

Freeland v Chemtob

2025 NY Slip Op 31263(U)

April 9, 2025

Supreme Court, New York County

Docket Number: Index No. 160094/2021

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X INDEX NO. 160094/2021

JAMES FREELAND,

Plaintiff,

MOTION SEQ. NO. 004

- v -

NANCY CHEMTOB,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

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

In the instant action, plaintiff James Freeland (“landlord” or “plaintiff”) seeks damages against defendant Nancy Chemtob (“tenant” or “defendant”) for breach of contract for allegedly violating the terms of a residential lease.

Defendant is the former tenant of apartment 5AS located at 150 Charles Street, New York, New York 10014 (the, “subject premises” or “premises”) (NYSCEF Doc. No. 87, ¶ 1). Defendant and her family entered into possession of the subject premises pursuant to a written lease and rider, with plaintiff, dated December 3, 2015, in which the monthly rent amount was \$24,000.00. Pursuant to this lease, defendant paid a \$24,000.00 security deposit to plaintiff when she began her tenancy (NYSCEF Doc. Nos. 26; 27; 87 at ¶10, 93).

Thereafter, the parties entered into a series of successive written leases with associated riders, and lease extensions that further extended defendant’s tenancy at the subject premises through July 31, 2021. The monthly rent pursuant to the last lease extension was \$15,000.00 (NYSCEF Doc. No. 87, ¶¶ 5-7; 9; *see also* NYSCEF Doc. Nos. 29; 89; 90; 92). Upon the expiration of defendant’s final lease extension on July 31, 2021, defendant failed to timely vacate, and ultimately vacated and surrendered possession of the premises on August 18, 2021, 18 days after expiration of the lease (NYSCEF Doc. No. 87, ¶ 22).

Following defendant’s vacatur and upon plaintiff’s inspection of the premises, plaintiff notified defendant that she was in violation of various obligations under the lease and was responsible for damages and alterations and had not allegedly returned to the condition they should have been. Additionally, plaintiff made demands for use and occupancy, electrical charges, repairs and or restoration of the premises, as well as attorney’s fees, costs and interest. Upon defendant’s refusal to pay the demanded amounts, plaintiff applied defendant’s \$24,000.00 security deposit towards repair costs (NYSCEF Doc. Nos. 97; 98; 100) and sued defendant.

Plaintiff commenced this action in November 2021, for breach of lease, alleging four causes of action, including, defendant's holdover at the premises past the expiration of the parties' lease, defendant's damage to the premises beyond ordinary wear and tear, defendant's failure to pay electrical charges, and for attorney's fees and expenses (NYSCEF Doc. No. 94). Defendant answered the complaint in January 2022, asserting three counterclaims for harassment, the return of her security deposit, and for reasonable attorney's fees (NYSCEF Doc. No. 95).

Defendant now moves pursuant to CPLR 3212 for dismissal of the complaint in its entirety and for partial summary judgment on her second and third counterclaims. Plaintiff opposes the motion and cross-moves pursuant to CPLR 3212 for summary judgment on the complaint and for dismissal of all three of defendant's counterclaims. The motions are consolidated for disposition herein.

On a motion for summary judgment "the movant 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" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [internal quotation marks and citation omitted]). "Once this showing has been made, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal citation and quotation marks omitted]). Where the moving party fails to make such a showing, the motion must be denied without regard to the sufficiency of the opposing papers (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "Since [summary judgment] deprives the litigant of [its] day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Plaintiff alleges in his first cause of action that defendant did not vacate and surrender the premises until August 18, 2021, and is therefore required to pay use and occupancy for the 18 days between August 1, 2021, through August 18, 2021, as well as any holdover penalties pursuant to the lease. Plaintiff asserts that § 30 of the 2020 lease provides that, in the event of a holdover, defendant would be obligated to pay 200% of the highest monthly rent set forward in the lease. Plaintiff further asserts that § 67 of the 2020 rider sets forth that the highest monthly rent pursuant to the lease was \$23,000.00, making defendant's obligation for use and occupancy for the 18 days \$26,709.66.¹ Plaintiff also asserts that he is entitled to late fees on the unpaid use and occupancy pursuant to § 67 of the 2020 rider (NYSCEF No. 94).

Defendant initially argues she has established her *prima facie* burden and entitlement to summary judgment dismissing plaintiff's first cause of action because she was not a holdover tenant, and therefore not subject to the holdover clauses of the 2020 lease. Defendant contends that she never received the statutorily required 90-day notice of plaintiff's intent not to renew defendant's tenancy, in violation of Real Property Law (RPL) § 226-c. Defendant further contends the 90-day notice must be served by a process server and that notice by e-mail is

¹ 200 percent of \$23,000.00 is \$46,000.00 [\$46,000.00 divided by 31 days equals \$1,483.87 per day], and [\$1,483.87 x 18 days equals \$26,709.66].

insufficient to satisfy the statute. Defendant argues that plaintiff's failure to properly serve this notice created a month-to-month tenancy and, as such, defendant cannot be subject to the holdover penalties outlined in the parties' lease. Defendant further argues that plaintiff's demand for late fees exceeds the allowable amount and that the maximum late fee plaintiff may recover here is \$50.00 pursuant to RPL § 238-a(2) & (3). Defendant also asserts that the maximum use and occupancy plaintiff may be entitled to here would be a prorated portion of the \$15,000.00 monthly amount defendant was paying during the final lease extension (NYSCEF Doc. Nos. 86, 87, 192).

Plaintiff opposes defendant's motion and argues that defendant was provided with the required written notice of plaintiff's intent of non-renewal, and as defendant held over past the expiration of the lease, she is subject to the contractual provisions and penalties of the lease as alleged (NYSCEF Doc. Nos. 154, 191). Plaintiff asserts that a series of e-mails submitted on this record establishes the non-renewal notice was timely provided to defendant and further asserts these e-mails satisfy the statutory requirements of RPL § 226-c (NYSCEF Doc. Nos. 162-165). Plaintiff further argues that RPL § 226-c is silent regarding a method of service of the non-renewal notice, therefore there is no method of service as required by law.

The amended RPL § 226-c, which governs non-renewal of leases, became effective on October 12, 2019, as part of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). It provides in relevant part, that whenever a landlord does not intend to renew the tenancy of an occupant in a residential dwelling, the landlord shall provide written notice as required in subdivision two. Subdivision two requires the notices to be for the "cumulative amount of time the tenant has occupied the residence or the length of the tenancy in each lease, whichever is longer" (RPL § 226-c(2)(a)). For tenancies of less than one year, a thirty-day notice is required; for tenancies/leases of at least one year but less than two years, a sixty-day notice is required; for tenancies/leases of at least two years, a ninety-day notice is required (*Id.* at (2)(b)-(d)). Pursuant to RPL § 226-c(2)(d) defendant was entitled to a 90-day notice of plaintiff's intent of non-renewal as she had occupied the subject premises for more than two years. Here, the parties do not dispute that a 90-day notice pursuant to the time frames articulated in RPL § 226-c is the appropriate notice period.

The statute further provides that, "[i]f the landlord fails to provide timely notice, the occupant's lawful tenancy shall continue under the existing terms of the tenancy from the date on which the landlord gave actual written notice until the notice period has expired, notwithstanding any provision of a lease or other tenancy agreement to the contrary" (*see* RPL § 226-c(1)(a)). Therefore, the statute automatically extends a tenancy until the appropriate notice period expires. However, this statutory extension of the tenancy does not create a new month-to-month tenancy, as defendant claims. Further, as no money was tendered and accepted past the expiration of the parties' lease (*see* RPL § 232-c), defendant's argument that a new month-to-month tenancy was created here is unavailing.

Pursuant to RPL § 226-c, plaintiff was required to provide defendant with a written notice of his intent not to renew her tenancy. However, beyond that basic requirement, the statute is silent as to what the notice must say or how it must be served. "It is a fundamental principle of statutory interpretation that a court should attempt to effectuate the intent of the

legislature and where the statutory language is clear and unambiguous, the court should construe the statute to give effect to the plain meaning of the words used” (*Eaton v New York City Conciliation & Appeals Board*, 56 NY2d 340, 345 [1982] [citations omitted]). “Where...the statute describes the particular situations to which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (*Id.* [internal quotation marks and citations omitted]).

On March 16, 2021, plaintiff sent defendant an e-mail stating, “we can’t extend any further unfortunately” (*see* NYSCEF Doc. No. 163 p 1). Defendant responded the same day, “understood” (*Id.*). In an April 19, 2021, email, defendant requested an extension of her lease and asked plaintiff, “is there any way we can extend our lease[?]” (NYSCEF Doc. No. 164 at 2). Plaintiff responded, “unfortunately not sorry” (*Id.*). Evaluated on their own or in the aggregate, these e-mails establish that plaintiff sent defendant written notice of his intent not to renew defendant’s tenancy prior to 90 days of the expiration date of her lease.

Similarly, there is no service requirement within RPL § 226-c directing how or in what form a writing must be given to a tenant. Therefore, the notice is deemed properly served when the method of service adheres to the method of service required by the lease (*see Singer v Bezark*, 83 Misc 3d 1297[A], 2024 NY Slip Op 51309[U] [Civ Ct, New York County 2024]; *Frischer v Goldner*, 76 Misc 3d 1226[A], 2022 NY Slip Op 51060[U] [Civ Ct, Kings County 2022]). Here, the Bills and Notices clause of the parties’ lease is unambiguous (*see North Shore Community Services, Inc. v Community Drive LLC*, 120 AD3d 1142 [1st Dept 2014]). It provides, in relevant part: Any notice, statement, demand or other communication required or permitted to be given, rendered or made by either party to the other, pursuant to this lease or pursuant to any applicable law or requirement of public authority, shall be in writing (whether or not so stated elsewhere in this lease) and shall be given by registered or certified mail, return receipt requested, or by overnight mail by a nationally recognized overnight carrier or via email (*see* NYSCEF Doc. No. 89, § 26). Therefore, delivery of the non-renewal notice by e-mail was proper.

Here, plaintiff has demonstrated *prima facie* that he timely delivered to defendant an unequivocal written notice of his intent not to renew defendant’s tenancy, pursuant to the statutory requirements of RPL § 226-c. In opposition, defendant has failed to raise an issue of fact regarding the same. Further, as defendant admittedly remained in occupancy of the subject premises for 18 days beyond the July 31, 2021, expiration date, defendant triggered the penalties pursuant to her holdover under the lease. Therefore, defendant must pay use and occupancy accordingly.

RPL 238-a(2) limits late fees to an amount of “fifty dollars or five percent of the monthly rent, whichever is less.” Therefore, as the late fees plaintiff seeks here, far exceed an amount allowable pursuant to the statute, plaintiff is entitled to late fees in the amount of \$50.00, as a matter of law.

Plaintiff alleges in his third cause of action that defendant failed to pay \$8,136.55 in electrical costs due under the parties’ 2020 lease and rider. Specifically, plaintiff asserts that under § 13C of the lease, defendant was responsible, at defendant’s sole cost and expense, for

securing electricity and all other utilities or services in or to the subject premises (NYSCEF Doc. No. 94, ¶ 25; *see also* Doc. No. 89 § 13). Plaintiff further asserts that defendant was to pay these costs and expenses within five days after rendition to defendant of any bill or statement (*Id.*). Plaintiff alleges that the parties' rider modified the lease to allow plaintiff to present defendant with the service bill mentioned in § 13 within seven days of the conclusion of the lease term for payment of all electricity incurred since taking occupancy of the subject premises within thirteen days of presentation (NYSCEF Doc. No. 94, ¶ 26; *see also* Doc. No. 90 § 73). Plaintiff contends that when presented with the demand for the outstanding electrical charges, defendant failed to pay, and this is a violation of the parties' lease agreement.

Defendant opposes plaintiff's cross-motion and argues that plaintiff's third cause of action must be dismissed as plaintiff failed to not only present a service bill for the electrical charges to defendant timely but failed to provide the requisite amount of time pursuant to the lease to pay such service bill. Defendant asserts that an e-mail accompanied with a letter dated August 19, 2021, from plaintiff's attorney to defendant's attorney demanding payment of the electricity charges is insufficient to constitute a proper bill of service (NYSCEF Doc. No. 100). Defendant further argues that even if such a communication were deemed proper, the timing of it violates the parties' lease, as it only provided one day for defendant to make payment, when the lease contractually provides thirteen days for payment.

In response, plaintiff argues that defendant cannot avoid paying the electricity charges based on an inapplicable technicality. Specifically, plaintiff asserts that his delay in providing the electricity charges was outside of his control as his requests for the electricity ledgers from building management were not fulfilled until August 13, 2021. Once received, plaintiff forwarded the electricity ledgers onto his attorneys accordingly (NYSCEF Doc. No. 154, ¶¶ 33; 42; *see also* Doc. Nos. 145; 189; 190). Additionally, plaintiff relies on § 54 of the lease which provides in relevant part, that the lease shall not end or be modified, nor will tenant's obligations be ended or modified if for any cause not fully within owner's reasonable control, owner is delayed or unable to fulfill any of owner's promises or agreements (NYSCEF Doc. No. 159). Accordingly, plaintiff contends that his delay in providing the electricity charges to defendant does not modify defendant's obligation to pay such charges.

The elements of a breach of contract claim are the existence of a valid contract, performance of the contract by the injured party, breach by the other party, and resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]). There is no dispute on this record that the parties' lease is a valid contract. Here, plaintiff has established that he performed his obligations under the lease, by providing defendant with a demand for payment of the electricity charges incurred since defendant took occupancy of the subject premises, at the conclusion of the lease term. Defendant breached the lease by failing to pay those outstanding charges (*see Billy Chicago Ltd. v Chicago China Tour, LLC*, 176 AD3d 566 [1st Dept 2019]). In opposition, defendant fails to raise an issue of material fact.

Despite defendant's contentions, defendant fails to demonstrate that the lease permits defendant's non-payment of the electrical charges upon plaintiff's late delivery of a bill or statement of charges, or that such late delivery constitutes a breach by plaintiff under the lease. When analyzing a lease, "[t]he intent of the parties must be found within the four corners of the

contract, giving a practical interpretation to the language employed and the parties' reasonable expectations" (*Goldman Sachs Group, Inc. v Almah LLC*, 85 AD3d 424, 427 [1st Dept 2011] [internal quotation marks and citations omitted]). "All parts of a contract must be read in harmony to determine its meaning" (*Bombay Realty Corp. v Magna Carta, Inc.*, 100 NY2d 124, 127 [2003] [internal citation omitted]). When read 'in harmony' the parties' lease is explicit that defendant has an obligation to pay all electricity incurred for the duration of her tenancy, despite the possibility of plaintiff's late delivery of a statement of charges. Here, sections 13 of the lease and 73 of the rider fail to contemplate a default provision regarding the late delivery by plaintiff of a statement of charges, and section 54 of the lease provides that plaintiff's delay does not modify defendant's obligation to pay for such charges. Therefore, as plaintiff has established his entitlement to judgment on his third cause of action as a matter of law, defendant must pay the outstanding electrical charges as alleged.

Plaintiff alleges in his second cause of action that defendant damaged the subject premises beyond ordinary wear and tear and failed to return the apartment to the same condition it was when the defendant first occupied it, in violation of the parties' lease. Plaintiff asserts the cost to repair the alleged damage as outlined in the complaint was \$71,880.00 and that defendant is responsible for this cost. Plaintiff, therefore retained defendant's entire \$24,000.00 security deposit and applied it towards the \$71,880.00 total. Plaintiff contends that defendant owes the remaining \$47,880.00 balance in repair costs that defendant's security deposit was insufficient to cover (*see* NYSCEF Doc. Nos. 94, 89 § 9, 90 §71).

Defendant asserts in her second counterclaim that she is entitled to the full return of the \$24,000.00 security deposit because plaintiff failed to and refused to return her security deposit within fourteen days after she surrendered the subject premises, in violation of the HSTPA (NYSCEF Doc. No. 95 ¶¶ 120-3). Defendant argues that plaintiff failed to provide a proper and sufficiently itemized statement of repairs to defendant, in violation of GOL § 7-108(1-a)(e), and that the statement provided to defendant was too vague for a reasonable tenant to understand what the alleged damages were and what was being repaired. Additionally, defendant asserts that plaintiff gave explicit written permission allowing defendant to make certain alterations to the apartment that did not require removal at the end of the tenancy (*see* NYSCEF Doc. No. 90).

Defendant also argues for the first time in her moving papers that plaintiff could not have retained the full \$24,000.00 security deposit because plaintiff was required to refund defendant an excess of \$9,000.00 in security deposit funds, as this was the difference in the amount of monthly rent defendant paid when she began her tenancy under the parties' first lease (\$24,000.00) and the monthly rent defendant paid under the last lease extension (\$15,000.00) at the time defendant vacated the subject premises (*see* NYSCEF Doc. No. 92). Defendant contends § 7-108(1-a)(a) of the General Obligations Law (GOL), prohibits a landlord from retaining a security deposit in excess of one month's rent.

Plaintiff seeks dismissal of defendant's second counterclaim, opposes defendant's arguments, and asserts that defendant's contentions do not overcome the terms of the parties' lease. Plaintiff argues that defendant's argument regarding a refund of \$9,000.00 in security deposit funds should not be considered by the court as it is a new claim, improperly raised by defendant for the first time on summary judgment.

As a preliminary matter, defendant's theory that the security deposit should have been partially refunded pursuant to statute is prohibited, as defendant failed to raise this theory in any prior pleadings, and introducing a new theory at this juncture is not appropriate or admissible on a motion for summary judgment (see *Keilany B. v City of New York*, 122 AD3d 424, 425 [1st Dept 2014]). While the "[c]ourt may search the record to find an issue of fact to preclude summary judgment, [it] cannot search the record to support a new theory of recovery that was never remotely put forth by the [defendant]" (*Biondi v Behrman*, 149 AD3d 562, 564 [1st Dept 2017]). Further, CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Accordingly, defendant's partial refund theory shall not be considered.

Absent proof that a tenant caused damage beyond that attributable to ordinary wear and tear, a security deposit remains the property of a tenant and must be returned at the conclusion of the tenancy (see GOL § 7-103[1]; *Gerel Corp. v Prime Eastside Holdings, LLC*, 12 AD3d 86, 94 [1st Dept 2004]). Therefore, to apply security deposit funds to pay for the cost of repairing damages caused by a tenant, a landlord must establish the reasonable value of any of the repairs allegedly made to the subject premises and comply with the statutory requirements set forth in the GOL. Accordingly, "[w]ithin fourteen days after the tenant has vacated the premises, the landlord shall provide the tenant with an itemized statement indicating the basis for the amount of the deposit retained, if any, and shall return any remaining portion of the deposit to the tenant" (GOL § 7-108[1-a][e]).² "If a landlord fails to provide the tenant with the statement and deposit within fourteen days, the landlord shall forfeit any right to retain any portion of the deposit" (*Id.*).

Here, plaintiff has failed to establish his *prima facie* burden entitling him to judgment on his second cause of action regarding the alleged damages within the subject premises. While defendant argues that the itemized statement provided by plaintiff lacks specificity, and therefore requires plaintiff's forfeiture of defendant's security deposit, this argument is unavailing. The "penalty of forfeiture is only mandated when a landlord fails to provide an itemized statement of the repairs that it claims are required to justify the retention of a portion or the full security deposit" (*14 E. 4th St. Unit 509 LLC v Toporek*, 203 AD3d 17, 26 [1st Dept 2022]). The dispute on this record, is not that plaintiff failed to provide defendant with an itemized statement in a timely manner pursuant to the statute, only that defendant disagrees with the contents of the submission. Therefore, there remains an issue of fact to be resolved at trial regarding whether the itemized repairs were required because of damage caused by defendant beyond that of normal wear and tear, and the cost of remediating those damages.

However, inasmuch as the statute provides that tenant security deposits may be lawfully retained for "the non-payment of rent" and "the non-payment of utility charges payable directly to the landlord under the terms of the lease", plaintiff is entitled to retain defendant's \$24,000.00 security deposit (see GOL § 7-108 1-a(b)). Here, judgment has been awarded to plaintiff in the amount of \$26,709.66 for use & occupancy, and in the amount of \$8,136.55 for electricity charges. As these costs are statutorily deductible from defendant's security deposit as a matter of

² General Obligations Law § 7-108(1-a)(e) was enacted by the HSTPA.

law, defendant is not entitled to the return of her security deposit, as the total judgment amount exceeds the \$24,000.00 deposit retained by plaintiff.

Defendant's first counterclaim for harassment alleges that plaintiff engaged in a pattern of behavior in violation of New York City Administrative Code 27-2004, 27-2005, and 27-2115, by intentionally intimidating and interfering with defendant's quiet enjoyment, ultimately causing defendant to vacate the subject premises. Specifically, defendant avers plaintiff engaged in a multi-pronged campaign of harassment against defendant and her family that included threatening defendant by demanding defendant's immediate surrender of the subject premises, directly corresponding with defendant rather than with defendant's counsel as requested, and intrusively entering the subject premises without permission. Defendant further avers plaintiff made false and misleading statements, as well as threats to change the locks, send workers into the subject premises before defendant vacated, throw out defendant's belongings, and have the doormen restrict defendant from entering the building (NYSCEF Doc. No. 87, ¶¶ 16-22; *see also* Doc. Nos. 95, 152).

Plaintiff argues defendant's claims of harassment should be dismissed as defendant's claims are without merit. Specifically, plaintiff asserts defendant's allegations of threatened violent acts concerning plaintiff's entry into the subject premises and false or misleading statements concerning repairs are merely unsupported accusations. Plaintiff avers defendant was notified on every occasion plaintiff or his agents requested access to the subject premises and defendant's permission was obtained prior to gaining access to the subject premises (*see* NYSCEF Doc. Nos. 154 ¶ 35-37; 180-188). Plaintiff further argues that his compliance with the terms of the parties' lease regarding notice and defendant's consent for access fails to constitute harassment (*see* NYSCEF Doc. No. 159, § 15).

In opposition to plaintiff's cross-motion, defendant argues plaintiff's threats of violence, false information, harassment and unwanted intrusions caused defendant to vacate the subject premises before she had to and inflicted upon defendant unwanted stress and anxiety as well as financial damages (NYSCEF Doc. No. 193, ¶ 21). As such, defendant requests the court search the record and grant summary judgment on defendant's first counterclaim for harassment.

Harassment is defined in the Housing Maintenance Code (HMC) as, "any act or omission by or on behalf of an owner that causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (NYC Admin Code § 27-2004[a][48][i]). Pursuant to NYC Admin Code § 27-2005(d) an owner has a duty to refrain from harassing tenants. Proof that an owner violated a section of this statute gives rise to a "rebuttable presumption that such acts or omissions were intended to cause [the tenant] to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (NYC Admin Code § 27-2004[a][48][ii]), and "includes a long list of possible acts and omissions, such as the use of force, interruptions of essential services, baseless court proceedings, and removing the door or the tenant's possessions" (*Prometheus Realty Corp. v City of New York*, 80 AD3d 206, 209 [1st Dept 2010]). Admin Code § 27-2115 was amended to add a private right of action based on a claim of harassment (*see* NYC Admin Code § 27-2115[h]; *Id.*).

Here, defendant asserts her claims of harassment based on allegations that plaintiff substantially interfered with or disturbed her comfort, repose, peace or quiet under NYC Admin Code § 27-2004(a)(48)(ii)(g), and that plaintiff provided false or misleading information under NYC Admin Code 27-2004(a)(48)(ii)(a-1).³ To the extent an allegation of harassment asserted under § 27-2004(a)(48)(ii)(g) is based on the physical condition of a dwelling, such allegation must be based at least in part on one or more violations of record issued by the Department of Housing Preservation & Development (DHPD) or any other agency (*see* § 27-2115[h][2][i]). Therefore, defendant would “require the existence of a predicate violation to state a claim for harassment” (*Berg v Chelsea Hotel Owner, LLC*, 203 AD3d 484, 487 [1st Dept 2022]). In the absence of the required predicate violation, defendant must establish significant repeated “other acts or omissions” by plaintiff that disturbed defendant’s comfort to demonstrate plaintiff engaged in acts of harassment (*see* § 27-2004[a][48][ii][g]). Similarly, under NYC Admin Code § 27-2004(a)(48)(ii)(a-1), defendant must establish that plaintiff knowingly provided defendant false or misleading information relating to her occupancy of the subject premises to demonstrate that plaintiff engaged in acts of harassment.

Here, defendant has failed to establish her *prima facie* burden entitling her to judgment on her first counterclaim for harassment. On this record, there are no violations related to plaintiff’s alleged substantial interference with or disturbance of defendant’s comfort, repose, peace or quiet, as required by the statute. Although defendant asserts her quiet enjoyment was disturbed, she testified that the subject premises was in “excellent” condition, that no one ever broke down her door or changed the locks, and that essential services were never interrupted or interfered with. Nor did defendant report any hazardous violations to any governmental authority (NYSCEF Doc. No. 151 p 69 lines 2-12; p 72 lines 8-16; p 73 line 2). Defendant’s testimony is lacking in important details about the acts described, especially regarding the unwanted intrusions into the subject premises, including dates, the people involved, and first-hand knowledge of the acts alleged. Further, there is no evidence within defendant’s testimony or affidavits of any false or misleading information relating to defendant’s occupancy of the subject premises, made by plaintiff to defendant.

Defendant describes plaintiff as a “terrorist”, despite never meeting him, and complains that the landlord tenant relationship only began to deteriorate (after a five-year tenancy) from the time she entered into the final lease agreement (NYSCEF Doc. No. 151 p 62 line 6; p 65 line 21). “Without more than the testimony of interested parties, what the [c]ourt is left with is evidence of a mutually bad relationship” (*Garcia v Adams*, 71 Misc 3d 1205[A], 2021 NY Slip Op 50283[U] * 21-22 [Civ Ct, Kings County 2021]). However, “a mutually acrimonious landlord/tenant relationship... does not prove harassment” (*Id.*). Therefore, defendant has failed to establish her claims for harassment.

Plaintiff alleges in his fourth cause of action that he is entitled to recover from defendant reasonable attorneys’ fees resulting from defendant’s delay in surrendering the subject premises

³ Defendant’s first counterclaim was previously established to encompass this statutory framework in this court’s decision and order dated May 31, 2023, and that portion of defendant’s first counterclaim asserted under NYC Admin Code 27-2004(a)(48)(ii)(d), for allegations of frivolous court proceedings was dismissed pursuant to the same decision and order. Accordingly, this has become the law of the case (*see* NYSCEF Doc. No. 80).

and defendant's default under the lease (NYSCEF Doc. No. 94 ¶¶ 88-92; *see also* Doc. No. 89 §§ 20, 30).

Defendant alleges in her third counterclaim that she is entitled to reasonable attorneys' fees resulting from plaintiff's breach and violation of her tenancy (NYSCEF Doc. No. 95 ¶¶ 124-127).

Generally, a prevailing party may only be awarded attorneys' fees based on a statute or contractual provision (*see EVE Meta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551, 553 [1st Dept 2019]). Under Real Property Law (RPL) § 234, a tenant may avail itself of the reciprocal fee statute where the landlord commences suit against the tenant for a violation that arises out of the lease. However, for a tenant to collect attorneys' fees under RPL § 234, the tenant must be the prevailing party (*see Sandlow v 305 Riverside Corp.*, 201 AD3d 418, 421 [1st Dept 2022]). The language in the parties' lease provides an unmistakably clear intent to permit the plaintiff recovery of attorneys' fees in this type of action should he prevail (*see Sage Sys., Inc. v Liss*, 39 NY3d 27, 33 [2022]; *see also* NYSCEF Doc. No. 89, § 20(iv) & (vii), § 30(B)). Accordingly, should defendant prevail in this action, defendant would also be entitled to collect reasonable attorneys' fees pursuant to the same language in the parties' lease and RPL § 234.

Here, plaintiff is a prevailing party, and therefore, has established his entitlement to a judgment of attorneys' fees in an amount to be determined at a hearing at the culmination of this action after trial. However, as "[a]ttorney fees are not damages for breach of any substantive provision of a contract... [and]... represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined" (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226-7 [1st Dept 2005]), interest on this undetermined amount shall accrue only from the date at which judgment is entered and not from the date of default.

The court has considered the parties' additional arguments regarding the motions, even if not specifically addressed and finds them unpersuasive. Accordingly, it is

ORDERED defendant Nancy Chemtob's motion pursuant to CPLR 3212 for partial summary judgment is denied, and it is further;

ORDERED plaintiff James Freeland's cross-motion pursuant to CPLR 3212 for summary judgment is granted to the following extent and otherwise denied:

- a) That part of plaintiff's cross-motion that seeks summary judgment on the first cause of action in the complaint is granted in the amount of \$26,709.66.
- b) That part of plaintiff's cross-motion that seeks summary judgment on the third cause of action in the complaint is granted in the amount of \$8,136.55.
- c) That part of plaintiff's cross-motion that seeks summary judgment on the fourth cause of action in the complaint for attorneys' fees is granted in an amount to be determined at trial.
- d) That part of plaintiff's cross-motion that seeks dismissal of defendant's first counterclaim for harassment is granted.

e) That part of plaintiff's cross-motion that seeks dismissal of defendant's second counterclaim is granted, and it is further;

ORDERED and ADJUDGED that the \$26,709.66 use & occupancy amount, and \$8,136.55 electricity amount are to be offset by the \$24,000.00 security deposit previously retained by plaintiff, leaving a total judgment payable to plaintiff of \$10,846.21, with prejudgment interest at the rate of 9% per annum, from the date of default, plus a \$50.00 late fee, to be paid by defendant, and it is further;

ORDERED that plaintiff's second cause of action for property damage remains, to be determined at trial, and it is further;

ORDERED that defendant's first counterclaim for harassment is hereby dismissed, and it is further;

ORDERED that defendant's second counterclaim for the return of her security deposit is hereby dismissed, and it is further;

ORDERED that defendant's third counterclaim for attorneys' fees remains, only to the extent as it may relate to plaintiff's second cause action after trial.

This constitutes the decision and order of the court.

April 9, 2025



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: