

**Roche v Capri**

2017 NY Slip Op 31573(U)

July 27, 2017

Civil Court of the City of New York, Bronx County

Docket Number: CV-014373/16

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX: PART 35

\_\_\_\_\_  
FRANCES ROCHE, X

Plaintiff

HON. SABRINA B. KRAUS

-against-

**DECISION & ORDER**  
**Index No.: CV-014373/16**

FRANK CAPRI, 2266 SEWARD LLC,

Defendants

\_\_\_\_\_  
X

**BACKGROUND AND PROCEDURAL HISTORY**

**Frances Roche** (Plaintiff) commenced this action against **Frank Capri** and **2266 Seward LLC** (collectively “Defendants”) seeking a judgment in the amount of \$3,533.00, for the return of a security deposit and “other monies due” pertaining to a landlord tenant relationship between the parties, for apartment 2 at 2266 Seward Avenue, Bronx, New York 10473(Subject Premises).

The summons and endorsed complaint were filed on January 9, 2017, proof of service was filed March 10, 2017. Defendants failed to answer or appear and Plaintiff was directed to proceed with an inquest.

On April 28, 2017, Defendants appeared, and the court (Alpert, J) issued an order vacating Defendants’ prior default in appearing and allowing Defendants to file an answer within 20 days. A trial date was set for June 12, 2017, at 9:30 am.

On May 17, 2017, Defendants, by counsel, filed an answer and counterclaim.

Defendants assert a counterclaim for \$2263.00 for use and occupancy and attorneys fees incurred in a prior summary holder proceeding between the parties under Index Number LT-20937/16.

On June 12, 2017, Defendants moved for an order dismissing Plaintiff's claim and awarding Defendants \$3623.00 on their counterclaim. The motion was adjourned by the court to July 25, 2017, to afford Plaintiff an opportunity to submit opposition papers.

On July 25, 2017, Plaintiff appeared but had not served any opposition papers. Plaintiff declined the opportunity to further adjourn the motion for the submission of papers. After several discussions with the parties on the record, the court marked Defendants' motion submitted and reserved decision.

#### **ALLEGED FACTS**

Plaintiff was the rent stabilized tenant of record for the Subject Premises pursuant to a written lease executed on July 29, 2014 for a one year period (Ex B). The lease annexed to Defendants moving papers has neither a commencement date nor an ending date for the term of the lease, and provides for a monthly rental of \$1866.00.

Plaintiff became the recipient of a section 8 subsidy for the Subject Premises . Portions of the HAP contract are annexed to the moving papers. Although, Defendants allege rent was due from August 2014 forward, the HAP contract references a term of September 1, 2014 through August 31, 2015.

The moving papers provide no documentation to the court regarding the amount of the subsidy and what Plaintiff's share of the rent was. The moving papers provide no rent history or rent ledger to the court. No complete enforceable contract is annexed.

Defendants commenced a holdover proceeding against multiple respondents including Plaintiff, under the above referenced Index number. Although, Defendants allege the holdover was based simply on the expiration of the lease, no such cause of action would lie against a Rent Stabilized tenant, and it is unclear what the status of the Section 8 subsidy was at the time the holdover proceeding was commenced. Certainly no basis to terminate the tenancy under Rent Stabilization of the HAP contract is alleged by Defendants in their moving papers.

On June 2, 2016, Plaintiff never the less signed a stipulation in the holdover proceeding consenting to the entry of a judgment of possession and forthwith issuance of the warrant (Ex D). The stipulation provided that execution of the warrant was stayed through July 31, 2016, for Plaintiff to vacate, conditioned on the payment of \$467.00 per month in use and occupancy for June and July 2016 at a rate of \$467.00. The stipulation, neither preserved any claim for attorneys fees, nor severed any monetary claim for other use and occupancy or rent alleged due and owing.

Defendants acknowledge that Plaintiff paid the use and occupancy due under the stipulation for June and July 2016. However, Defendants seek \$1360 in attorneys fees for the holdover proceeding, and \$1796 in use and occupancy for the 10 days of August 2016 that Plaintiff remained in possession prior to vacating.

Defendants do not deny that they are holding \$1796.33 as a security deposit from Plaintiff, nor do they credit Plaintiff for said sum in any of their accountings.

**DEFENDANT'S MOTION FOR DISMISSAL AND SUMMARY JUDGMENT IS DENIED AND PURSUANT TO CPLR 3212(B) PLAINTIFF IS AWARDED PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIM FOR ATTORNEYS' FEES**

CPLR § 3212(b) provides that on a motion for summary judgment “(i)f it shall appear that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

Recognizing that “[a] motion for summary judgment must be addressed to one or more specific causes of action or defenses” (*Conroy v. Swartout*, 135 A.D.2d 945, 947, 522 N.Y.S.2d 354), the Appellate Divisions have uniformly held that a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court (see, e.g., *Frank v. City of New York*, 211 A.D.2d 478, 479, 621 N.Y.S.2d 546 [1st Dept.]; *Mercedes-Benz Credit Corp. v. Dintino*, 198 A.D.2d 901, 902, 604 N.Y.S.2d 451 [4th Dept.]; *Marshall v. New York City Health & Hosps. Corp.*, 186 A.D.2d 542, 543–544, 588 N.Y.S.2d 364 [2d Dept.]; *Conroy v. Swartout*, supra [3d Dept.]).

*Dunham v. Hilco Const. Co.*, 89 N.Y.2d 425, 429–30, (1996).

**DEFENDANTS COUNTERCLAIM FOR ATTORNEYS’ FEES INCURRED IN THE  
PRIOR HOLDOVER PROCEEDING IS DISMISSED**

Defendants have no basis in law or fact for the judgment of \$3623.00. \$1360 of said claim is alleged to be for attorneys’ fees from the holdover proceeding. As noted above there was no reservation of the right to seek attorneys’ fees in the stipulation of settlement signed by the parties in housing court, as such the claim was waived by Defendants [*Rosewohl Enterprises, LLC v Gluck* 16 Misc.3d 312(A); *512 East 11<sup>th</sup> St HDFC v Als* 10 Misc.3d 142(A)].

Based on the foregoing, Plaintiff is granted summary judgment dismissing the attorneys’ fees claim.

**DEFENDANTS CLAIM FOR USE AND OCCUPANCY FOR JULY 2017 IS DISMISSED**

Similarly, as Defendants already sued for all use and occupancy due through July 2016 in the summary holdover proceeding, they may not assert a counterclaim for the same relief in this action. The claim for use and occupancy for July 2016 is dismissed.

That leaves only Defendants' claim for 10 days of use and occupancy for August 2016. Defendant asserts it is entitled to collect the full contract rent of \$1796 for the ten days of use and occupancy. Defendants are wrong as a matter of law. Defendants are only entitled to seek additional use and occupancy for the ten days of August that it is alleged Plaintiff remained in possession (*Towne Partners LLC v RJZM, LLC* 79 AD3d 489).

However, due to the failure of movants to provide the court with all of the necessary information, the court can not determine what, if anything is alleged due for said ten days, and any sum if due, and assuming arguendo that Defendants are not relegated to seeking relief for that in the summary proceeding, would have to be off set by Plaintiff's claim for the return of her security deposit.

**THE BALANCE OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED**

The balance of Defendants' motion is denied. There are many defects preventing the award of the relief sought by Defendants. Defendants fail to provide the court with an enforceable contract, the complete HAP contract, the pleadings from the summary proceeding out of which its claims arise, proof of the legal regulated rent for the period at issue, and the tenant ledger or rent records pertaining to Plaintiff's tenancy.

Additionally, the counterclaim asserts that Plaintiff did pay July use and Occupancy, the moving papers make a contradictory assertion. The fact that there is no beginning or ending term in the lease relied upon is problematic. No information is provided by Defendants as to when the subsidy was terminated, or even what portion of what is sued for represents Plaintiff's

non-subsidized portion of the rent. Finally, Defendants do not deny that they are holding Plaintiff's security, and have shown no reason why said sum should not be returned or credited.

Based on the foregoing, the balance of the motion is denied and the action is restored to the trial calendar for October 4, 2017 at 9:30 am for trial.

This constitutes the decision and order of the Court.

Dated: Bronx, New York  
July 27, 2017

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Sabrina B. Kraus, JCC

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