Koehler v Darby
2016 NY Slip Op 32384(U)
December 2, 2016
Supreme Court, New York County
Docket Number: 158177/2014
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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RICHARD KOEHLER and JUDY KOEHLER,

Plaintiffs,

-against-

DAVID DARBY,

Defendant.

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DECISION/ORDER
Index No. 158177/2014

HON. CYNTHIA KERN, J.:

Plaintiffs commenced the instant action against defendant to recover unpaid rent allegedly due and owing pursuant to a residential lease agreement. Plaintiffs now move pursuant to CPLR § 3212 for summary judgment on their complaint. Defendant cross-moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' complaint and for summary judgment on his cross-claims for the return of the two months' rent he paid and his security deposit. The motions are resolved as set forth below.

The relevant facts are as follows. Plaintiffs own a condominium unit located at 295 Greenwich Street, Apartment Nos. 9H/8H, New York, New York (the "unit"). In or around January 2014, plaintiffs entered into a residential lease agreement with defendant whereby defendant agreed to rent the unit for a two-year term beginning in March 2014 for $10,000.00 per month (the "lease"). Plaintiffs later postponed the move-in date to April 2014. The lease provides that the tenant defaults under the lease if he does not take possession or move into the unit within fifteen days after the beginning of the lease. Further, the lease provides that whether the unit is re-rented or not after the tenant moves out, the tenant "must pay to Owner [plaintiffs] as damages" the difference between the rent specified in the lease and the amount actually received from any new tenant. In early March 2014, defendant notified plaintiffs that he planned to move to Florida and thus would not be occupying the unit. Thereafter, plaintiffs contacted their broker and entered

into an exclusive contract with him to market and relet the unit in order to mitigate their damages. Defendant then asked plaintiffs if his broker could co-market the unit with plaintiffs' broker. Plaintiff Richard Koehler responded that "[i]n terms of co brokering [sic] I suggest your broker contact Jackie Kurtz [plaintiffs' broker]. I gave her and Warburg Realty an exclusive today." Although plaintiffs' broker offered to work with defendant's broker, in part by including defendant's broker in showings of the unit, defendant's broker did not respond to her offer. According to his deposition testimony, defendant never requested the keys or access to the unit. In or around July 2014, plaintiffs entered into a residential lease agreement with new tenants to rent the unit for $8,500.00 per month.

The court first considers plaintiffs' motion for summary judgment and the portion of defendant's motion for summary judgment dismissing the complaint. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, plaintiffs' motion for summary judgment is granted and the portion of defendant's cross-motion for summary judgment dismissing the complaint is denied. Plaintiffs are entitled to summary judgment based on the existence of the lease and based on the undisputed fact that defendant told plaintiffs that he did not intend to ever occupy the unit as he was moving to Florida, thereby defaulting under the lease.

Defendant's argument that plaintiffs are not entitled to summary judgment because they failed to mitigate their damages is without merit. A landlord who owns residential premises is not required to relet the premises to mitigate his damages. *See Whitehouse Estates, Inc. v. Post*, 173 Misc.2d 558, 559 (App. Term, 1st Dept 1997), *citing Holy Properties Ltd. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, 134 (1995) ("Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a

landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages"). Moreover, the evidence before the court is that plaintiffs did mitigate their damages, by immediately listing the unit with a broker in an attempt to relet it.

Defendant's argument that he is not liable for damages on the ground that the lease was surrendered by operation of law because plaintiffs accepted his abandonment of the unit and used the unit for their own benefit is also without merit. A lease may be surrendered by operation of law where the tenant abandons the premises and the landlord reacts by accepting the abandonment and using the premises for his own benefit. *See Wofford v. Adams*, 299 A.D.2d 249, 249-50 (1st Dept 2002). In the present case, defendant has failed to establish that the lease was surrendered by operation of law as there is no evidence that plaintiffs accepted defendant's abandonment of the unit and used the unit for their own benefit. There is no evidence that plaintiffs changed the locks or prevented defendant from accessing the unit. To the contrary, defendant informed plaintiffs around the beginning of the lease term that he would not be occupying the unit and never even requested the keys or access to the unit.

Defendant's contention that plaintiffs accepted defendant's abandonment of the unit and used the unit for their own benefit because, after defendant informed plaintiffs that he planned to move to Florida and would not be occupying the unit, they gave an exclusive contract to their own broker to market and relet the unit is without merit. Plaintiffs were entitled to mitigate their damages by hiring a broker to relet the unit after defendant expressly told plaintiffs that he had no intention of ever occupying the unit.

Further, defendant's argument that the lease was surrendered by operation of law specifically because plaintiffs did not allow him to sublet the unit or assign the lease in violation of Real Property Law § 226-b is without merit. Real Property Law § 226-b provides that any lease provision purporting to waive a tenant's right to sublease or assign a lease is null and void and that a tenant must obtain the landlord's written consent to sublease or assign the lease, but also provides that a tenant may be released from a lease if he so requests if the landlord unreasonably withholds its consent for the tenant to assign the lease and may still sublet the apartment where the landlord unreasonably withholds its consent.

In the present case, defendant has failed to establish that the lease was surrendered by operation of law because plaintiffs did not allow him to sublet the unit or assign the lease as there is no evidence that defendant found a potential subtenant or assignee and actually requested plaintiffs' consent to sublet the unit or assign the lease and thus there is no evidence that plaintiffs unreasonably denied such a request. Although the lease contains a provision purporting to waive defendant's right to sublease and assign the lease, Real Property Law § 226-b does not invalidate the lease in its entirety but only provides that such provision is null and void.

Defendant's argument that he is not liable for damages because plaintiffs failed to deliver possession of the unit in violation of Real Property Law § 223-a is also without merit. Pursuant to Real Property Law § 223-a, "[i]n the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration paid."

In the present case, defendant has failed to establish that he is not liable for damages because plaintiffs failed to deliver possession of the unit in violation of Real Property Law § 223-a. It is undisputed that defendant informed plaintiffs before the lease term commenced that he was moving to Florida and would not be occupying the unit and thereafter never requested the keys or attempted to take possession of the unit.

The portion of defendant's cross-motion for summary judgment on his cross-claims is denied. Defendant has failed to show that he is entitled to recover the two months' rent he paid as the court has found that the lease was not surrendered by operation of law and that defendant did not have the right to rescind the lease and thus that he is liable for breach of the lease. Further, defendant has not shown that he is entitled to the return of his security deposit. The lease provides that "if You [defendant] do not carry out all your agreements in this Lease, Owner may keep all or part of your security deposit which has not yet been paid to You necessary to pay Owner for any losses incurred, including missed payments." As the

court has found that defendant breached the lease, the security deposit may be applied to cover plaintiffs' damages.

Accordingly, plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. It is hereby

ORDERED that an inquest is hereby directed on the issue of damages on a date to be set by the calendar clerk upon entry and service of a copy of this order together with payment of the appropriate fee. Judgment shall thereafter be entered in favor of the plaintiffs and against defendant for the amount of damages found upon the inquest. This constitutes the decision and order of the court.

DATE : 12/2/16

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.