2022-04-06

Karole v. 340 W. End Ave., LLC

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Karole v 340 W. End Ave., LLC
2022 NY Slip Op 50317(U)
Decided on April 6, 2022
Civil Court Of The City Of New York, New York County
Tsai, J.
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Decided on April 6, 2022

Civil Court of the City of New York, New York County

Arlene Marie Karole, Claimant,

against

340 West End Avenue, LLC, Defendant.

Index No. SC-016590-21/NY

Arlene Marie Karole, claimant pro se.

Steven Kirschner, for defendant 340 West End Avenue LLC [Note: Mr. Kirschner is a non-attorney appearing on behalf of defendant in a small claims matter]

Richard Tsai, J.

On August 11, 2021, claimant Arlene Marie Karole commenced this small claims action against defendant 340 West End Ave, LLC, seeking $2,655.86 in damages for, among other things, defendant's failure to return a security deposit for an apartment which claimant had leased from defendant. On February 1, 2022, claimant amended her claim to increase the amount of damages to $3,851.89 (Court Exhibit I).

This court conducted a nonjury trial of this small claims matter on March 24, 2022,

starting at 10:25 a.m. and concluding at 12:25 pm. Claimant appeared virtually via MS Teams; defendant appeared in person by Steven Kirschner, the president of Kay Equities, the management company of the apartment building. The trial was held on the record via FTR recording in Room 419 at 111 Centre Street, New York, New York.

Claimant testified at the trial and submitted 13 exhibits that were accepted into evidence, marked sequentially as Plaintiff's Exhibits A through M.

Kirschner appeared and testified on behalf of defendant. He submitted two [*2]exhibits that were accepted into evidence, marked as Defendant's Exhibits 1 and 2.

FINDINGS OF FACT

Recitation, as required by CPLR 4213 (b), of the findings of essential facts relied upon by the court:

Claimant was the tenant of a rent-stabilized apartment, known as Apartment A in a building located at 340 West End Avenue in Manhattan, which was owned by defendant 340 West End Avenue, LLC, pursuant to a written lease which would expire on October 31, 2021 (*see* Plaintiff's exhibit C, renewal lease). The building contains 6 or more dwelling units. Based on Kirschner's testimony and the lease, Kay Equities was the management company (*see id.*). Kirschner confirmed that defendant's true name was 340 West End Avenue LLC.

It is undisputed that claimant had tendered a security deposit to defendant, in the amount of $1,327.93. Defendant held the security deposit in an interest bearing account with Chase Bank (Defendants' Exhibits 1, 2). As indicated on the bank statements, defendant kept a portion of the accrued interest, and the remaining portion was paid annually to claimant (*id.*). Although claimant denied ever receiving any accrued interest from Chase Bank, the court credits defendant's documentary evidence over claimant's testimony.

Claimant credibly testified that, in August 2020, she informed Kirschner by telephone that she was moving out of the apartment. In an email dated October 31, 2020, Kirschner wrote, "All rent must be paid for November and December. Security will be refunded within 30 days of you vacating the premises and leaving it empty and broom swept condition" (*see* Plaintiff's exhibit C, emails).

Claimant credibly testified that she had paid rent for November and December 2020, and that she vacated the apartment in mid-December 2020. For the purposes of this lawsuit,

claimant stipulated that December 31, 2020 would be deemed the official date that claimant vacated and surrendered possession of the apartment.

Claimant credibly testified that, around the end of January and in February 2021, she telephoned and emailed Kirschner regarding the return of her security deposit, and that he did not return any calls.

On March 3, 2021, claimant sent, via certified mail with return receipt requested, a letter to Kirschner, demanding a return of her security deposit (Plaintiff's exhibit C, certified mail receipt and signed return receipt).

Claimant's letter dated March 3, 2021 states, in relevant part, "The exact amount of the security deposit as per my lease is $1,734.76 plus all interest on it. . . . I demand a refund in the amount of $1,734.76 plus all interest earned on it, and if I do not receive this **within 10 days** mailed to my name/address below, I will bring a proceeding in small claims court" (Plaintiff's exhibit C, letter).

In March 2021, claimant contacted Assemblymember Linda B. Rosenthal for assistance in getting her security deposit returned (Plaintiff's Exhibit H). Assemblymember Rosenthal emailed Kirschner with a letter from claimant regarding her security deposit (Plaintiff's Exhibit G).

On May 28, 2021, Kirschner emailed Assemblymember Rosenthal, stating, "We have spoken to your office on the phone about this matter. First, we have video of Arlene Karole still going in and out of the building for months after she supposedly vacated the apartment and collecting her rent from the premises. Second, the amount of her security on deposit is substantially less then [sic] stated as she never increased the security amount with her lease renewals. Her leases always stated the amount that was on deposit. We are willing to provide and show all to the courts" (Plaintiff's Exhibit D).

On or about May 28, 2021, Assemblymember Rosenthal sent Kirschner a formal letter, stating, in relevant part,

> "Management has concocted ridiculous reasons to justify its refusal to return her security deposit, such as her visiting the building and falsely accusing her of feeding birds outside. I should remind you that none of these allegations hold pertinence in management's argument for keeping Ms. Karole's $1,734.76 security deposit. The law regarding security deposits is clear"

(Plaintiff's Exhibit A). The letter then cited New York State Rent Stabilization Code 2525.4 and quoted General Obligations Law § 7-108 (*id.*).

On June 7, 2021, the Community Liaison/Scheduler for Assemblymember [*3]Rosenthal emailed Kirschner, stating, in pertinent part, "Even if everything that you are claiming is true, it is not grounds for withholding her security deposit. The tenant left the unit in good condition" (Plaintiff's Exhibit D).

Kirschner promptly replied by email, "I reiterate that we have way less than one month security on deposit and we are willing to tell our side of the story to the judge. I don't believe that your office should be strong arming us as this is a matter for the small claims court to decide. We will present all of our proof to the Judge and we will abide by the Judges [sic] decision" (*id.*).

Sometime between July 8 and July 13, 2021, Assemblymember Rosenthal's Deputy Chief of Staff left Kirschner a message to follow up with him about claimant's security deposit (Plaintiff's Exhibit F).

It is undisputed that defendant did not return any portion of the security deposit to claimant. Defendant submitted no evidence that it had provided claimant with an itemized statement indicating the basis for the amount of the deposit retained, if any. Kirschner stipulated that there was no damage to the apartment and that the apartment was left in at least a broom clean condition when claimant vacated the premises, which was supported by claimant's photographs of the apartment (Plaintiff's Exhibits I, J, K, L).

At trial, Kirschner testified that he did not return any portion of the security deposit because claimant mistakenly insisted that the landlord return $1,743, which was not the amount of the security deposit which defendant held.

The court finds that, as a management company, Kaye Equities, knew or should have known of General Obligations Law § 7-108, the law governing the return of security deposits.

Additionally, the court finds that Kirschner's explanation for not returning any portion of the security deposit was a pretext for not returning the security deposit. Kirschner admitted that there was no damage to the apartment, and that the apartment was left in at least broom clean condition. Neither were there any rent arrears at the time claimant moved out.

CONCLUSIONS OF LAW

Even in the relatively relaxed and informal atmosphere of a small claims action, the claimant has the prima facie burden of proof at trial to establish, by preponderance of the evidence, a basis for the defendant's liability (*see Parker v Nolan*, 42 Misc 3d 144[A], 2014 NY Slip Op 50275[U] [App Term, 1st Dept 2014]; *De Meo v Consolidated Edison Co. of NY, Inc.*, 32 Misc 3d 131[A], 2011 NY Slip Op 51319[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2011]).

> "Under General Obligations Law § 7-103 (1), it is black letter law that money deposited or advanced by a tenant on a lease agreement 'shall continue' to be tenant's money and 'shall' be held in trust for the benefit of tenant until the lease is terminated and it is repaid or applied. The deposit is meant to cover the costs of repairing damages to the apartment"

(*14 E. 4th St. Unit 509 LLC v Toporek*, 203 AD3d 17 [1st Dept 2022]).

The security deposit "must be returned at the conclusion of the tenancy, absent proof, for example, that the tenant caused damage beyond that attributable to ordinary wear and tear" (*Gable v Cahill*, 69 Misc 3d 128[A], 2020 NY Slip Op 51135[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020]). "Where a landlord establishes that the tenant caused such damage, it is the landlord's further burden to establish the reasonable value of any of the repairs allegedly made to the premises" (*id.* [internal citations and quotation marks omitted]).

As claimant correctly pointed out, Section 2525.4 of the Rent Stabilization Code provides that a security deposit paid by a tenant of a rent stabilized housing accommodation is subject to the provisions of article 7 of the General Obligations Law. General Obligations Law § 7-108 states, in pertinent part:

> "(b) The entire amount of the deposit or advance shall be refundable to the tenant upon the tenant's vacating of the premises except for an amount lawfully retained for the reasonable and itemized costs due to non-payment of rent, damage caused by the tenant beyond normal wear and tear, non-payment of utility charges payable directly to the landlord under the terms of the lease or tenancy, and moving and storage of the tenant's belongings. The landlord may not retain any amount of the deposit for costs relating to ordinary wear and tear of occupancy or damage caused by a prior tenant.
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> * * *
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> (e) Within 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. 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"

(General Obligations Law § 7-108 [1-a] [b], [e]). "[B]y the plain terms of the statute only the obligations in subdivision (e) are subject to a penalty of forfeiture if they are not complied with" (*14 E. 4th St. Unit 509 LLC*, 203 AD3d 17).

Here, claimant vacated the premises in mid-December 2020, but for the purposes of this trial, the parties stipulated that the date of vacatur was December 31, 2020. Thus, defendant was required to provide claimant with an itemized statement and any remaining portion of the deposit by Friday, January 14, 2021.

Because defendant neither timely returned claimant's entire security deposit nor timely provided her with an itemized statement and any portion of the deposit, defendant has forfeited any right to retain any portion of claimant's deposit.

Therefore, claimant is entitled to recover the full amount of her security deposit from defendant, i.e., $1,327.93.

The evidence at trial established that defendant had kept the security deposit in an interest-bearing bank account. Under those circumstances, a tenant is generally entitled to recover not only the principal amount of the security deposit, but also any interest accrued on the security deposit while it was in the interest-bearing account (*cf. Holmes v Worthen*, 19 Misc 3d 33, 35 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2008]).

However, a landlord of a rent-stabilized apartment is entitled to keep, as an administrative fee, "a sum equivalent to one percent per annum upon the security money so deposited" (Rent Stabilization Code [9 NYCRR] 2525.4 [b]). At the tenant's option, the remaining balance of the accrued interest may be paid annually to the tenant (*id.*). Here, claimant did not establish that there was any unpaid accrued interest on her security deposit at the time she vacated the apartment. The evidence at trial indicated that defendant kept a portion of the accrued interest, and the remaining portion was paid annually to claimant.

Claimant is entitled to prejudgment interest on $1,327.93 at the rate of 9% per annum, from January 15, 2021, the earliest ascertainable date that the cause of action existed—i.e., the date when claimant was entitled to the full amount of the deposit and could therefore sue defendant for not returning the deposit (*see Gihon, LLC v 501 Second St., LLC*, 103 AD3d 840, 842-43 [2d Dept 2013]; *see also 23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC*, 134 AD3d 629, 632 [1st Dept 2015] [tenant was entitled to interest on the full security

deposit from the date of its conversion]; *56 Bogart St., LLC v Vandyke*, 60 Misc 3d 135[A], 2018 NY Slip Op 51063[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]).

As to punitive damages,

> "[p]unitive damages are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations. . . . [P]unitive damages may be sought when the wrongdoing was deliberate and has the character of outrage frequently associated with crime. The misconduct must be exceptional, as when the [*4]wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights"

(*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [internal quotation marks, emendation, and internal citations omitted]). "In order to recover punitive damages, a plaintiff must show, by "clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives" (*Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal quotation marks and citations omitted]; *but see In re Seventh Jud. Dist. Asbestos Litig.*, 190 AD2d 1068, 1069 [4th Dept 1993]["the evidentiary standard for proving entitlement to punitive damages is preponderance of the evidence, not clear and convincing evidence"]).

Additionally, General Obligations Law § 7-108 (g) provides, "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 word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent" (*McLaughlin v Richland Shoe Co.*, 486 US 128, 133 [1988]). "[I]t requires more than inadvertence[,] and we have noted in other contexts that it requires actions performed 'knowingly, intentionally or deliberately'" (*Matter of Cervini Car Wash, Inc. v Adduci*, 167 AD2d 751, 752 [3d Dept 1990][quotation marks and citation omitted]). Thus, in other contexts, courts have construed "willfully" to mean whether someone "knew or should have known" that they were violating the law (*Matter of Central City Roofing Co., Inc. v Musolino*, 136 AD3d 1186, 1187 [3d Dept 2016]; *Matter of Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553, 555 [2d Dept 1996]).

In cases involving whether a landlord willfully violated rent statutes that prohibited the landlord from demanding rent in excess of lawful emergency rent, one court ruled,

> "the word 'wilfully' should, I think, be applied to a specific intention on the part of the landlord to violate the law, to defy the statute, an intent deliberately to exact a rent known to the landlord to be unlawful, or at least one which it may be fairly inferred that the landlord as a reasonable man knew was unlawful"

(*Manufacturers Trust Co. v Arvin Chemists, Inc.*, 187 Misc 38, 39 [NY City Ct 1946]). Another court ruled, "The word 'wilfully' in this statute which imposes a penalty or forfeiture, means much more than intentionally. It means malevolently, with an evil purpose, and without grounds for believing the act to be lawful. It implies some element of turpitude" (*McDougall v Service Garage, Inc.*, 187 Misc 950, 953 [NY Mun Ct 1946]).

Whether the applicable burden of proof was a preponderance of the evidence, or clear and convincing evidence, claimant met her burden of demonstrating that defendant willfully violated General Obligations Law § 7-108.

> "On the issue of intent, it is well settled that intent may be proved by circumstantial evidence. [I]ntent is a mental operation that ordinarily must be inferred by an examination of all the facts and circumstances" (*Staples v Sisson*, 274 AD2d 779, 781 [3d Dept 2000] [internal citations and quotation marks omitted]). As discussed above, as a management company, Kaye Equities knew or should have known of General Obligations Law § 7-108, the law governing the return of security deposits. "[T]he 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]). Defendant's failure to send any itemized statement to claimant within 14 days after claimant vacated the apartment, coupled with the pretextual explanation offered by Kirschner for not returning the security deposit, clearly demonstrates that defendant intentionally disregarded General Obligations Law § 7-108.

The fact that claimant was mistaken about the amount actually held on deposit would not have prevented defendant from timely tendering to claimant the full amount of the security deposit actually held by defendant. The fact that claimant indicated that she would sue defendant in small claims court for return of the security deposit did not entitle defendant to retain the security deposit until the dispute was resolved in court.

Thus, claimant is awarded punitive damages against defendant for twice the amount of the security deposit, i.e., $2,655.86 ($1,327.93 x 2).

Upon the court's own motion, the ad damnum clause in the statement of claim is amended to increase the damages sought, so as to conform to the proof at trial that defendant willfully violated General Obligations Law § 7-108 (CPLR 3025 [c]; *see also Johnson v Block*, 65 Misc 2d 634, 635 [App Term, 1st Dept 1971]).

However, claimant is not entitled to recover copying expenses, lost time from work, or travel expenses incurred in coming to court (*see* Plaintiff's exhibit M). These expenses fall under the categories of costs and disbursements.[FN1]

> "[C]osts are awarded for the very purpose of indemnifying the successful party for the expense of maintaining [their] rights. The costs of suit recoverable by a successful party are thus expressly limited by statute, and there is no authority for a recovery of any amount, except such as is provided by statute, in the absence of an express contractual obligation by the parties"

(*Mercantile Factors' Corp. v Warner Bros. Pictures*, 215 AD 530, 534-535 [1st Dept 1926], *affd sub nom. Mercantile Factors Corp. v Warner Bros. Pictures*, 244 NY 504 [1926]).

Here, the New York Civil Court Act does not provide for the recovery of costs in small claims actions (NY City Civ Ct Act § 1901 [c]). As to disbursements, the prevailing party in a small claims action may recover the fees paid to the clerk (NY Civ Ct Act § 1908 [a]), which in this case was $20.00 for the commencement of the action.

VERDICT

The court finds in favor of claimant. Claimant is awarded compensatory damages in the amount of $1,327.93, with prejudgment interest at the rate of 9% per annum, from January 15, 2021, and punitive damages in the amount of $2,655.86.

ORDER

Accordingly, it is hereby **ORDERED** that the Clerk is directed to enter judgment in favor of claimant Arlene Marie Karole against defendant 340 West End Avenue LLC in the amount of $1,327.93, with prejudgment interest at the rate of 9% per annum, from January 15, 2021, and punitive damages in the amount of $2,655.86, with disbursements to claimant in the amount of $20.00.

This constitutes the decision, verdict, and order of the court.

Dated: April 6, 2022
New York, New York
RICHARD TSAI, J.
Judge of the Civil Court

Footnotes

Footnote 1: "'[C]osts' refers to those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against a losing party. The term 'disbursements' includes out-of-pocket expenses incurred by a party in the preparation of and during the trial of an action; statutory 'costs,' however, are amounts awarded for various phases of litigation that are fixed by statute and have no relation to a party's actual expense" (24 NY Jur 2d Costs in Civil Actions § 2).

Return to Decision List