CITY COURT : CITY OF RYE
WESTCHESTER COUNTY

INES ESCOBEDO and MICHAEL SANTORO, SC11-74

Plaintiff,

-against- DECISION AND ORDER

ROSALBA CARREA,

Defendant.

Appearances:
Plaintiff *by Albert Talero, Esq., Forest Hills, NY*
Defendant *by Ben Paul Siino, Esq., West Harrison, NY*

This is a small claims action seeking return of a security deposit plaintiffs paid upon the rental of one unit of defendant's two family house located in White Plains, New York. Defendant filed a counterclaim for damages to the leased premises.

The parties stipulated that they entered into a lease (which does not identify the premises leased) and that plaintiffs paid defendant a $2,200 security deposit under the lease.

The check for the security deposit was deposited into defendant's account at Citibank bearing an account number ending in "7441". The defendant testified that he used the 7441 account for the property – not only to house the security deposit but to pay bills related to the property. Defendant also said he took $2,200 out of that 7441 account and, upon advice from the bank, after this action was begun, placed it in a separate checking account also at Citibank ending in "7410". At no time did the defendant notify the plaintiffs about the deposit of the security deposit check in either account since the defendant claimed he didn't know he had to notify the plaintiffs.

The treatment of money given as a security deposit in connection with the use or rental of real property is governed by General Obligations Law ("GOL") § 7-103.[1] GOL § 7-103 (a) provides, in relevant part:

Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money ... shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same ... .

GOL § 7-103 (2) provides, in relevant part,

Whenever the person receiving money so deposited or advanced shall deposit such money in a banking organization, such person shall thereupon notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit.

Where a landlord has deposited a security deposit in a bank and fails to comply with the notice provision of GOL § 7-103 (2), a court may draw the rebuttable inference that the landlord has mingled that security deposit with the landlord's own money, in violation of GOL § 7-103 (1). *Paterno v Carroll*, 75 AD3d 625, 905 NYS2d 653 [2nd Dept 2010]; *Dan Klores Assoc. v Abramoff*, 288 AD2d 121, 733 NYS2d 688 [1st Dept 2001]. Here, the rebuttable presumption is supported by the defendant's admissions of his use of the account for other purposes. Such commingling constitutes a conversion, as well as a breach of fiduciary duty (*LeRoy v Sayers*, 217 AD2d 63, 635 NYS2d 217 [1st Dept 1995]), and regardless of any noncompliance by the tenant with the terms of the lease, it entitles the tenant to an immediate return of the deposit. *Id.*; *accord Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 889 NYS2d 580 [1st Dept 2009]. In the event of such commingling, the landlord may not use any portion of the deposit even for otherwise legitimate purposes. *Id.*; *Dan Klores Assoc, supra*. The reason for this is that GOL § 703-1 and its predecessor statute transformed the landlord-tenant relationship with regard to security deposits from a creditor-debtor relationship to one in which the landlord is the trustee of the deposit. A tenant

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[1] NY GOL § 7-103 was enacted by L. 1963, ch. 576. Defendant's citation of cases that predate the enactment of GOL § 7-103 are meaningless to the extent the statute deals with the situation.

seeking the return of a deposit may not "be subject to setoffs or counterclaims asserted against him in a different capacity." *Matter of Perfection Tech. Servs. Press*, 22 AD2d 352, 356, 256 NYS2d 156 [2nd Dept 1965], *affd* 18 NY2d 644 [1966].

Here, it is undisputed that Landlord deposited tenant's security deposit, or caused it to be deposited, in an account (7441) at Citibank, and that Landlord did not give tenant contemporaneous written notice of that deposit. Accordingly, Landlord bears the burden of rebutting a presumption that it commingled tenant's security deposit with money of its own, in the account. The Landlord has not rebutted that presumption but bolstered it.

While the Court sympathizes with defendant's situation as a "small" landlord, that does not relieve a "small" landlord from complying with the law. Attempting to save money but not seeking the advice of an attorney who could have alerted the landlord to the legal requirements was a false savings. While the lease could have been far worse, failing to identify the leased property in it could have rendered the entire document worthless. The cost of getting legal advice is a factor every landlord should include in determining whether or not to be a landlord in the first place. If the landlord believes the costs of complying with the legal requirements is too great, he/she should either not be a landlord or seek legislative changes to change the legal requirements – otherwise they will bear the risks of not complying with those requirements.

The defendant failed to carry his burden of proof on the counterclaims. He failed to establish that plaintiff's dog ruined the hardwood floors, that plaintiff scratched the floor, or that the attic ladder was broken by plaintiff. Defendant also failed to prove his damages since he neither repaired the floors, nor replaced the stairs, nor paid for any repairs before renting the premises after plaintiff left.

Providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; *see Cosme v Bauer*, 27 Misc 3d 130(A), 2010 NY Slip Op 50638(U) [App Term, 9th Jud Dist April 8, 2010]; *Ross v Friedman*, 269 AD2d 584 [2nd Dept 2000]; & *Williams v Roper*, 269 AD2d 125 [1st Dept 2000]) and under a fair interpretation of the evidence (*see Claridge Gardens v. Menotti,* 160 A.D.2d 544 [1st Dept 1990] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Nobile v. Rudolfo*

Valetin Inc., 21 Misc.3d 128[A], 2008 N.Y. Slip Op 51962[U] [App Term, 9th and 10th Jud Dists 2008] (*see also, Vizzari v. State of New York,* 184 AD2d 564 [2nd Dept 1992]; *Kincade v. Kincade,* 178 AD2d 510, 511 [2nd Dept 1991]; & *Rotem v. Hochberg,* 28 Misc 3d 127(A), Slip Copy, 2010 WL 2681875 (Table) [App Term, 9th and 10th Jud Dists , 2010]), the Court finds that plaintiff security deposit was improperly retained by defendant and that the defendant may not make any further claim against it.

Accordingly, it is,

ORDERED and ADJUDGED that judgment be awarded to plaintiffs in the sum of Two Thousand Two Hundred ($2,200.00) dollars and that plaintiffs have execution therefor, and it is further

ORDERED that Defendant's counterclaim is dismissed.

February 8, 2012

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JOSEPH L. LATWIN
Rye City Court Judge

ENTERED

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Mary Jo Garrity

Appeals
--An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the Rye City Court Clerk's office. A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken. CPLR § 5515.
--Pursuant to UCCA § 1701 "Appeals in civil causes shall be taken to" the appellate term of the supreme court, 9th Judicial District.
-- An appeal as of right from a judgment entered in a small claim or a commercial claim must be taken within thirty days of the following, whichever first occurs:

1. service by the court of a copy of the judgment appealed from upon the appellant.

2. service by a party of a copy of the judgment appealed from upon the appellant.

3. service by the appellant of a copy of the judgment appealed from upon a party.

Where service as provided in paragraphs one through three of this subdivision is by mail, five days shall be added to the thirty day period prescribed in this section. UCCA § 1703(b).