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2022-10-11

### Munday v. 224 Lafayette St. Corp

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**Munday v 224 Lafayette St. Corp**

2022 NY Slip Op 33432(U)

October 11, 2022

Supreme Court, New York County

Docket Number: Index No. 150586/2020

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

-----X

ALEXANDER MUNDAY,

Plaintiff,

- v -

224 LAFAYETTE ST. CORP, RAUL VELAZQUEZ,  
EUGENIA VELAZQUEZ

Defendant.

-----X

INDEX NO. 150586/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

**BACKGROUND**

Plaintiff commenced this action seeking damages for alleged rent overcharge arising out of his tenancy at Apt 10 at 224 Lafayette Street, New York, New York (Subject Premises).

Defendant has asserted a counterclaim for ejectment.

**PENDING MOTION**

On August 3, 2020, plaintiff moved for summary judgment on his overcharge complaint and his claim for attorneys' fees, and for an order "striking" the counterclaims and defenses. The motion appears to have been fully briefed as of October 7, 2020.

In 2022, the action was assigned to this Court. On October 3, 2022, plaintiff's counsel wrote to advise this Court that no decision had ever been issued on the motion.

## DISCUSSION

### ***Plaintiff Has Failed to Meet Its Burden in Establishing Summary Judgment on The Overcharge Complaint***

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]). “On a motion for summary judgment, the court’s function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact” (*Martin v Citibank, N.A.*, 64 AD3d 477,478 [1st Dept 2009]; see also *Sheehan v Gong*, 2 AD3d 166,168 [1st Dept 2003] [“The court’s role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The complaint in this action was not verified by plaintiff. While plaintiff does submit a brief affidavit in support of the motion, the affidavit fails to provide basic information such as when and how plaintiff’s tenancy commenced. Instead plaintiff states “I reiterate the statements made in the Complaint and incorporate them herein.”

While CPLR §105(u) allows a verified pleading to be used as an affidavit, plaintiff cites to no legal authority allowing a party to subsequently verify a complaint through an affidavit. Assuming such authority did exist, the court would expect the affidavit to explicitly state the allegations in the complaint are true to the deponent's knowledge, a statement not present in Mr. Munday's affidavit. It is well settled that a party's burden on summary judgment is not met by merely "... incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified." (*Indig v Finkelstein* 23 NY2d 728, 729; *Schultz v Von Voight* 86 NY2d 865).

Furthermore, the court notes that little to no discovery appears to have taken place in this action and an initial Preliminary Conference has been scheduled by this court in January 2023.

Based on the foregoing, the court finds that plaintiff has failed to meet his burden in seeking summary judgment and denies the motion without prejudice to plaintiff moving again for summary judgment after the completion of discovery and the filing of a note of issue.

***Plaintiff's Motion to Dismiss Defendants'  
Defenses and Counterclaim Is Granted in Part***

The third, fifth and eighth affirmative defenses are dismissed as defendants did not oppose their dismissal and agreed to withdraw same. Similarly, defendants have consented to the dismissal of the counterclaim for ejectment, without prejudice.

The first defense asserted is failure to state a cause of action. The motion to dismiss this defense is denied as the defense may be raised at anytime (*Riland v Frederick S. Todaman & Co* 56 AD2s 350).

The second affirmative defense is unclean hands. "The doctrine of unclean hands applies when the complaining party shows that the offending party "is guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to the subject matter

in litigation and the party seeking to invoke the doctrine was injured by such conduct’ ”  
(*National Distillers & Chem. Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16, 267 N.Y.S.2d 193, 214 N.E.2d 361 [1966], quoting *Weiss v. Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 316, 152 N.Y.S.2d 471, 135 N.E.2d 208 [1956]; see *Kopsidas v. Krokos*, 294 A.D.2d 406, 407, 742 N.Y.S.2d 342 [2d Dept. 2002]).” *Arista Dev., LLC v. Clearmind Holdings, LLC*, 207 A.D.3d 1127, 1130 (2022).

The defendant asserts that plaintiff permanently moved back to England, advised the landlord he was permanently vacating, and asked the landlord to give a lease to the individual remaining in possession of the Subject Premises. It was only after the landlord refused to do so that plaintiff stated he had changed his mind and would be remaining in New York, and that this action was filed. It is unclear whether plaintiff has to date returned to live in the Subject Premises and exactly who is paying the rent for the Subject Premises, based on all of the foregoing, the motion to dismiss the defense is denied.

The motion to dismiss the tenth affirmative defense is granted without opposition.

The court has considered plaintiff’s arguments to dismiss the remaining defenses and finds them unavailing.

WHEREFORE it is hereby:

ORDERED that plaintiff’s motion for summary judgment is denied without prejudice to renewal after the completion of discovery and the filing of a note of issue; and it is further

ORDERED that defendant’s counterclaim and third, fifth, eighth and tenth affirmative defenses are dismissed; and it is further


ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119);

and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

202210111532675BKRAUS9175CA15E6104C03B6B8B7CB1279FC78  


10/11/2022  
DATE

\_\_\_\_\_  
SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: