2022-03-14

Herald Towers LLC v. Melnik

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

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HERALD TOWERS LLC,

Plaintiff,

- v -

ALEKSANDRA MELNIK,

Defendant.

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INDEX NO. 650958/2021

MOTION DATE 07/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, and 29

were read on this motion for a MONEY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion for judgment is granted per the following memorandum.

Procedural Posture

Plaintiff residential landlord commenced this action against defendant tenant by summons and verified complaint filed February 2, 2021, seeking rent arrears as of that time in the principal sum of $34,116.13 past due as of the end of the lease term (December 14, 2020) and post-expiration use and occupancy payments at the rate of $5,000 per month for the duration of defendant's continued occupancy of the apartment. Plaintiff thereafter moved, by notice of motion filed June 30, 2021, for a default judgment due to defendant's non-appearance at that point in time. The motion was thoroughly supported by client affidavit, attesting to: the circumstances of the lease, and submitting a copy of same; defendant's defaults in payment of her lease obligations, submitting a copy of the rent ledger; paragraph 8 of the lease, fixing the rate of $5,000 per month as defendant's holdover use and occupancy obligation; defendant's

holdover past the lease's expiration date; and paragraph 19 of the lease, entitling plaintiff to its legal fees in respect of this action (*see*, NYSCEF Doc. No. 13). Plaintiff also submitted the affirmation of its attorney, affirming to defendant's default in answering the verified complaint (as of that point in time); and presenting argument in support of a money judgment against defendant for rent arrears and for ongoing use and occupancy payments, as well as for plaintiff's legal fees incurred herein (*see*, NYSCEF Doc. No. 12).

Subsequent to the foregoing, the parties entered into a stipulation, dated August 18, 2021, extending defendant's time to respond to the verified complaint, to August 31, 2021 (NYSCEF Doc. No. 25). Defendant missed that deadline by only three days, filing a verified answer on September 3, 2021 (NYSCEF Doc. No. 23). But before the stipulation was entered into, plaintiff filed an amended notice of motion for a money judgment against defendant, on July 9, 2021 (*see*, NYSCEF Doc. No. 21). The only difference between the original notice of motion and the amended one appears to be a change of the return date.

Naturally, plaintiff's August 2021 stipulation to afford defendant more time to appear in the action nullified defendant's erstwhile default in appearance upon which plaintiff's two prior notices of motion were predicated.[1] Given that reality, and given the thoroughness of plaintiff's submissions on its pre-answer motion, defendant filed an opposition to the motion styled as an opposition to a motion for summary judgment (*see*, NYSCEF Doc. No. 24). Plaintiff interposed no objection to that procedural characterization, stating, in its reply papers, as follows:

> Defendant's Memorandum of Law asserts that Plaintiff's motion should be treated as a motion for summary judgment. Accepting Defendant's assertion, Plaintiff is entitled to summary judgment in this matter as there is no issue of fact requiring trial.

[1] Defendant's three-day lapse in strict adherence to the answering deadline of the stipulation may be excused as *de minimis* (*e.g.*, *35 Jackson House Apts. Corp. v Yaworski*, 163 AD3d 805 [2d Dept 2018]).

(NYSCEF Doc. No. 26 ¶ 3.) The balance of plaintiff's reply papers presents argument within the expressly stated context of a "a motion for summary judgment" (*id.*, ¶ 25; *see, id., passim*). Given the parties' jointly pragmatic treatment of the motion as one for summary judgment, this court will accept that procedural characterization and will dispose of the motion, viewed as one for summary judgment (*see, Jaffe & Asher, LLP v Cushing*, 289 AD2d 17, 17 [1st Dept 2001] ["The parties agreed to convert that motion to the motion for summary judgment here under review."]).

The Merits of the Motion

Defendant's initial opposition point to the motion posits that it is premature. Defendant cites CPLR 3212 (f) which states: "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." But defendant did not submit an affidavit in opposition to the motion, and, therefore, it cannot "appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." And at a bare minimum, the verified answer fails to do so. Furthermore, all necessary facts related to defendant's liability are contained within the submissions and corroborative exhibits submitted in support of the motion, making clear that no issue of fact exists which would require a trial.

In spite of the evidence submitted by plaintiff, defendant asserts that discovery is required regarding "several charges sought in Plaintiff's notices which are not part of the contractual relationship between the parties" (NYSCEF Doc. No. 24 at 5). It is unclear what notices defendant is referring to; but what *is* clear is that this action, as well as the instant motion, are

only seeking to collect back-rent and use and occupancy payments, which are expressly set forth in the lease (*see also*, Rent Ledger [NYSCEF Doc. No. 28]). Plaintiff has provided substantial factual support, in the form of the lease (NYSCEF Doc. No. 17), for the assertion that defendant had an obligation to pay rent and use and occupancy to plaintiff. Furthermore, plaintiff's agent's affidavit and the rent ledger indicate that defendant failed to fulfill her obligations. Per the lease, defendant was obligated to pay plaintiff rent in the amount of $3,375.00 on the first of each month from the commencement of the lease until the lease ended on December 14, 2020. As was set forth in the affidavit of plaintiff's agent, Neal Gitlitz (NYSCEF Doc. No. 13), defendant has defaulted under the lease by failing to make any rent payments after January 10, 2020. Accordingly, plaintiff has carried its summary judgment burden to show that defendant owes $33,750.00 for unpaid rent representing the months of February 2020 through November 2020, and $1,524.19 for unpaid rent pro-rated for the final month of the lease, December 2020. Additionally, on October 1, 2020, plaintiff applied $1,000 from defendant's security deposit, to her arrears. By the end of defendant's lease, defendant already had arrears of $34,274.19 (*see*, NYSCEF Doc. No. 28).

Moreover, paragraph 8 of the lease establishes the use and occupancy obligation per month in the event that defendant held over, stating: "The parties hereto agree that Tenant's failure to surrender the Premises . . . shall trigger Liquidated Damages in the sum of $5,000.00 per month of use and occupancy for each whole and/or partial month that Defendant shall fail to vacate and Surrender . . . ." (NYSCEF Doc. No. 17 ¶ 8.)

As part of her defense, defendant offers ten affirmative defenses in an attempt to oppose judgment. None of these affirmative defenses creates a triable issue of fact. Defendant's first affirmative defense asserts that plaintiff has failed to state a cause of action upon which relief can

be granted. When determining whether or not to dismiss based on failure to state a claim, the court must "accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Fough v August Aichhorn Center for Adolescent Residential Care*, Inc., 139 AD3d 665 [2d Dept 2016]). In the verified complaint, plaintiff asserts that defendant agreed to pay rent pursuant to a lease agreement entered into on November 26, 2019, and ending on December 14, 2020. Plaintiff also asserts that pursuant to this lease agreement defendant must pay plaintiff's attorneys' fees in successfully prosecuting its claims herein. Additionally, plaintiff asserts that defendant remains in possession of the apartment and is required to pay $5,000 per month for ongoing use and occupancy, pursuant to the lease. Finally, plaintiff asserts that defendant owes $34,116.13 in rent arrears that came due during the lease term, and ongoing use and occupancy at the contract rate of $5,000 per month. The verified complaint clearly states actionable claims against defendant for rent and use and occupancy.

Defendant's second affirmative defense asserts that plaintiff did not act in a commercially reasonable manner. This defense seems to be suggesting some duty to mitigate damages in the event of tenant defaults. But defendant remained in possession for the entirety of, and beyond, the end of her lease term. Considering that defendant was in possession of the apartment for the entire duration of the lease, and beyond, it is unclear what damages defendant believes plaintiff should have mitigated.

Defendant's third affirmative defense asserts that each of plaintiff's causes of action "are barred by documentary evidence including but not limited to, the Lease, communications between Landlord and Tenant, and governmental orders relating to the COVID-19 pandemic" (NYSCEF Doc. No. 23 ¶ 7). A motion to dismiss based on documentary evidence, under CPLR

3211 (a) (1) can only be granted when the evidence "utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]). Far from "utterly refut[ing]" the plaintiff's allegations, the subject lease provides the foundation for plaintiff's allegations and causes of action, as discussed above (*see also*, Rent Ledger [NYSCEF Doc. No. 28]).

Defendant's assertion that governmental orders relating to the COVID-19 pandemic would bar the cause of action under CPLR 321 l (a) (1) are incorrect. The COVID-19 protections that defendant references in her answer are found in New York State Bill S.9114/A.11181. Section 1 of this Bill states "This act enacts into law components of legislation relating to . . . eviction and foreclosure protections. . . ." As the instant action against defendant is exclusively seeking money damages pursuant to a contract, and is not concerned with eviction or foreclosure, the Bill has no effect on the instant action and is not a bar to the relief sought in the instant motion for a money judgment against defendant.

Defendant's fourth affirmative defense asserts that "Landlord is estopped from enforcing any of the alleged rights, claims and/or obligations it seeks to enforce against Tenant." (NYSCEF Doc. No. 23 ¶ 8.) To establish the defense of estoppel, defendant must be able to satisfy the elements required for estoppel, which are: "(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts" (*First Union Nat. Bank v Tecklenburg*, 2 AD3d 575, 577 [2d Dept 2003]). Each of plaintiff's causes of action is premised upon a clause in the lease which defendant signed. Accordingly, defendant was in possession of all relevant facts from the date that she signed the lease.

Defendant's fifth affirmative defense asserts that if defendant is found to be liable to plaintiff for damages, those damages must be reduced by the amount that plaintiff received, or should have received, by mitigating the damages. However, as observed above, defendant remained in possession of the apartment throughout the lease term and beyond, and without payment of the contractually fixed rent or use and occupancy.

Defendant's sixth affirmative defense asserts that efforts to enforce the lease agreement or to collect rent are "unconscionable" in light of the COVID-19 pandemic (NYSCEF Doc. No. 23 ¶ 10). The Court of Appeals in *State of N.Y. v Avco Financial Serv. of N.Y. Inc.* (50 NY2d 383 [1980]) held that for there to be unconscionability in a contract there must be a showing of "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*id.*, at 389). Defendant cannot logically argue that there was a lack of meaningful choice in entering into the lease agreement with plaintiff in November 2019 (*see*, NYSCEF Doc. No. 17). Furthermore, there are no clauses in the lease that are unreasonably favorable to plaintiff (*see, id.*). Defendant's insertion of the clause "in light of the COVID-19 pandemic" adds no support for defendant's position (*see, e.g., Kel Kim Corp. v Central Markets, Inc.*, 70 NY2d 900 [1987]; *558 Seventh Ave. Corp. v Times Square Photo Inc.*, 194 AD3d 561, *appeal dismissed* 37 NY3d 1040 [2021]; *Pettinelli Elec. Co., Inc. v Board of Educ.*, 56 AD2d 520 [1st Dept], *affd* 43 NY2d 760 [1977]).

Defendant's seventh affirmative defense asserts that each of Plaintiff's causes of action are barred by some mutual mistake that the apartment "would and could be usable for lawful commercial purposes for the full term of the Lease" (NYSCEF Doc. No. 23 ¶ 11). Defendant submits no affidavit in opposition to the motion explaining the meaning or circumstances upon which that defense could possibly be premised. Absent any such explanation, the court takes

note of the indisputable fact that the subject lease, which defendant signed, expressly stated that defendant was to "use the Apartment for living purposes only" (NYSCEF Doc. No. 17 ¶ 1).

Defendant's eighth affirmative defense asserts that the causes of action are barred by the doctrine of waiver. Again, no opposition affidavit is submitted by the defendant explaining what circumstances might be intended as support for application of the doctrine of waiver to the instant case. But regardless, it is well established that "[w]aiver means the intentional relinquishment of a known right" (*Meachem v New York Central RR. Co.*, 8 NY2d 293, 299 [1960]). Paragraph 27 of the lease agreement that defendant entered into is entitled "NO WAIVER OF LEASE PROVISIONS" and states in pertinent part as follows:

> A. Even if Owner accepts your rent or fails once or more often to take action against You when You have not done what You have agreed to do in this Lease, the failure of Owner to take action or Owner's acceptance of rent does not prevent Owner from taking action at a later date if You again do not do what You have agreed to do.
>
> B. Only a written agreement between You and Owner can waive a violation of this Lease.
>
> C. If You pay and Owner accepts an amount less than all the rent due, the amount received shall be considered to be in payment for all or a part of the earliest rent due. It will not be considered an agreement by Owner to accept this lesser amount in full satisfaction of all the rent due. . . .

(NYSCEF Doc. No. 17 ¶ 27.)

It is clear from the language in the lease agreement, signed by both parties, that no waiver can be asserted absent a written agreement expressly manifesting a waiver of any violation of the lease.

Defendant's ninth affirmative defense asserts that each of the causes of action is barred because plaintiff failed to provide proper notice to defendant regarding her default under the lease. Defendant also asserts, as part of her ninth affirmative defense, that plaintiff failed to send notices to the proper address and that plaintiff sent an unsigned notice to defendant at a time

when defendant was not in default. It is unclear what notice is being referred to. But in any event, such notice would have no effect on the liability of defendant under the lease.

In addition, as regards the allegation that plaintiff failed to provide proper notice to defendant regarding her default, paragraph 25 of the lease that was signed by both parties states in pertinent part:

> A. Notices to You. Any notice from Owner, Owner's agent or attorney will be considered properly given to You if it (1) is in writing; (2) is signed by or in the name of Owner or Owner's Agent; and (3) is addressed to You at the Apartment and delivered to You personally or sent by registered or certified mail to You at the apartment.

(NYSCEF Doc. No. 17 ¶ 25.)

Plaintiff was served with the summons and complaint on February 22, 2021, at the apartment (50 West 34th Street, Apt. 18A05, New York, New York) (*see*, NYSCEF Doc. No. 2). Absent any other notice requirement under the lease, the summons and complaint served to notify defendant that she was in default under the lease, was signed by an agent of the plaintiff, and was addressed to defendant at the apartment.

Defendant's tenth affirmative defense – also cast as a counterclaim – alleges that plaintiff does not have clean hands and has been harassing defendant in violation of the Tenant Protection Act (Administrative Code §27-2005 [d]). Defendant alleges, without any specificity, that upon failure to pay rent, plaintiff began harassing defendant by making derogatory comments, refusing to maintain the apartment, and telling defendant she should leave (*see*, NYSCEF Doc. No. 23 ¶ 17). Again, no opposition affidavit has been submitted to substantiate said allegations. It is elementary that, upon proffer of evidence by a summary judgment movant establishing a *prima facie* case, the party opposing the motion bears the burden of producing evidentiary proof in

admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Defendant has failed in this burden.[2]

As for the aspect of the tenth affirmative defense cast as a counterclaim for $10,000 in damages for the referenced harassment (*see*, NYSCEF Doc. No. 23 ¶ 21), nothing is submitted in any evidentiary form, or with any basic specifics, to support the sparsely pled allegation of harassment.

Accordingly, plaintiff is entitled to a grant of summary judgment herein. The court is constrained by plaintiff's notices of motion, which go no further than seeking an order recognizing liability on the part of the defendant and directing "an inquest on the assessment of damages" as to rent arrearage and use and occupancy and an "inquest for determination of Plaintiff's attorneys' fees" (NYSCEF Doc. Nos. 11, 21).

Conclusion

For the foregoing reasons, it is

ORDERED that plaintiff's motion for judgment against defendant is granted to the extent stated hereinafter; and, accordingly, it is

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff Herald Towers LLC and against defendant Aleksandra Melnik on the issue of liability on the first cause of action for rent arrears and on the second cause of action for use and occupancy, and on the third cause of action for plaintiffs' reasonable attorneys' fees incurred herein, set forth in

[2] While it is true that a verified answer can serve, in *lieu* of an affidavit, to oppose a motion for summary judgment by presenting genuine material triable issues of fact (*Kim v An*, 150 AD3d 590 [1st Dept 2017]), the mere recitation of conclusory assertions, as found in defendant's verified answer herein, remain insufficient to oppose plaintiff's thoroughly supported motion for summary judgment (*see, American Savings Bank FSB v Imperato*, 159 AD2d 444 [1st Dept 1990]).

the verified complaint, with the issue of damages, including reasonable attorneys' fees, to be determined by a Judicial Hearing Officer ("JHO") or Special Referee; and it is further

ORDERED that the issue of such damages and attorneys' fees is severed and a JHO or Special Referee shall be designated to conduct an inquest and determine the amount of plaintiff's said damages and attorneys' fees, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above.

This will constitute the decision and order of the court.

ENTER:

Louis L Nock

3/14/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE

650958/2021 HERALD TOWERS LLC vs. MELNIK, ALEKSANDRA
Motion No. 001