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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 105170/2011
CENPARK REALTY, LLC.
vs.
GURIN, ELLIE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, - 3

Answering Affidavits — Exhibits _____ | No(s). 4 - 6

Replying Affidavits _____ | No(s). 7

Upon the foregoing papers, it is ordered that this motion is

DECIDED PER ATTACHED

DECISION AND ORDER

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/17/12

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

CENPARK REALTY LLC,

Plaintiff,

- against -

ELLIE GURIN and ADINA MARMELSTEIN,

Defendants.

----------X

Index No.
105170/11

Decision and
Order

Mot. Seq. No. 2

HON. EILEEN A. RAKOWER, J.S.C.

This is an action regarding the rights and obligations of the parties as they relate to apartment 16K located in 360 Central Park West, New York, NY. The instant action seeks to resolve issues of tenancy, rent, and use and occupancy allegedly owed to plaintiff Cenpark Realty, LLC. Presently before the Court is defendant Ellie Gurin's motion for an Order dismissing plaintiff's complaint as against her and awarding her judgment on her first and second counterclaims. Plaintiff cross moves pursuant to CPLR §3212 for summary judgment dismissing Gurin's first counterclaim and defendant Adina Marmelstein's first and ninth affirmative defenses. Plaintiff also cross moves pursuant to CPLR §2221 to reargue and/or renew its prior motion. Marmelstein cross moves to amend her amended verified answer in order to supplement her ninth affirmative defense.

As set forth in Gurin's supporting Affidavit, Gurin, formerly known as Ellie Marmelstein, entered into possession of apartment 16K located at 360 Central Park West, New York, NY, pursuant to a rent stabilized lease dated December 12, 1989 with plaintiff's predecessor-in-interest Cenpark Realty Company. The term of the initial lease was for two years, commencing on February 1, 1990 and ending January 31, 1992. A copy of the lease agreement is attached to Gurin's Affidavit. Marmelstein, Gurin's sister, resided with her at the subject apartment but did not sign the lease and was not named on the lease. In her Affidavit, Gurin claims that the lease

should have been in both of their names but the managing agent insisted that only one name appear on the lease. Marmelstein claims the same in her affidavit.

As set forth in Gurin's Affidavit, Gurin moved out of the apartment one year later and Marmelstein stayed in the apartment. Although not mentioned in Gurin's papers, the landlord offered to Ellie Marmelstein renewal leases in 1992, 1994, and 1996 . (*See* the Decision of Judge Jean Schneider dated April 1, 2011 in the Civil Court matter Index 52740/2007).

Plaintiff sent both Gurin and Marmelstein a "Notice of Intention Not to Renew Lease" dated October 28, 1997. The Notice was sent to Gurin at the subject apartment and her New Rochelle home. The Notice stated:

> PLEASE TAKE NOTICE that the tenancy of Ellie Marmelstein a/k/a Ellie Marmelstein Gurin ("Ellie") in the premises known as Apartment 16K ("Apartment") at 360 Central Park West, New York, New York, 10025 ("the Premises") shall be terminated effective on February 28, 1998, which is the termination date stated on Ellie's currently effective lease, as renewed, on the grounds that Ellie does not maintain the Apartment as her primary residence. By reason of the foregoing, the landlord does not intend to offer Ellie a renewal lease. Specifically, it has come to the attention of the landlord that Ellie maintains her primary residence at 66 Beverly Road, New Rochelle, New York.
>
> PLEASE TAKE FURTHER NOTICE, that the facts supporting the landlord's termination are:
>
> 1. Ellie has not resided in the Apartment since at least 1993 as confirmed and substantiated by the landlord's personnel at the Premises.
>
> ***
>
> PLEASE TAKE FURTHER NOTICE, that the landlord elects to terminate your tenancy in the Apartment effective on February 28, 1998, which is greater than 120 days but fewer than 150 days after the service of this notice on you.
>
> PLEASE TAKE FURTHER NOTICE, that you are hereby required to quit, vacate, remove yourself from and surrender the Apartment on or before

> February 28, 1998, as aforestated, the landlord will commence summary proceedings under the statute to remove you from the Apartment.

In accordance with its Notice of Intention Not to Renew Lease, plaintiff commenced a holdover summary proceeding in March 1998 against Gurin, naming Marmelstein as an illegal undertenant. In the Verified Holdover Petitioner, plaintiff averred, "The term of the Lease and Respondent's tenancy expired on February 28, 1998 by virtue of the circumstances herein and Notice of Intention Not to Renew Lease." At her deposition in the holdover proceeding, Gurin testified that she had moved out of the apartment. A copy of the relevant deposition excerpt is annexed to Donald Eng's attorney affirmation. The summary proceeding was marked off calendar for discovery and was never restored by plaintiff. The last court order issued in the 1998 summary proceeding directed Marmelstein to pay use and occupancy *pendente lite*.

After the summary proceeding was abandoned in 1998, no action was taken by plaintiff until January 2007 when it served upon Gurin, who was residing in New Rochelle, a three day rent demand for rent for the period of January 1999 through January 2007. The amount demanded was $70,525.04. The matter proceeded to trial in 2010. At the end of plaintiff's case, by Decision/ Order dated April 1, 2011, Judge Schneider granted Gurin's motion to dismiss without prejudice for failure of proof. The Decision states,

> Here plaintiff did not establish that any landlord-tenant relationship exists between petitioner and either of the respondents. Petitioner specifically terminated the tenancy of respondent Ellie Gurin and then commenced a holdover proceeding against her. Although the petitioner abandoned the holdover proceeding, there is no evidence in this record that petitioner even, thereafter, offered Ms. Gurin a lease or otherwise revived her tenancy by the payment and acceptance of rent.

By Order dated May 1, 2011, Judge Schneider denied Gurin's request for attorneys' fees. Gurin has appealed the Order.

Plaintiff commenced the instant action by Summons and Complaint filed on May 2, 2011. The Complaint contains seven causes of action, five of which assert claims against Gurin either individually or jointly with Marmelstein. The first cause

of action claims Gurin owes "rent" dating back to March 1996 in the total amount of $78,205.83. The landlord bases Gurin's liability upon the lease. The second cause of action seeks "use and occupancy" for an unspecified period in an unspecified amount. The third cause of action claims that Gurin and Marmelstein benefitted from the use of the apartment and that it would be "inequitable and unconscionable" for them to enjoy the same without any payment. The fourth cause of action seeks a judicial declaration that Gurin never surrendered the apartment. The seventh cause of action seeks attorneys' fees against Gurin pursuant to a provision in the lease. The sixth cause of action, which seeks a judgment or ejectment, is only stated against Marmelstein.

In the instant action, plaintiff previously moved and sought an order directing Gurin and Marmelstein to pay the outstanding use and occupancy for the subject apartment dating back to December 2010 and directing them to pay use and occupancy *pendente lite*. By Order dated March 21, 2012, the Court ordered Adina Marmelstein to pay continuing use and occupancy in the amount of $759.70 per month, without prejudice, commencing April 1, 2012 and *pendente lite*. The Court noted that "[i]t is uncontested that Ellie Gurin does not occupy the premise and that Adina Marmelstein occupies the premise." Plaintiff has appealed the Court's Order.

A. Gurin's Motion for Summary Judgment as to Complaint and Counterclaims

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

1. As to Plaintiff's Complaint

Based on the uncontested facts and the conduct of both parties, Gurin is entitled to summary judgment as to plaintiff's Complaint.

Plaintiff contends that Gurin is responsible under the terms of the last lease, the 1996 lease, based on the fact that Gurin has never surrendered the premises. Plaintiff urges that Gurin's failure to surrender the keys to the unit in 1998 or thereafter, is either determinative on this issue, or raises an issue of fact regarding whether Gurin ever surrendered the premises.

However, plaintiff's argument is belied by its own conduct in terminating Gurin's tenancy as of February 28, 1998 as per the October 28, 2007 "Notice of Intention Not To Renew Lease" on the basis that Gurin no longer resided at the apartment. While plaintiff commenced a holdover proceeding in 1998 against Gurin on the same basis, it abandoned that proceeding and took no action as against Gurin until 2007 when it sent her a rent demand for the preceding eleven years. Plaintiff's demand in 2007 did not revive Gurin's tenancy which had been terminated by plaintiff as of February 28, 2008. Plaintiff did not thereafter offer Gurin a lease and there are no allegations that Gurin repossessed the premises. Gurin readily admitted she did not live at the premises and did not contest Plaintiff's intention not to renew the lease in 1998. She contends the lease expired by its terms February 28, 1998. The landlord was silent until 2007. Additionally, the issue was fully litigated before Judge Schneider who found the landlord was unable to establish proof that a landlord tenant relationship survived.

"A surrender by operation of law occurs when the parties to a lease do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." *Research Institute v. KMGA, Inc.*, 68 N.Y. 2d 689, 691 (1986). Where the pertinent facts relating to the surrender are not in dispute, the question of whether there was a surrender by operation of law can be made as a matter of law. *See generally Dadich v. Ilana Knitting, Inc.*, 208 A.D. 2d 792, 793 (2d Dept 1994).

Here, it is undisputed that Gurin abandoned the premises, and took no position inconsistent with her relinquishing the premises in all subsequent proceedings. The landlord served her with a notice of its intent not to renew the lease, served a notice

to quit, and commenced a holdover proceeding against Gurin, serving her at her New Rochelle residence. That proceeding was marked off calendar in 1998, and the Landlord made no further demands of Gurin, including a demand for keys. The next action taken by Landlord was in 2007, a proceeding long after the facts which lend themselves to a surrender by operation of law. Consistent with this, the 2007 proceeding ended with the Decision and Order of Judge Schneider which acknowledged that there was no proof in admissible form to support a finding that there existed a landlord tenant relationship between Landlord and Gurin. No additional proof of such a relationship is provided here.

Gurin points to the case of *88th Street Realty LP v. Maher*, 21 Misc 3d 190 (Civ. Ct. NY County, 2008), *aff'd*, 28 Misc. 3d 10 (1st Dept 2010), wherein the lease was to expire by its terms, tenant vacated prior to the expiration date, but tenant's roommate remained in the apartment and refused to leave. The court found "when the lease has terminated and a subtenant or roommate remains in possession, the landlord has a duty to mitigate the record tenant's damages by proceeding expeditiously with an eviction."

Here, landlord abandoned its holdover proceeding in 1998, and, despite its 2007 claim of nonpayment for a period dating back to 1999, took no action for the interim years. Indeed, landlord does not account for the delay here.

The undisputed facts give rise to a surrender by operation of law. As there are no triable issues of fact, Gurin's motion for summary judgment dismissing the Complaint is granted and the Complaint is dismissed as against Gurin.

2. As to Gurin's Counterclaims

Gurin also moves for summary judgment as to her two Counterclaims. Plaintiff cross moves for summary judgment to dismiss Gurin's first Counterclaim.

Gurin's first Counterclaim alleges that plaintiff's action is brought in bad faith and without any legal justification and as such constitutes an abuse of process and malicious prosecution. As Gurin alleges only that plaintiff served a summons and complaint, a cause of action for abuse of process fails as a matter of law. (*See Curiano v. Suozzi*, 63 N.Y.2d 113, 116 [1984](stating that the mere service of a summons and complaint cannot constitute the basis of an action for abuse of process). As it is undisputed that criminal proceedings were never commenced against Gurin in relation

to the underlying incident, a cause of action for malicious prosecution also fails as a matter of law. (*Cantalino v. Danner*, 96 N.Y.2d 391, 396 [2001]) ("In order to recover for malicious prosecution, a plaintiff must establish four elements: that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice.").[1] Accordingly, Gurin's motion for summary judgment as to her first Counterclaim is denied and plaintiff's cross motion dismissing the same is granted as Gurin's first Counterclaim fails to state a claim.

Gurin's second Counterclaim seeks attorneys' fees pursuant to RPL 234 based upon a provision of the expired lease. However, inasmuch as this Court has determined that summary judgment should be granted on the basis that the lease is without force and effect as against Gurin, reciprocal attorneys fees are not warranted. Summary judgment awarding legal fees is denied. The Court notes that the same was previously denied by Judge Schneider at the end of plaintiff's non-payment proceeding and Gurin has filed a notice of appeal or that Order.

B. Plaintiff's Cross Motion

1. For Leave to Renew And/or Reargue

Plaintiff cross moves for an Order pursuant to CPLR §2211 granting leave to reargue and/or renew its prior motion, which was resolved by the Court's March 21, 2012 Order. It is uncontested that Marmelstein has not paid use and occupancy as ordered by this Court, which would warrant a striking of Marmelstein's pleading. (RPAPL 745 [2][c][i]). Marmelstein contends she mistakenly paid $742.36, she apologizes, and offers to pay the difference "by the end of this month." Plaintiff did not accept the reduced payment.

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[1]In Gurin's reply papers, she submits that she could have alternatively sought legal fees pursuant to NYCRR Section 130.1-1.1 rather than assert a claim for abuse of process and malicious prosecution. Such a claim, however, was not plead by Gurin.

2. To Dismiss Marmelstein's First and Ninth Affirmative Defenses

Plaintiff moves pursuant to CPLR §3212 to dismiss Marmelstein's first and ninth affirmative defenses set forth in her amended verified answer and affirmative defenses.

Marmelstein's first affirmative defense alleges that, "upon information and belief, the Court lacks personal jurisdiction over the Defendant in that the summons and complaint was not served in compliance with the requirements of the C.P.L.R." Marmelstein does not oppose the striking of this affirmative defense.

Marmelstein's ninth affirmative defense alleges that "the Plaintiff is barred from obtaining the relief sought in the herein action by virtue of the fact that Adina Marmelstein is the Tenant of the premises and or is the tenant of the premises pursuant to the laws of succession rights."

Marmelstein's proposed ninth affirmative defense asserts that she should be deemed a co-tenant of the premises with the right to continue in possession as a rent stabilized tenant based on the fact that her name should have been on the lease which was signed by Gurin alone in 1989. Also, she claims plaintiff accepted rent payments from both defendants. Marmelstein argues that plaintiff's refusal to permit her name on the lease was unlawful.

Marmelstein also seeks to add a tenth affirmative defense which asserts that she should be deemed entitled to a rent stabilized lease in her name in accordance with her succession rights under the statute. Marmelstein concludes that she resided in the apartment together with Gurin for the requisite time period under the statute for her to attain succession rights. Marmelstein's pleading does not state how long Marmelstein allegedly resided with Gurin, however she would have had to have resided simultaneously with Gurin in the unit for two years. (*See 245 Realty Associates v. Sussis*, 243 AD2d 29, 32 [1st Dept 1998]). Gurin states in her sworn affidavit that Gurin only lived in the subject apartment for one year. She confirms in her deposition, dated November 24, 1998, that she moved into the subject unit in March of 1990, and moved across the street in January 1991. Marmelstein does not refute Gurin's testimony.

Based on the uncontested facts, Marmelstein's ninth affirmative defense fails

as a matter of law. While Marmelstein seeks to amend her answer to supplement her ninth affirmation defense, the proposed ninth affirmation defense does not add any allegations even if true to support a claim of succession. It is uncontested that Marmelstein was not a tenant pursuant to a lease agreement. It is further uncontested that while Marmelstein may have asserted the defense in plaintiff's 1998 holdover proceeding and in plaintiff's 2008 non-payment proceeding, the former proceeding was abandoned and the latter was dismissed without prejudice. Marmelstein did not otherwise move for a declaration as to her alleged succession rights. Even if Marmelstein's claims for succession are otherwise valid, the claims would be barred by the six year statute of limitations that applies to actions seeking a declaratory judgment. See CPLR 213(1). Marmelstein's proposed amendment therefore lacks merit and would be futile.

Wherefore it is hereby

ORDERED that defendant's Ellie Gurin's motion for summary judgment is granted to the extent that plaintiff Cenpark Realty LLC's Complaint is hereby dismissed as against Gurin in its entirety, and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that plaintiff Cenpark Realty LLC's cross motion is granted to the extent that defendant Ellie Gurin's first Counterclaim is dismissed and defendant Adina Marmelstein's first and ninth affirmative defenses are stricken; and it is further

ORDERED that Ellie Gurin's motion for summary judgment on her counterclaim for attorney's fees is denied; and it is further

ORDERED that Marmelstein's cross motion to amend is denied; and it is further

ORDERED that plaintiff's motion to reargue is granted solely to the extent that defendant Adina Marmelstein must pay all use and occupancy previously ordered by this court no later than ten days after service of a copy of this order with notice of entry; and it is further

ORDERED that if Adina Marmelstein fails to timely pay all sums due as directed above, defendant's remaining affirmative defenses shall be stricken and

plaintiff shall have an immediate trial of the issues.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 17, 2012

Eileen A. Rakower, J.S.C.