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2022-10-19

### 8 E. 102nd St. LLC v. Ben-Shitrit

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**8 E. 102nd St. LLC v Ben-Shitrit**

2022 NY Slip Op 33621(U)

October 19, 2022

Supreme Court, New York County

Docket Number: Index No. 159124/2020

Judge: Verna L. Saunders

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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. VERNA SAUNDERS, JSC **PART 36**  
*Justice*  
-----X **INDEX NO.** 159124/2020  
 8 EAST 102ND STREET LLC,  
Plaintiff, **MOTION SEQ. NO.** 002  
 - v - **DECISION + ORDER ON**  
**DORAN BEN-SHITRIT,** **MOTION**  
Defendant.

-----X  
 The following e-filed documents, listed by NYSCEF document number (Motion 002) 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  
 were read on this motion to/for AMEND CAPTION/PLEADINGS

Plaintiff, the landlord of the building located at 1214 Fifth Avenue, New York, New York 10029 commenced this action by summons and verified complaint against defendant, the tenant of apartment 25C within the building (“premises”) seeking rent (first cause of action); legal fees, costs and expenses (second cause of action) and late fees (third cause of action); and damages based on account stated (fourth cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

Defendant filed an answer, raising several affirmative defenses. Defendant also asserts a counterclaim, asserting, *inter alia*, that there is a pending case in the Civil Court of the City of New York, County of New York, under index No. LT- 302819/2020, which involves this same subject matter and, thus, that the instant action is inappropriate and was filed solely to harass, annoy, alarm or otherwise intimidate defendant. Additionally, defendant claims that, by filing this action, plaintiff is trying to circumvent laws and stays that have been implemented by the government for the protection of persons residing in residential units. (NYSCEF Doc. No. 19, *answer*).

In reply to the counterclaim, plaintiff alleges, *inter alia*, that the referenced housing court proceeding commenced under LT – 302819/2020 was discontinued on July 16, 2021. Furthermore, plaintiff asserts that, contrary to defendant’s allegations regarding “laws and stays” and protections afforded to tenants in summary proceedings, this action is not to recover possession of real property or to evict defendant from the apartment but, rather, to recover unpaid rent, electricity charges, late fees and bounced check charges from defendant pursuant to the lease for the subject premises (NYSCEF Doc. No. 29, *reply to counterclaim*; 30, *signed stipulation of discontinuance of the Civil Court action*).

Plaintiff now moves the court, pursuant to CPLR 3212(a) and 2004, for an order granting leave to extend its time to move for summary judgment; pursuant to CPLR 3025(c), granting plaintiff leave to amend the first and second causes of action in the verified complaint to conform to the proof; pursuant to CPLR 3013 and 3211(b), dismissing defendant’s affirmative defenses



and counterclaim; and, pursuant to CPLR 3212, for an order granting plaintiff summary judgment on its first, second and third causes of action in the amounts set forth in the moving papers or, in the alternative, scheduling an inquest to determine damages (NYSCEF Doc. No. 35, *notice of motion*).

The motion is not opposed.

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].)

As an initial matter, the preliminary conference order in this action directed that all motions for summary judgment be filed within sixty (60) days after the filing of the note of issue (NYSCEF Doc. No. 27, *preliminary conference order*). The note of issue in this action was filed November 2, 2021 (NYSCEF Doc. No. 34, *note of issue*). Plaintiff filed its motion on February 28, 2022 (NYSCEF Doc. No. 35, *notice of motion*). Now, this court, in its discretion, grants that branch of the motion seeking to extend plaintiff’s time to move for said relief and deems the motion timely *nunc pro tunc* (*see CPLR 2001, 2004*).

As it pertains to the amendment, “[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.” (CPLR 3025). “An application to amend pursuant to CPLR 3025 (subd [c]) is addressed to the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to CPLR 3025 (subd [b]).” (*Schwartzman v Weintraub*, 100 AD2d 818, 820 [1st Dept 1984], citing *Murray v New York*, 43 NY2d 400 [1977].) In accordance with the general principle that motions to amend “shall be freely given” (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]), that branch of the motion seeking to amend the first and second causes of action to reflect that \$84,744.92 has accrued in rent, additional rent and late fees since the filing of the complaint, and that plaintiff has incurred \$30,732.00 in reasonable attorneys’ fees, costs and disbursements through the date of this motion, is granted.

This court will now address the motion for summary judgment. “The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].) Here, Senay Mekonen, who is employed by Related



Management Company L.P, the managing agent for plaintiff, affirms that defendant breached the lease agreement (collectively the initial lease, lease amendment, first renewal lease and second renewal lease [NYSCEF Doc. Nos. 40-43]) and, upon this court's review of the terms of said lease, this court finds plaintiff has established its *prima facie* entitlement to summary judgment, on liability, on its first, second and third causes of action. Mekonen affirms that, since the filing of the complaint, an additional \$82,636.80 in rent and \$2,058.12 in additional rent, and \$50.00 in late fees, in the sum certain amount of \$84,744.92 has accrued (NYSCEF Doc. No. 38 ¶ 25). Mekonen further asserts that defendant breached the lease and owes the total sum certain amount of \$154,353.20 in rent and additional rent through the date of this motion, corresponding to \$149,196.80 in rent, \$4,356.40 in additional rent, and \$800.00 in late fees, and that defendant owes reasonable attorney's fees, costs and disbursements, as set forth in the Mendoza affirmation (NYSCEF Doc. No. 38, *Mekonen's affidavit*). However, this court notes that the ledger attached to the moving papers, which Mekonen relies upon, reflects an outstanding balance in the amount of \$154,984.10. Given this discrepancy and a lack of explanation regarding the same, the matter is referred to a special referee for computation of damages on the first and third causes of action. The special referee shall also determine attorney's fees.

Defendant's failure to raise pleaded affirmative defenses and its counterclaim in opposition to the motion for summary judgment renders those defenses and claims waived (*SLG Graybar Mesne Lease LLC v Capital Programs, Inc.*, 2018 NY Slip Op 30602 [U], \*5-6 [Sup Ct, NY County 2018]; see also *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 756-757 [2d Dept 2013] [Supreme Court erred in finding that a triable issue of fact existed regarding affirmative defense where defendants waived that defense by failing to raise it in opposition to plaintiff's motion for summary judgment]; *Flagstar Bank, FSB v Curtis*, 59 Misc 3d 1208[A], 2018 NY Slip Op 50448 [U], \*\*7 [Sup Ct Suffolk County 2018] ["(t)he failure to raise and support pleaded affirmative defenses and counterclaims in opposition to a motion for summary judgment renders them abandoned and subject to dismissal"] [citations omitted].) Furthermore, the counterclaim, based on the pending related action in Civil Court, is dismissed as moot, insofar as the proceeding has since been discontinued. Accordingly, it is hereby

**ORDERED** that plaintiff's motion seeking an extension of time to move for summary judgment is granted, pursuant to CPLR 2001 and 2004, and deemed timely *nunc pro tunc*; and it is further

**ORDERED** that plaintiff's motion seeking to amend the first and second causes of action to conform the pleadings to the proof is granted in accordance with the foregoing; and it is further

**ORDERED** that plaintiff's motion seeking dismissal of defendant's affirmative defenses and counterclaim is granted, without opposition; and it is further

**ORDERED** that plaintiff's motion seeking summary judgment is granted only to the extent that the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant, only as to liability, on its first, second and third causes of action; and it is further

**ORDERED** that the matter shall be referred to a special referee for computation of damages and attorney’s fees, and any such award of damages shall be a non-possessory money judgment only; and it is further

**ORDERED** that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

**ORDERED** that service upon the Clerk of the Court and the General Clerk’s Office 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)).

This constitutes the decision and order of this court.

October 19, 2022

  
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**HON. VERNA L. SAUNDERS, JSC**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>
				OTHER
				REFERENCE