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2021-12-28

Bauer v. Gerber

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

-----X

JESSICA BAUER,

Plaintiff,

-against-

AVA GERBER, 213 ASHLAND LLC., and 213
ASHLAND PROPERTY, LLC.,

Defendants.

-----X

RECITATION, AS REQUIRED BY CPLR 2219 (A), OF THE PAPERS CONSIDERED ON THE REVIEW OF THESE MOTIONS FOR SUMMARY JUDGMENT.

PAPERS	NUMBERED
NOTICES OF MOTION AND ANNEXED AFFIDAVITS	1, 2
AFFIRMATION IN OPPOSITION	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THESE MOTIONS IS AS FOLLOWS:

Plaintiff, Jessica Bauer, filed this action against Defendants seeking \$7,600 (from November 1, 2020) for failure to return a security deposit and reimbursement of related attorney fees, along with punitive damages for willful violation of General Obligations Law § 7-108.

Plaintiff now brings this motion to strike Defendant's affirmative defenses and grant of summary judgment pursuant to Civil Practice Law and Rules §§ 3211 (b) and 3212, respectively. Defendant Gerber, cross move to dismiss the action pursuant to CPLR 3211.

Plaintiff, in support of her motion, submits an affidavit, various email correspondence between herself and Defendant Gerber, Defendant's Gerber estimate of floor damages, dated November 4, 2020; a copy of the 2016 lease agreement expiring 2017, signed by both parties; a copy of the an extended lease agreement expiring 2020 signed only by Defendant Gerber; and a letter from Plaintiff's lawyer to Defendant Gerber demanding return of the security deposit.

Defendant Gerber, in support of her cross motion submits an affidavit, a receipt from Toscano Floor Designs indicating the required repairs to the floor, bank statement evidencing payment of the invoice, pictures, and an email dated November 16, 2020, which are relevant to the court's decision herein.

UNDISPUTED FACTS

Plaintiff entered into a rental lease agreement with Defendant Gerber commencing on or about October 1, 2016 and expiring September 30, 2017 for monthly rent of \$2,800 and a security

deposit of \$2,800. Plaintiff submitted a second lease that extended the original lease through September 30, 2020, which was unsigned by Plaintiff but signed by Defendant Gerber. Plaintiff remained in possession of the subject premises until she vacated the premises on October 24, 2020.

According to the parties' emails presented, Plaintiff on October 8, 2020 informed Defendant Gerber of her intent to vacate the apartment on October 31 or November 15, whichever date Defendant Gerber preferred. Plaintiff submitted an email she received from Defendant Gerber that indicates on November 16, 2020, Defendant Gerber sent Plaintiff an invoice for damage to the floor and her intent to deduct the cost to repair it from the security deposit. In Plaintiff's email, dated November 19, to Defendant she offered to pay \$400 for the damage to the floor and demanded return of \$1,900, the remaining balance of the security deposit as Defendant had already tendered \$500 of the security deposit to the Plaintiff (reflective of her reduction of approximately \$2,300 to repair the floor). Plaintiff also submitted a letter, dated January 31, 2021, from her attorney demanding return of the balance of the security deposit. In response, Defendant Gerber, on February 11, 2021, emailed Plaintiff's attorney explaining she retained a portion of the security deposit for damage Plaintiff caused to the floor.

Defendant's Gerber cross motion also contains the relevant email to Plaintiff, dated November 16, specifying the cost to repair the floor and her reduction from the security deposit along with the invoice received from Toscano Floor Designs.

DISCUSSION

The primary issue before this court is whether Defendants violated General Obligations Law § 7-108 (1-a) (e) and is therefore obligated to return the full security deposit to Plaintiff and whether Defendants are subject to punitive damages for failure to comply with General Obligations Law § 7-108 (1-a) (g).

General Obligations Law § 7-108 became effective June 14, 2019 and its legislative intent is to ensure that landlords' inform tenants of their rights to inspect said rental premises upon vacatur and landlord's obligation to inform tenants', in writing, of any damages to the premises within 14 days of vacatur with return of their security deposit, in 14 days, less any amounts retained for damages caused beyond normal wear and tear. The relevant portions of the statute are as follows:

1-a (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.

1-a (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.

General Obligations Law § 7-108 is applicable herein since the action was commenced after the date of enactment, June 14, 2019. In email exchanges between the parties, it is undisputed that Plaintiff vacated the subject premises on October 24, 2020 and Defendant Gerber obtained an estimate to repair the floors on or about November 4, 2020. More importantly, Defendant Gerber notified Plaintiff via email on November 16, 2020 of the damages to the floor, the cost to repair and her corresponding reduction of the security deposit. Specifically, Defendant Gerber informed Plaintiff that the floor had to be redone, and that she would be returning \$350.31, the difference between Plaintiff's \$2,800 deposit and the \$2,449.69 cost of refinishing the floor. The Plaintiff's documentary submissions support Plaintiff's claim that Defendant Gerber failed to comply with General Obligations Law § 7-108 (1-a) (e).

Additionally, Defendant Gerber's own documentary submissions indicate that she violated General Obligations Law § 7-108 (1-a) (e) since she notified Plaintiff on November 16th of the damage and cost to repair and her intent to apply the cost to the security deposit, which based upon Plaintiff's move out date of October 24, 2020, Defendant Gerber's notice is beyond the statutory 14-day requirement.

With respect to Plaintiff's request for punitive damages pursuant to General Obligations Law § 7-108 (1-a) (g), her argument is unavailing. This Court does not note any willful acts Defendants committed in their failure to return the security deposit but a legitimate dispute as to Plaintiff's failure to deliver the apartment in the condition she received it less extraordinary wear and tear. Plaintiff in her emails to Defendant Gerber acknowledged her damage to the floor and was willing to pay a portion of the security deposit towards the repair of sections of the floor. Defendant Gerber remained in constant and immediate communications with Plaintiff and eventually with Plaintiff's attorney, prior to the commencement of the action, to resolve withholding the security deposit to repair the floor, which she believed damaged by the Plaintiff gluing carpet to the wood floors, beyond ordinary wear and tear. Thus, Defendant Gerber's actions were in good faith and she made diligent efforts to resolve the dispute during a global pandemic. Therefore, this Court does not find her failure to return the security deposit willful.

CPLR 3212, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Gerber does not dispute the fact that she did not return Plaintiff the security deposit or provide notice of the damage within 14 days of Plaintiff's surrender of the premises. In opposition to Plaintiff's motion for summary judgment, Defendant Gerber failed to present any facts sufficient to require a trial of any issue of fact with regard to her non-compliance with General Obligations Law § 7-108 (1-a) (e) (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). This Court, having viewed the facts and the parties' submissions in the light most favorable to the non-moving party (*Vega v Restani Const. Corp.*, 18 NY3d 499 [2012]), and having determined no

triable issue of fact with regard to Defendant Gerber's non-compliance with GOL § 7-108 (1-a) (e), finds Defendant Gerber violated General Obligations Law § 7-108 (1-a) (e) by not returning Plaintiff's security deposit within fourteen days from the day Plaintiff vacated the subject apartment and by not providing Plaintiff with an itemized statement of damages within that time frame.

Accordingly, Plaintiff is granted summary judgment as a matter of law against Defendant Gerber.

With respect to the remaining Defendants, Plaintiff failed to meet her burden of proof for grant of summary judgment pursuant to CPLR 3212.

LEGAL FEES

Plaintiff moves to recover legal fees pursuant to Real Property Law § 234.

If a landlord includes a provision in a rental agreement allowing the landlord to recover legal fees "incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease," Real Property Law § 234 creates an implied covenant that the landlord shall pay the tenant "reasonable attorneys' fees and/or expenses incurred by the tenant...in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease" (Real Property Law § 234).

A month-to-month tenancy is an implied rental agreement created after the expiration of a lease or written agreement as long as the tenant continues to pay rent and the landlord continues to accept it (*see Logan v Johnson, supra; see also Carlo v Koch-Matthews*, 53 Misc 3d 466, 467 [Albany City Ct 2016]). In a month-to-month tenancy, the terms of the former lease continue to apply until the tenant vacates the premises (*Logan v Johnson, supra*).

Paragraph 23 of the lease provides, "Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee." This language is similar to the language used by the landlord in *Graham Ct. Owner's Corp. v Taylor* (24 NY3d 742, 748, 28 NE3d 527 [2015]) and as such provides a basis for reciprocal legal fees to Plaintiff/Tenant who prevailed in this action.

Additionally, General Obligations Law § 7-108 (1-a) (g) obligates the landlord to pay for actual damages if determined in breach of any provisions of the statute.

Pursuant to General Obligations Law § 7-108 1(e) and Real Property law § 234, this Court finds Defendant Gerber failed to timely return the security deposit and notice Plaintiff of any damages and therefore is liable for Plaintiff's reasonable attorney fees incurred.

CPLR 3211, DEFENDANTS' MOTION TO DISMISS

Defendant Gerber's motion to dismiss the action pursuant to CPLR 3211, alleging Plaintiff failed to state a cause of action is denied.

On a motion to dismiss under CPLR 3211(a) (7) the court is "concerned with whether the pleading states a cause of action rather than the ultimate determination of the facts" (*Stukuls v State*, 42 NY2d 272, 275, 366 NE2d 829, 831 [1977]). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17, 20 [1977]). Under CPLR 3211, "the pleading is to be afforded a liberal construction. [The court accepts] the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 [1994] [internal citations omitted]).

Plaintiff's complaint unequivocally alleges Defendants failed to return her security deposit, therefore stating a cause of action.

Accordingly,

IT IS ORDERED, Plaintiff's motion for summary judgment is granted as against Defendant Gerber.

IT IS FURTHER ORDERED, Plaintiff's motion for summary judgment is denied as against all remaining Defendants.

IT IS FURTHER ORDERED, Plaintiff's claim for punitive damages is denied.

IT IS FURTHER ORDERED, a hearing shall be held to determine Plaintiff's reasonable attorney fees incurred.

IT IS FURTHER ORDERED, Defendants' cross motion to dismiss Plaintiff's complaint is denied.

The foregoing constitutes the Decision and Order this Court.

Dated:
December 28, 2021

Cedwards

HON. CENCERIA P. EDWARDS