

Excelsior 57th Corp. v Kotogianni

2024 NY Slip Op 32758(U)

August 7, 2024

Supreme Court, New York County

Docket Number: Index No. 157730/2021

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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EXCELSIOR 57TH CORP.,

Plaintiff,

- v -

AIKATERINI KOTOGIANNI A/K/A/ KORINA KOTOGIANNI,
STAVROULA KOTOGIANNI

Defendant.

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INDEX NO. 157730/2021

MOTION DATE 04/12/2024,
04/12/2024

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, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

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

In this action to recover cooperative maintenance fees plaintiff moves for summary judgment on its first and second causes of action seeking a money judgment for alleged non-payments of obligations under the Proprietary Lease in addition to attorney’s fees. Plaintiff also moves to strike and dismiss defendant’s affirmative answers and counterclaims. Defendant cross-moves to dismiss plaintiff’s complaint for non-compliance with discovery demands. Defendant also cross-moves for summary judgment on her counterclaims.

As a preliminary matter pursuant to CPLR § 2215 a cross-motion must be served “[a]t least three days prior to the time at which the motion is noticed to be heard”, however “if such notice and any supporting papers are served by mailing ... they shall be served three days earlier than as prescribed in this rule.” Here, the motion return date was May 23, 2024 (NYSCEF Doc No 64). Service was conducted by mail on May 20, 2024 (NYSCEF Doc No 91). Since, the

cross-motion was served beyond the time frame permitted by CPLR § 2215, plaintiff filed a notice of rejection (NYSCEF Doc No 92). Accordingly, the cross-motion will not be considered.

Plaintiff also rejected defendant's opposition to the motion pursuant to NY R UNIF TRIAL CTS § 202.8-b because defendant's opposition papers exceed the 7,000 words limit. Defendant's affidavit in opposition is 85 pages long and over 20,000 words, therefore it will not be considered the opposition.

Summary Judgment Standard

"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.'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339

[2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Breach of Lease

“The elements of a [breach of contract] claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, while plaintiff has established that a contract exists (NYSCEF Doc No 52), the ledger it submits in support of its allegation that defendant failed to make certain maintenance payments is missing the period between May 1st, 2022 and July 1st, 2023 (NYSCEF Doc No 54). As such, the court cannot determine if the alleged non payments come from a breach of an obligation in the Proprietary Lease. Accordingly, plaintiff’s motion for summary judgment on its first cause of action must be denied. Additionally, since entitlement on plaintiff’s second cause of action for attorney’s fees is dependent on its status as a prevailing party in the lease (NYSCEF Doc No 52), summary judgment will be denied on the second cause of action as well.

Striking Affirmative Defenses and Counterclaims

“CPLR 3013 was intended, together with CPLR 3026, to move pleadings away from the rigid formalism of prior case law and give the pleader, inartistic though [her] product may have been, the benefit of whatever can fairly be gathered from the pleading” (*Rich v Lefkovits*, 56 NY2d 276, 281 [1982]).

Here, while *pro se* defendant’s answer is inartistically plead, she has raised an affirmative defense a breach of the warranty of habitability defense by alleging that she was subject to constant noise and harassment by neighbors without any response from plaintiff’s management


to her complaints. Accordingly, defendant’s affirmative defense and counterclaim for breach of the warranty of habitability will not be stricken.

Accordingly it is,

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

ORDERED that plaintiff’s motion to strike and dismiss defendant’s counterclaims and affirmative defenses is denied; and it is further

ORDERED that defendant’s cross-motion is denied.


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<u>8/7/2024</u>				<u>PAUL A. GOETZ, J.S.C.</u>
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE