

Mazzone v Elwood
2024 NY Slip Op 35427(U)
April 25, 2024
Supreme Court, Albany County
Docket Number: Index No. 911657-23
Judge: Denise A. Hartman
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DANA M. MAZZONE,

Plaintiff,

DECISION AND ORDER

Index No. 911657-23

-against-

April 25, 2024

RAYMOND ELWOOD AND
SARAH JONES,

Defendants.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

BOND, SCHOENECK & KING, PLLC
Ryan B. Cross, Esq.
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Albany, New York 12211-2503
Attorneys for Plaintiff

No other appearances on the motion.

Hartman, J.

On December 5, 2023, plaintiff, the owner and landlord of rental property located at 3279 Carman Road, Guilderland, New York, commenced this action against defendants, her former tenants, seeking damages for breach of a residential lease agreement, legal fees, costs, and statutory interest. On December 15, 2023, plaintiff served defendants at their current residence in accordance with CPLR article 3 (*see* NYSCEF Doc Nos. 14, 15). Defendants did not answer or otherwise appear.

By notice of motion,¹ dated February 2, 2024, plaintiff moves for a default judgment against defendants for breach of a residential lease agreement and seeks damages of \$14,524.49 as follows: \$10,000 in unpaid rent for the months of June 2023 through October 2023; late fees of \$50² per month for June 2023 through October 2023; \$45 for an unpaid water bill for June 2023; \$2,450 for damage to plaintiff's driveway; and \$1,779.49 in legal fees relating to eviction proceedings and enforcement (NYSCEF Doc No.2 [Complaint] at 7). Plaintiff also seeks statutory interest beginning "no later than October 16, 2023 totaling

¹ Plaintiff provided the additional notice required under CPLR 3215 (g) (3) (i) on December 21, 2023 (NYSCEF Doc No. 18).

² Plaintiff concedes that she is not entitled, as a matter of law (*see* Real Property Law § 238-a [b]), to the \$250 per month late fee set forth in the Lease Agreement and requests a late fee for June 2023 through October 2023 of \$50 per month (Complaint 2 at 2 n 2).

\$108.90, plus costs on this action, disbursements, and reasonable attorney's fees" (*id.* at 7).

Background

In support of her motion, plaintiff submits the Lease Agreement to rent the premises located at 3279 Carman Road (the premises) executed by plaintiff as landlord and both defendants as tenants for the term of March 1, 2022, to March 1, 2023 (NYSCEF Doc No. 3 [Lease Agreement]). Under the Lease Agreement, monthly rent was set at \$2,000 per month payable in advance on the first of the month, and tenants agreed to pay plaintiff a \$2,000 security deposit "as security for Tenant's performance of th[e] lease and against any damages caused to the premises" (*id.* at ¶ 5). The Lease Agreement required the tenant to pay utilities, including water (*see id.* at ¶ 7).

The Lease Agreement further provided that, "[i]f Tenant shall be in default in the payment of rent provided for in this Lease for five (5) days, then Tenant shall be responsible for a . . . late charge" (Lease Agreement at ¶ 3). In order to extend or renew the Lease Agreement after expiration of the initial term, the Lease Agreement provided that a "lease renewal/extension addenda should be utilized" but "[i]n the absence of any further written agreement all terms in this lease shall remain in effect except that the term shall be on a month-to-month basis with either party having the right to terminate with at

least 30 days' notice given prior to the due date of the final rent payment" (*id.* at ¶ 10 [additional quotation marks and capitalization omitted]).

Paragraph 11 of the Lease Agreement defined "holdover" as "[a] tenant who retains possession after the expiration of a lease" and provided that, "[i]f Tenant fails to relinquish possession of [the] premises at the end of any lease term or extension thereof, the Landlord is afforded all rights and remedies pursuant to the laws of the State of New York to have the Tenant removed from the premises. Tenant shall pay the Landlord monthly rent of \$2,000[] during any Holdover period" (Lease Agreement at 2 ¶ 11). The tenant was "responsible for all attorneys' fees, costs, and disbursements incurred by Landlord in enforcing the terms, covenants and conditions of th[e] Lease" (*id.* at 2 ¶ 16).

Plaintiff avers that, due to defendants' continued failure to timely pay rent, plaintiff issued defendants a 90-day notice of non-renewal in November 2022, which informed defendants that the Lease Agreement would not be renewed after expiration of the lease term on March 1, 2023 (Complaint at ¶ 11). "Upon receipt of the 90-day notice[,] plaintiff states, "[d]efendants stopped paying rent altogether" (*see id.* at ¶ 12). On February 8, 2023, plaintiff served defendants with a five-day notice that rent was not timely paid (*see id.* at ¶ 13). When defendants failed to pay rent as demanded in the five-day notice, plaintiff served defendants with a 14-day demand to pay or quit (*see id.* at ¶

16). Plaintiff alleges that defendants refused to pay or vacate, so on March 15, 2023, plaintiff served a notice of petition and petition to recover the property for non-payment (*see id.* at ¶ 17).

According to plaintiff, at an April 10, 2023 town court appearance, defendants “agreed to pay [plaintiff] all rent arrears, late fees, and water utilities through May 1, 2023” (Complaint at ¶ 18). And, on April 26, 2023, plaintiff served defendants with a notice to terminate, which advised defendants, in relevant part, “Landlord elects to terminate your tenancy of the . . . premises now held by you on a month-to-month basis,” and that plaintiff would commence summary eviction proceedings against defendants if they failed to vacate the premises “by July 31, 2023, the day on which your term expires” and “demand the value of your use and occupancy of the premises during such holding over” (NYSCEF Doc No. 6). Plaintiff argues that defendants did not pay rent after May 1, 2023, and did not turn over possession of the premises to plaintiff (Complaint at ¶ 20). Plaintiff contends that defendants left the premises on or about July 1, 2023, and moved to their present residence, “but refused to return the keys or remove their personal property from the [premises]” (*id.* at ¶ 21).

On August 9, 2023, plaintiff served defendants with a notice of petition and petition to recover the property and sought money damages for use and occupancy arrears with late fees for June, July, and August 2023 (*see*

Complaint at ¶ 22; NYSCEF Doc No. 7). Plaintiff obtained a warrant of eviction from Guilderland Town Court on September 14, 2023, which was served upon defendants on September 20, 2023 (*see* Complaint at ¶¶ 23, 24; NYSCEF Doc Nos. 8, 9). On October 16, 2023, the Albany County Sheriff executed a formal eviction (*see* NYSCEF Doc No. 10).

Plaintiff also alleges that, on February 16, 2023, during the lease term, plaintiff personally observed and photographed a liquid leaking out of one of defendants' vehicles causing damage to the driveway at the premises (Complaint at ¶ 14). Plaintiff proffers a text exchange from February 16, 2023, between plaintiff and both defendants in which plaintiff advises the defendants of the leak and damage to the driveway and asks defendants to park the vehicle on the street (*see* NYSCEF Doc No. 5). Defendants declined to remove the vehicle from the driveway, stating that they are not allowed to park on the street (*see id.*). Plaintiff also submits photographs depicting defendants' vehicle parked in the driveway and a large hole in the driveway where the vehicle was parked (*see* NYSCEF Doc No. 4). Plaintiff submits estimates from Luizzi Asphalt Services, one for \$4,450 to resurface the driveway and another for \$6,950 for excavation and disposal of the old asphalt and repaving, both dated December 1, 2023 (NYSCEF Doc No. 12). Relying on the lesser estimate, plaintiff seeks \$2,450 for the damage to the driveway (\$4,450 less defendants' \$2,000 security deposit) (*see* Complaint at ¶ 38).

For the preparation of the two eviction petitions, notices, and court appearances, plaintiff submits invoices from the Law Office of Opal F. Hinds, from February 2, 2023, March 13, 2023, April 28, 2023, and August 4, 2023, totaling \$1,400 (*see* NYSCEF Doc No. 13). Plaintiff also submits a \$128.95 invoice from Ideal Legal Support Services, LLC, dated November 18, 2022, for the 90-day notice of non-renewal (*see id.*). Further, plaintiff submits a \$142.00 receipt from the Albany County Sheriff dated September 21, 2023, for execution of the eviction warrant; and a locksmith's receipt, dated October 17, 2023, for \$108.54 for changing the locks at the premises (*see id.*). In addition, plaintiff provides a \$45 water bill from June 2023 for the premises, which plaintiff states in her verified complaint that she paid (*see* NYSCEF Doc No. 11; Complaint at ¶ 36).

Analysis

Pursuant to CPLR 3215, “[w]hen a defendant has failed to appear . . . the plaintiff may seek a default judgment against him” (CPLR 3215 [a]). In order to establish entitlement to a default judgment, a plaintiff is required to submit proof of (1) valid service of the summons and the complaint, (2) the facts constituting the claim, and (3) the default (*see Miller Greenberg Mgt. Group, LLC v Couture*, 193 AD3d 1273, 1274 [3d Dept 2021], citing CPLR 3215 [f]). “[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them” (*Woodson v*

Mendon Leasing Corp., 100 NY2d 62, 71 [2003]). “The Court, however, must still reach the legal conclusion that those factual allegations establish a prima facie case” (*Walley v Leatherstocking Healthcare, LLC*, 79 AD3d 1236, 1238 [3d Dept 2010]). While the quantum of proof necessary to support an application for a default judgment is not as exacting as the proof required on a motion for summary judgment, “some firsthand confirmation of the facts” forming the basis of the claim must be proffered (*see Woodson*, 100 NY2d at 68 [internal quotation marks and citation omitted]). Here, plaintiff has established proper service of process on defendants, who have neither answered nor otherwise appeared in this action. The Court therefore turns to the single cause of action in the unanswered complaint for damages under the Lease Agreement.

Breach of the Lease Agreement

“To recover for a breach of contract, a party must establish the existence of a contract, the party’s own performance under the contract, the other party’s breach of its contractual obligations, and damages resulting from the breach” (*Ironwoods Troy, LLC v Optigolf Troy, LLC*, 204 AD3d 1130, 1131 [3d Dept 2022] [internal quotation marks, brackets, and citations omitted]; *see Ampower-US, LLC v WEG Transformers USA, LLC*, 214 AD3d 1129, 1131 [3d Dept 2023]; *see also Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [a lease is a contract]). And to establish a month-to-month tenancy after expiration of a lease term, the tenant must pay and the

landlord must accept payment of an agreed-upon monthly rent (see Real Property Law § 232-c; see *Omansky v 160 Chambers St. Owners, Inc.*, 155 AD3d 460, 461 [1st Dept 2017]; *Matter of Joyous Holdings v Volkswagen of Oneontai*, 128 AD2d 1002, 1005 [3d Dept 1987]). A month-to-month tenancy continues “on the same terms, and subject to the same covenants, as contained in the [expired] lease” (*Stephen LLC v Zazula*, 171 AD3d 488, 488 [1st Dept 2019]).

Here, paragraph 10 of the Lease Agreement governs month-to month tenancy. It establishes that, in the absence of a written agreement to renew or extend the Lease Agreement upon expiration, a month-to-month tenancy would be established automatically with the terms of the Lease Agreement remaining in effect and either party having the right to terminate with at least 30 days’ notice prior to the due date of the final rent payment (Lease Agreement at ¶ 10). Plaintiff alleges that, “[u]pon receipt of the 90-[d]ay [n]otice” of non-renewal in November 2022, “[d]efendants stopped paying rent altogether” (Complaint at ¶ 12). The Lease Agreement expired on March 1, 2023. Defendants’ non-payment arguably could have resulted in a holdover tenancy at this point. But, according to plaintiff, a month-to-month tenancy was established when, as a result of an April 10, 2023 town court appearance, defendants “agreed to pay [plaintiff] all rent arrears, late fees, and water utilities” (*id.* at ¶ 18), and apparently became current on rent and all past-due arrears as of May 1, 2023, thereby establishing a month-to-month tenancy.

And based on plaintiff's April 26, 2023 notice, defendants' month-to-month tenancy was to run until July 31, 2023. Given defendants' default, the Court accepts plaintiff's characterization of the month-to-month tenancy.

Under the terms of the Lease Agreement, which "remained in effect" as a result of the establishment of a month-to-month tenancy, defendants' obligations under the Lease Agreement, including for rent and late charges, continued until July 31, 2023 (Lease Agreement at ¶ 10; *see id.* at ¶ 10). According to plaintiff, "[d]efendants refused to pay rent after May 1, 2023, and did not return possession of the [premises]" (Complaint at ¶ 20). Consequently, plaintiffs have established prima facie entitlement to unpaid rent and late charges for the months of June and July 2023. And plaintiff has also, through her verified complaint and submission of the June 2023 water bill, established prima facie entitlement to damages in the amount of \$45 for the unpaid June 2023 water bill.

After July 31, 2023, defendants would be considered holdover tenants, and their obligations would be governed by the Lease Agreement's holdover provision, paragraph 11. Under paragraph 11, defendants agreed that they would pay plaintiff \$2,000 per month during any holdover period. But plaintiff has failed to establish a prima facie case for defendants' liability as holdover tenants after July 31, 2023. Plaintiff acknowledges that defendants left the premises and moved into their current residence on July 1, 2023. Plaintiff

argues, however, that defendants held over from July 31, 2023, until the October 16, 2023 eviction by leaving personal property in the premises and failing to return their keys to the premises.

“Whether the failure to remove property at the termination of a lease creates a holdover tenancy ‘is usually a question of fact, to be determined by taking into consideration the nature of the property leased[,] the amount paid as rent, the value of the real property, the value of the personal property left on the leased premises, the intent with which it was left, and all other facts and circumstances surrounding the transaction’” (*Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920, 922 [4th Dept 2003], *amended on rearg*, 306 AD2d 952 [4th Dept 2003], quoting *Calvin v Harris & Co.*, 222 App Div 326, 329 [1927], *affd* 248 NY 541 [1928]; see *Lordae Realty Corp. v Montefiore Med. Ctr.*, 232 AD2d 338, 338 [1st Dept 1996]). “Where the value of the property left behind is relatively small or worthless,” or where the property has been abandoned, no holdover tenancy is established (*id.*). And, the Third Department has rejected a claim to hold a former tenant liable for holdover damages premised solely on the former tenant’s retention of a set of keys and intermittent use of the premises to complete repairs (see *Charlebois v Carisbrook Indus., Inc.*, 23 AD3d 821, 822 [3d Dept 2005]).

The Court cannot discern on the submissions before it whether defendants, in fact, held over after July 31, 2023, when defendants had moved

to a new residence on July 1, 2023. The Lease Agreement is silent as to the effect of the tenant leaving personal property behind after vacatur or eviction. Though plaintiff obtained a warrant of eviction in town court in September 2023, and produced a certificate of removal/eviction and restoration of possession to the landlord on October 16, 2023, plaintiff has not advanced proof to establish the nature, value, or extent of the personal property defendants allegedly left in the premises. Nor has plaintiff set forth facts concerning the nature of defendants' use of the property, if any, after July 1, 2023. And the verified complaint and memorandum of law in support of the present motion are bereft of any facts or arguments from which the Court can ascertain the defendants' intent in leaving property at the premises after July 1, 2023. Consequently, plaintiff has not met her burden of establishing prima facie defendants' liability as holdover tenants from after July 31, 2023, through October 2023.

Finally, the Court finds that plaintiff has failed to establish prima facie entitlement to late charges during any holdover period under the terms of Lease Agreement. The proper measure of damages for a holdover period is the reasonable value of the use and occupancy of the premises from expiration of the lease term through the time the premises is vacated (*see American Package Co., Inc. v Kocik*, 55 AD3d 762, 763 [2d Dept 2008]; *501 E. 87th St. Realty Co. v Ole Pa Enters.*, 304 AD2d 310, 311 [1st Dept 2003]).

Unlike paragraph 10 which provides that “all terms in th[e] lease remain in effect” during a month-to-month tenancy, paragraph 11 governing holdover is silent as to the additional terms (Lease Agreement at ¶ 10; *see id.* at ¶ 11). And although plaintiff and the Lease Agreement characterize payments owing during the holdover period as “rent,” the Court construes paragraph 11’s holdover obligations to be a provision for liquidated damages based on use and occupancy of the premises. Consequently, as holdover tenants, the Lease Agreement entitled plaintiff to use and occupancy damages, set at \$2,000 per month, but not late fees.

Damages to the Driveway

Through the verified complaint, copy of the Lease Agreement, photographs, and the February 16, 2023 text message exchange between plaintiff and defendants, plaintiff has met her burden of establishing prima facie defendants liability for the damage to the driveway at the premises. Pursuant to paragraph 16 of the lease, “Tenant shall bear full responsibility for any damages to the Premises which are caused by the negligence of Tenant” (Lease Agreement at ¶ 16). The verified complaint and text message exchange between plaintiff and defendants establish that, on February 16, 2023, plaintiff observed that one of defendants’ vehicles was leaking liquid onto the driveway and causing damage. Plaintiff asked defendants to move the vehicle in order to avoid further damage to the driveway. Though defendants acknowledge that

the vehicle was in need of repair and did not deny the leak, defendants declined to remove it from the driveway. Further, plaintiff's photographs depict a large hole in the driveway in the precise location where the vehicle referred to in the text exchange was parked. Accordingly, plaintiff has established prima facie that defendant's conduct caused damage to the driveway in violation of the lease terms, entitling plaintiff to seek financial redress from defendants pursuant to the Lease Agreement.

Plaintiff has also established prima facie damages for the driveway repair in the amount of \$2,450. Plaintiff bases the repair damages on the lesser of two estimates from Luizzi Asphalt Services, dated December 1, 2023—\$4,450 (*see* Complaint; NYSCEF Doc No. 12). The court finds this sufficient in the context of motion for default judgment. And plaintiff is permitted under paragraph 5 of the Lease Agreement to apply defendants' \$2,000 security deposit to the driveway repair, leaving the unpaid balance of \$2,450. Consequently, plaintiff has established a prima facie case for damages for the driveway repair.

Attorneys' Fees and Costs

Plaintiff has also established prima facie entitlement pursuant to paragraph 16 of the Lease Agreement to attorneys' fees, costs, and disbursements of \$1,779.49 incurred prior to commencement of this action through the submission of receipts and invoices for preparation of the two

eviction petitions and court appearances; the 90-day notice of non-renewal; the cost of execution of the warrant of eviction; and changing the locks following the eviction (*see* Lease Agreement at ¶ 16; NYSCEF Doc No. 13).

But plaintiff has neither pointed to any provision in the Lease Agreement nor advanced any argument to establish why she is entitled to statutory interest from “no later than October 16, 2023,” or any earlier date (Complaint at 7; *see* CPLR 5001 [b]). Neither has plaintiff or plaintiff’s counsel provided any breakdown of the costs, disbursements, or attorney’s fees associated with the present action; consequently, the Court reserves decision on the issue of interest, costs, disbursements, and attorney’s fees in the present action, which may be supplemented after inquest.

Based on the foregoing, it is hereby

ORDERED that plaintiff’s motion for default judgment is granted, in part, and, denied in part, in accordance with this decision; and it is further

ORDERED that plaintiff is awarded a money judgment in the amount of \$8,374.49 for unpaid rent and a \$50.00 per month late charge for June 2023 and July 2023; the unpaid June 2023 water bill; damages to plaintiff’s driveway; and attorneys’ fees, costs, and disbursements incurred prior to commencement of this action; and it is further

ORDERED that an inquest will be held on May 24, 2024, at 10:00 a.m. at the Albany County Courthouse to determine the extent, if any, of

defendants' holdover liability and damages for August through October 2023, as well as the percentage, amount, and duration of interest, if any, to which plaintiff is entitled; and it is further

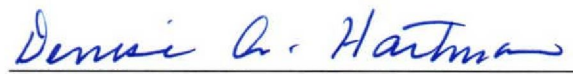
ORDERED that the branch of plaintiff's motion seeking attorneys' fees, costs, and disbursements with respect to the present action is held in abeyance pending inquest or resolution of the entire action; and it is further

ORDERED that pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (a), plaintiff shall file a note of issue and certificate of readiness for inquest, with proof of service on all parties entitled to notice; and it is further

ORDERED that plaintiff shall serve upon defendant a copy of this Decision and Order by certified mail no later than May 3, 2024, and file proof of service on or before May 10, 2024.

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiff shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
April 25, 2024


HON. DENISE A. HARTMAN, AJSC



04/25/2024

Papers Considered

1. Summons, dated December 4, 2023 (NYSCEF Doc No. 1);
2. Verified Complaint, dated December 4, 2023 (NYSCEF Doc No. 2);
3. Lease Agreement (NYSCEF Doc No. 3);
4. Photographs of driveway at 3279 Carman Road (NYSCEF Doc No. 4);
5. Text message exchange, dated February 16, 2023 (NYSCEF Doc No. 5);
6. April 10, 2023 notice of termination (NYSCEF Doc No. 6);
7. Eviction Petition, dated August 9, 2023 (NYSCEF Doc No. 7);
8. Warrant of Eviction, dated September 20, 2023 (NYSCEF Doc No. 8);
9. Notice of Eviction, dated September 20, 2023 (NYSCEF Doc No. 9);
10. Certificate of Removal, dated October 16, 2023 (NYSCEF Doc No. 10);
11. June 1, 2023 water bill (NYSCEF Doc No. 11);
12. Driveway repair estimates from Luizzi Asphalt Services, dated December 1, 2023 (NYSCEF Doc No. 12);
13. Invoices and receipts invoices from the Law Office of Opal F. Hinds, from February 2, 2023, March 13, 2023, April 28, 2023, and August 4, 2023; invoice from Ideal Legal Support Services, LLC, dated November 18, 2022; receipt from the Albany County Sheriff dated September 21, 2023; locksmith's receipt, dated October 17, 2023 (NYSCEF Doc No. 13);
14. Affidavits of Service, dated December 15, 2023 (NYSCEF Doc Nos. 14, 15);
15. Notice of Motion for Default Judgment, dated February 2, 2024 (NYSCEF Doc No. 16);
16. Affirmation of Ryan B. Cross in Support of Motion, dated February 2, 2024 (NYSCEF Doc No. 17);
17. CPLR 3215 Notice and Affidavit of Service, dated December 21, 2023 (NYSCEF Doc No. 18);
18. Memorandum of Law in Support of Motion for Default Judgment, dated February 2, 2024 (NYSCEF Doc No. 19);
19. Affidavits of Service of Notice of Motion for Default Judgment and supporting materials (NYSCEF Doc Nos. 21, 22).