2023-02-17

Solda v. KJL Ventures LLC

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

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POLINA SOLDA and PAUL SOLDA — Index No. CV-028374-21/NY

Plaintiff(s), — **DECISION/ORDER**

-against-

KJL VENTURES LLC., JAMES LYNCH and KATHLEEN LYNCH

Defendant(s),

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Hon. Kim M. Parker

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

Papers	**Numbered**
Plaintiffs' Notice of Motion, Affirmation, Affidavit, and Exhibits.....	1
Defendants' Affirmation in Opposition, Affidavit, and Exhibits	2
Plaintiff's Reply, Affirmation, Affidavit, and Exhibits.....	3
Plaintiff's Cross-Motion, Affirmtion, Affidavit, and Exhibits.....	4
Defendants' Memorandum in Opposition, Affidavit, and Exhibits.....	5
Plaintiffs' Reply, Affirmation, Affidavit, and Exhibits.....	7

Plaintiffs Polina and Paul Solda ("Plaintiffs") move for leave to renew and reargue a motion that was decided on August 22, 2022, and upon reargument an order granting summary judgment.

Plaintiffs argue that the Court should grant reargument based on the following facts (1) Defendants did not offer nor permit a mutual inspection of the premises and (2) Defendants never disputed that they did not offer nor conduct a mutual inspection with Plaintiffs. Plaintiffs claim that these facts are highly relevant since General Obligations Law ("GOL") § 7-108(1-a)(d) provides that before a landlord can serve a notice purporting to claim defects it must provide notice for a mutual inspection. Plaintiff contends that since Defendants did not provide for an inspection summary judgment should be granted in Plaintiffs' favor. Plaintiffs emphasize the fact that the court overlooked the import of Defendant's failure to notice and provide a mutual inspection under GOL § 7-108 (1-a)(d). Plaintiffs state that had Defendants abided by the statute it would have afforded them the opportunity to challenge or cure any defects claimed by

Defendants. Plaintiffs also emphasizes the fact that David Vipler, a real estate broker, attested in his affidavit to the fact that plaintiffs moved out on November 15, 2021, because he viewed the empty apartment on the same date. Plaintiffs argue that the Court should grant renewal based on the fact that they did not provide the additional documentary evidence on the belief that it would be over burdensome and cumulative to the court and some of these evidentiary pieces were also too difficult to secure at the time. Plaintiffs now provide a purported email by Kathleen Lynch addressed to Plaintiff Paul Solda dated October 15, 2022, where she acknowledges Plaintiffs projected move out date. She states in part "Thank you for providing us with the move out date of November 15, 2021... with regard to the two TV mounts, we have been advised by our broker that it is best for you to remove them...Please let us know when you will be moving out on November 15, so we can set up the inspection immediately thereafter". Plaintiffs also provide a text message exchange between Kathleen Lynch and himself. On November 13, 2021, Ms. Lynch informs Plaintiff to leave all (two or more) sets of keys with the door men and on November 16, 2021, Ms. Lynch asks Mr. Solda where the keys to the door and mailbox are or who did they leave the keys with. Mr. Solda replied that he left it at the front desk and if they were meeting. In a reply, Plaintiffs argues that a new month-to-month tenancy was created when the modified extended lease term expired in June 2021. Plaintiffs also contend that they did not include the exhibits of the text message exchange and email because they did not want to burden the court and it was a costly and timely process to retrieve the text message thread.

In opposition Defendant Kathleen Lynch, in an affidavit alleges that Defendants did agree to a mutual inspection on the move out day. Ms. Lynch states that on the day that Plaintiffs were supposed to move out there were items that were left on the premises. Defendants contend that it was essentially impossible for the Court to overlook Plaintiffs argument that the GOL § 708(1-a)(d, requires that a landlord provide a written notice to the tenant of its right to a mutual inspection, as a prerequisite to the landlord retaining any portion of the security deposit since, Plaintiff did not argue it in its motion papers. Defendants contend that even if the Court were to consider this argument the new requirements of the Housing Stability and Tenant Protection Act ("HSPTA") codified in GOL do not apply to the lease at issue and even if it did apply material issues of fact exists as to whether Plaintiffs and KJL agreed to an alternative arrangement regarding inspection. Defendants maintain that the argument Plaintiffs posit was never overlooked since it was never argued in their motion. Defendants aver that the HSPTA's

provisions do not apply to leases and lease renewals entered into before July 14, 2019, and that the lease at issue was entered into on June 22, 2017, and modified for an extension of the original lease. Defendants state that the parties agreed to mutually inspect the premises on November 15, 2021, however when Ms. Lynch asked for a time on that day Plaintiffs never responded. Defendants further argue that leave to renew should be denied also since Plaintiffs did not satisfy the prongs of CPLR 2221(e)(3). Defendants highlight the fact that Plaintiffs' motion for renewal is based upon additional information that could have been submitted in their original motion for summary judgment papers. Defendants contend that Plaintiffs failed to show both a reasonable justification for not submitting the additional evidence and that the additional evidence would have altered the outcome of the prior motion. Defendants argue that the additional evidence would not change the court's determination that triable issues of fact exist.

Motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision (*E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2d Dept 2007], *quoting Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]; *see Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 655 [2d Dept 2007]). Further, "[c]ourts are empowered to vacate orders or judgments on the grounds codified in CPLR 5015 (a) as well as for sufficient reason and in the interest of substantial justice" (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 78 [2d Dept 2020]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Katz v Marra*, 74 AD3d 888 [2d Dept 2010]). A court of original jurisdiction may entertain a motion for leave to renew a prior order or judgment based on newly discovered evidence not offered on the prior motion that would change the prior determination and shall contain reasonable justification for the failure to present such facts on the prior motion (*160 E. 84th St. v New York State Div. of Hous. and Community Renewal*, 203 AD3d 501 [1st Dept 2022]; CPLR 221[e]). Although it is true that a motion to renew should generally be based upon newly discovered facts, this rule is not inflexible, and the court has discretion to grant renewal in the interest of justice even upon facts that were known to the movant at the time the original motion was made (*Glob. Liberty Ins. Co. v Laruenceau*, 187 AD3d 570 [1st Dept 2020]).

Where the original lease includes an option to renew, the exercise of it by the tenant does not create a new lease; rather it is a prolongation of the original agreement for a further period. Once the option is exercised, the original lease is deemed a unitary one for the extended term and a new lease is not necessary (*Dime Sav. Bank of New York, FSB v Montague St. Realty Assoc.*, 90 NY2d 539, 543 [1997]). The parties hold, not under any contract of renewal, but by virtue of the original lease (*Id*). However, even in the absence of an option to renew in the original contract, a tenancy agreement may subsequently be modified, and the lease term extended (*Dime Sav. Bank of New York, FSB v Montague St. Realty Assoc.*, 90 NY2d 539, 543 [1997]). In *Garfield v Howard*, the Court found that a month-to-month tenancy was created as a result of defendants' acceptance of plaintiffs' rent payments after the August 31, 2000, expiration of the lease extension (*Garfield v Howard*, 2002 NY Slip Op 40422(U) [App Term June 27, 2002]). Furthermore, the common-law rule in New York has been modified to the extent that presently only a month-to-month periodic tenancy springs forth from the combination of tenant holdover and landlord acceptance of rent (*Park Summit Realty Corp. v Frank*, 107 Misc 2d 318, 322 [App Term 1980], affd, 84 AD2d 700 [1st Dept 1981], affd, 56 NY2d 1025 [1982]).

Within a reasonable time after notification of either party's intention to terminate the tenancy, unless the tenant terminates the tenancy with less than two weeks' notice, the landlord shall notify the tenant in writing of the tenant's right to request an inspection before vacating the premises and of the tenant's right to be present at the inspection (General Obligations Law § 7-108[d]). If the tenant requests such an inspection, the inspection shall be made no earlier than two weeks and no later than one week before the end of the tenancy (General Obligations Law § 7-108[d]). The landlord shall provide at least forty-eight hours written notice of the date and time of the inspection (*Id).* After the inspection, the landlord shall provide the tenant with an itemized statement specifying repairs or cleaning that are proposed to be the basis of any deductions from the tenant's deposit (*Id*). The tenant shall have the opportunity to cure any such condition before the end of the tenancy (*Id*). Any statement produced pursuant to this paragraph shall only be admissible in proceedings related to the return or amount of the security deposit (General Obligations Law § 7-108[d]).

After further consideration, the Court finds that Plaintiffs' motion to reargue and renew is based upon matters of fact or law overlooked or misapprehended by the court in determining Plaintiffs' cross-motion for summary judgment and upon facts not offered on the prior motion

that would change the prior determination. Thus, the Court in its discretion and in the interest of justice, grants Plaintiffs motion for leave to reargue and renew and upon renewal and re-argument, the August 22, 2022, decision and order is vacated, and Plaintiff's underlying motion for summary judgment is decided as follows:

The Court finds that Defendants failed to rebut Plaintiffs prima facie showing entitling them to judgment as a matter of law. The Court recognizes its failure to take into account the fact that the original extended lease had expired June 2022, wherein, a new month-to-month tenancy was created. This tenancy essentially was created by an implied contract where Plaintiffs proffered rent and Defendants accepted the rent. Defendants failed to produce evidence that shows to the contrary. Defendants' acceptance started a new tenancy that was created after the new terms of General Obligations Law § 7-108 went into effect. Thus, Defendants is required by statute to comply with the provision in respect to Plaintiffs' month-to-month tenancy. Defendants have failed to demonstrate with documentary proof that they complied with GOL §7-108(d). Pursuant to GOL § 7-108(d) within a reasonable time after notification of either party's intention to terminate the tenancy, the landlord shall notify the tenant in writing... Plaintiffs notified Defendants in advance sometime before October 15, 2022, that they were vacating the premises on November 15, 2022, which is more than two weeks' notice. Defendants' emphasis on the exception to this statute is without merit. The exception to GOL § 7-108(d) provides that landlords must abide by the statute unless the tenant terminates the tenancy with less than two weeks' notice. Defendants had advance notice of Plaintiffs' intention to terminate the lease since Ms. Lynch acknowledged that Plaintiffs were expected to vacate the premises on that date in an email dated October 15, 2022. Although Defendants contend that they gave Plaintiffs notice of an inspection they have not proffered any documentary details proving the same. The only documentary evidence besides their submitted affidavits that speaks to an inspection is the email between Ms. Lynch and Mr. Solda, where she requests that Mr. Solda, informed her of when he would be moving out on November 15, 2021, so that she could set up the inspection "soon thereafter". Also, Ms. Lynch, made mention of an inspection again in a text message exchange between her and Mr. Solda, where she states that her husband would do an inspection on the day after Plaintiffs were expected to vacate the premises. When, Mr. Solda, asks if they were meeting [for the inspection], there was no response from Ms. Lynch. Pursuant to GOL § 7-108 Defendants were supposed to notify the tenant in writing of the tenant's right to request an

inspection before vacating the premises and of the tenant's right to be present at the inspection. Here, there is no evidence that any such writing was ever created. Even if Defendants made the argument that the email dated October 15, 2021, was Plaintiffs notice in writing that argument would fail because it did not explicitly notify Plaintiffs of their express right to request an inspection before vacating the premises and of the right to be present at the inspection. Based upon Ms. Lynch's own words in the email she only asked for Mr. Solda, to inform her when he was moving out, on November 15, 2021, so that she could set up the inspection soon thereafter, and that her husband was going to conduct an inspection the day after November 15, 2021. Thus, since Defendants failed to give written notice to Plaintiffs, Plaintiffs were not offered the opportunity to be present during the inspection or to cure any conditions found before the tenancy ended. This is a violation of the statute.

Accordingly, Plaintiffs motion for summary judgment for their first cause of action is granted to the extent that the Defendant KJL Ventures LLC is ordered to remit payment of the full value of the security deposit in the amount of $9,000.

This constitutes the decision and order of the Court.

Dated: February 17, 2023

Hon. Kim M. Parker, J.C.C

New York County Civil Court
Civil Judgment

Plaintiff(s):
POLINA SOLDA;
PAUL SOLDA

vs.

Defendant(s):
KJL VENTURES LLC;
JAMES LYNCH;
KATHLEEN LYNCH

Index Number: CV-028374-21/NY

Judgment issued: Per Motion Decision

On Motion of:

Self Represented

Amount claimed	$9,000.00	Index Number Fee	$0.00	Transcript Fee	$0.00
Less Payments made	$0.00	Consumer Credit Fee	$0.00	County Clerk Fee	$0.00
Less Counterclaim Offset	$0.00	Service Fee	$0.00	Enforcement Fee	$0.00
Interest 11/29/2021	$0.00	Non-Military Fee	$0.00	Other Disbursements	$0.00
Attorney Fees	$0.00	Notice of Trial Fee	$0.00	Other Costs	$0.00
Cost By Statute	$0.00	Jury Demand Fee	$0.00		
Total Damages	$9,000.00	**Total Costs & Disbursements**	$0.00	**Judgment Total**	$9,000.00

The 9% post-judgment interest rate pursuant to NY CPLR §5004(a) applies.

The following named parties, addressed and identified as creditors below:

Plaintiff creditor(s) and address

(1) POLINA SOLDA
60 E 42ND ST, 46 FL, New York, NY 10165
(2) PAUL SOLDA
60 E 42ND ST, 46 FL, New York, NY 10165

Shall recover of the following parties, addresses and identified as debtors below:

Defendant debtor(s) and address

(1) KJL VENTURES LLC
14 COUNTRY CLUB DR, Shelter Island Heights, NY 11965
(2) JAMES LYNCH
14 SUTTON PLACE SOUTH, APT 5B, NEW YORK, NY 10022-3109
(3) KATHLEEN LYNCH
14 SUTTON PLACE SOUTH, APT 5B, NEW YORK, NY 10022-3109

Judgment entered at the New York County Civil Court, 111 Centre Street, New York, NY 10013, in the STATE OF NEW YORK in the total amount of **$9,000.00 on 02/22/2023 at 12:23 PM.**

Judgment sequence 1

Alia A. Razzaq

Alia Razzaq, Chief Clerk