 42, ¶ 8). During negotiations, Broker's agents, Carini and Ilona Ihnatovich (Ihnatovich), told plaintiffs that Sunset wanted only U.S.-based personal guarantors, which plaintiffs did not have (*id.*, ¶ 9). In a telephone conversation with Carini on August 14, 2021, Nour and Lamia proposed that "[p]laintiffs would be amendable to paying rent up-front in lieu of guarantors" (*id.*). Yassin avers that Carini responded, "this was 'not allowed in New York,' but that he would do it" (*id.*; NYSCEF Doc No. 43, Nour aff, ¶ 6). Ihnatovich emailed the Lease and rider for execution to Nour along with payment instructions the next day (*id.*, ¶ 11).

Sunset counters the motion should be denied as premature. Sunset disputes that Broker had authority to enter into an illegal agreement with plaintiffs on Sunset's behalf with respect to rent and that Sunset had no contact with plaintiffs such that they could have understood that Sunset had authorized Broker's conduct. Sunset also maintains that plaintiffs' offer to pay rent in advance, which is permissible in Europe and Canada, undercuts their claim for punitive damages. In any event, Sunset submits that proof of delivery of certified checks to Broker is not proof of payment, and plaintiffs have not demonstrated that the checks were indorsed. Sunset also urges the court to deny the motion in the absence of discovery, including depositions exploring the scope of Broker's authority and the circumstances surrounding the transaction. Sunset further argues that summary judgment is inappropriate because plaintiffs have caused significant damage to the Premises. On these points, Sunset's managing member, Gianluigi Torzi (Torzi), affirms that Sunset hired Broker to procure a tenant and prepare a lease agreement (NYSCEF Doc No. 92, Torzi affirmation, ¶¶ 1 and 10). Torzi states that, as an Italian citizen residing in the United Kingdom, he is not familiar with New York's rent laws and relied on Broker to represent Sunset's

best interests (*id.*, ¶ 5). Torzi claims that Sunset did not authorize Broker to expose it to potential liability for a General Obligations Law violation (*id.*, ¶ 10). Torzi also states that plaintiffs have caused at least \$148,718.50 in damages to the Premises and the furnishings therein based on estimates from a contractor, Marpro Construction, and an art dealer, Contemply S.r.l. (*id.*, ¶ 22; NYSCEF Doc Nos. 86-87, Torzi affirmation, exhibits C-D). Sunset submits the brokerage agreement, photographs purporting to depict damage to the Premises, invoices, and other exhibits.

For its part, Broker contends that it cannot be held liable for an alleged violation of General Obligations Law § 7-108 (1-a) because the statute applies to owners and landlords, who are in the position to repay any rent paid in advance. Broker argues it did not agree to serve as Sunset's legal counsel on the transaction and Sunset agreed to accept plaintiffs' proposal to prepay all rent. Carini, a real estate broker duly licensed in New York and Broker's owner, avers that he told plaintiffs prepayment of rent was not permissible, but ultimately it would be Sunset's decision (NYSCEF Doc No. 98, ¶¶ 1 and 10). Carini avers that he also explained to Torzi that plaintiffs' proposed arrangement was not permissible in New York (*id.*, ¶ 11). Carini also spoke to Sunset's corporate counsel to explain that New York law prohibited payment of advance rent (*id.*). By email dated August 16, 2021, Torzi instructed Carini to proceed with the transaction (*id.*, ¶ 12; NYSCEF Doc Nos. 99-100, Carini aff, exhibits A-B).

Plaintiffs respond that Sunset's proof on damages is not in admissible form and should not be considered. Plaintiffs further contend that Sunset ratified the illegal agreement by accepting the prepaid rent. Plaintiffs additionally argue that General Obligations Law § 7-108 (1-a) (g) applies to any person, without limitation.

Discussion

A party moving for summary judgment under CPLR § 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met its prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise an issue of fact (*Alvarez*, 68 NY2d at 324).

At the outset, plaintiffs urge the court to grant the motion as against Sunset because it failed to submit a counterstatement of material facts. The version of 22 NYCRR 202.8-g (b) in effect in March 2022 states that a party opposing a summary judgment motion “shall include ... [a statement] responding to each numbered paragraph in the statement of the moving party” (22 NYCRR 202.8-g [b]). In the event the opposing party fails to do so, “[e]ach numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted” (22 NYCRR 202.8-g [c]). Although the rule requires the court to deem uncontroverted statements admitted (*see Reus v ETC Hous. Corp.*, 72 Misc 3d 479, 483-484 [Sup Ct, Clinton County 2021], *affd* 203 AD3d 1281 [3d Dept 2022]), “[b]lind adherence” to the rule is not mandated (*On the Water Prods., LLC v Glynos*, 211 AD3d 1480, 1481 [4th Dept 2022], quoting *Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 851 [3d Dept 2022]). The court excuses Sunset’s failure to submit a counterstatement in this instance.

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs' third and fourth causes of action are predicated on General Obligations Law § 7-108 (1-a), which reads in relevant part that, except for certain types of dwelling units not applicable here:

“(a) No deposit or advance shall exceed the amount of one month’s rent, unless the deposit or advance is for an owner-occupied cooperative apartment as provided for in subdivision six of this section.

...

(g) Any person who violates the provisions of this subdivision shall be liable for actual damages, provided a person found to have willfully violated this subdivision shall be liable for punitive damages of up to twice the amount of the deposit or advance.”

The third cause of action seeks \$120,000 in actual damages and the fourth cause of action seeks \$240,000 in punitive damages.

Plaintiffs have demonstrated they paid in advance in excess of one month’s rent, as evidenced in the certified checks made payable to Sunset, which is prohibited under General Obligations Law § 7-108 (1-a) (a), and that the checks were tendered to Broker as Sunset’s agent. Plaintiffs also submit that Sunset and Broker are in *pari delicto*, a phrase which means “equally at fault” (Black’s Law Dictionary, 11th ed 2019), and that Sunset is liable because Broker, as Sunset’s agent, was authorized to accept plaintiffs’ proposal that they prepay all rent.

“An agent’s power to bind [its] principal is coextensive with the principal’s grant of authority” (*Ford v Unity Hosp.*, 32 NY2d 464, 472 [1973]). Proof of an agent’s authority cannot be established through the agent’s representations, declarations or conduct (*Matter of Brookfield Clothes, Inc. v Tandler Textiles*, 78 AD2d 841, 841 [1st Dept 1980]). An agent may have actual authority, either express or implied, from its principal to act (*see Site Five Hous. Dev. Fund Corp. v Estate of Bullock*, 112 AD3d 479, 480 [1st Dept 2013]). Whereas express actual authority

involves an explicit grant of authority from a principal to the agent (*see Sirius Satellite Radio v Chinatown Apts.*, 303 AD2d 261, 261 [1st Dept 2003] [facility agreement granted a managing agent express authority to enter into license agreement on the defendant's behalf]), implied actual authority depends upon the principal's verbal or other actions to the agent "which reasonably give an appearance of authority to conduct the transaction" (*see Greene v Hellman*, 51 NY2d 197, 204 [1980]). The communications provided by Broker support its contention of actual authority. Further, in the absence of actual authority, an agent may be clothed with apparent authority, which turns on the "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Thus, a principal may be held liable because "the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals" (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). An agent's actions are presumptively imputed to their principal "even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud." (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]).

Plaintiffs have made a prima facie case for violation of General Obligations Law § 7-108(1-a)(a) by Sunset. The burden then shifts to defendants to furnish admissible evidence sufficient to raise an issue of fact. Among other issues, a triable issue has been raised with respect to the application of the in pari delicto doctrine, which "mandates that the courts will not intercede to resolve a dispute between two wrongdoers" (*Kirschner*, 15 NY3d at 464). Application of the "[in pari delicto] doctrine 'requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it'" (*Romanoff v Romanoff*, 148 AD3d 614, 615 [1st Dept 2017] [citation omitted]). Here, plaintiffs readily admit

that they initially proposed paying all rent in advance (NYSCEF Doc No. 42, ¶ 9). Plaintiffs also agreed to pay all rent in advance even after they were informed this was “not allowed in New York” (*id.*). The courts do not act to resolve disputes between two wrongdoers, but will leave them where their own acts have placed them. (*Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]). Thus, a triable issue of fact exists as to whether plaintiffs’ claims based on General Obligations Law § 7-108 are barred by the doctrine of in pari delicto, and plaintiffs’ motion for summary judgment is denied.

B. Broker’s Cross-Motion for Summary Judgment

Broker cross-moves for summary judgment dismissing the third and fourth causes of action as against it on the ground that General Obligations Law § 7-108 (1-a) is not applicable to it. “[C]ourts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used” (*People v Williams*, 37 NY3d 314, 317-318 [2021] [internal quotation marks and citation omitted]). The “text itself is generally the best evidence” of the legislature’s intent (*Colon v Martin*, 35 NY3d 75, 78 [2020] *rearg dismissed*, 38 NY3d 1122 [2022]), as “a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact” (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995], *rearg denied* 85 NY2d 1033 [1995] [internal quotation marks and citation omitted]). As recited above, General Obligations Law § 7-108 (1-a) (g) subjects “[a]ny person” who violates the provisions of the subdivision to liability for actual and/or punitive damages. The relevant subsection is (a), which prohibits an advance from exceeding a month’s rent. There is no evidence presented that Broker entered into a contract with the plaintiffs on Broker’s own behalf, and an agent for disclosed principal is not liable on a contract

between the principal and a third party without evidence showing the agent's intention to be liable (*Bank of Am., N.A. v ASD Gem Realty LLC*, 205 AD3d 1, 7 [1st Dept 2022]). The Broker did not set the deposit or advance. That was a creature of the agreement between the plaintiffs and Sunset. Nor has any party provided a citation to a case in which an agent was held liable for the statutory violation of its principal. Dismissal of these claims against Broker is supported by dicta in *McLendon v Kelley* (2021 NY Slip Op 30672[U] [Sup Ct, NY County 2021]), cited by Broker. In that action, the plaintiff tenant sued an owner, a real estate brokerage, and a real estate broker for, among other claims, advance rent payments made in violation of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) (*id.*, *2). The court dismissed the action against the real estate brokerage and the broker because the plaintiff failed to specifically address those claims in the opposing papers, noting “[i]n any event, those fees are charged by the landlord, not the broker,” (*id.*, *3). As far as the guidance issued by the New York State Department of State on the HSTPA states that a broker requesting advance rent payments may be subject to discipline (NYSCEF Doc No. 55, Yassin aff, exhibit K at 3), the guidance does not support the conclusion that the violation of the statute, and liability pursuant to GOL § 7-108(1-a)(g), will accrue to that broker. Therefore, the Broker's cross-motion for partial summary judgment is granted and claims three and four are dismissed as to the defendant Broker.

Accordingly, it is

ORDERED that the motion of plaintiffs Lamia Elsayed Salem Elsayed, Nour Mohamed Tarek Mohamed Zaher, Indji Monsen Abdel El Henawy, and Yassin Tarek El Sayed for summary judgment on the third and fourth causes of action is denied; and it is further

ORDERED that the cross-motion of defendant Carini Group LLC for summary judgment dismissing the third and fourth causes of action against it is granted; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on Microsoft Teams on January 24, 2024 at 11:30 a.m.

1/9/2024

DATE



ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE

SUBMIT ORDER

CHECK IF

ORDER

FIDUCIARY APPOINTMENT

APPROPRIATE

INCLUDES TRANSFER/REASSIGN

REFERENCE