

**Harlington Realty Co. LLC v Lawrence Plumbing
Supply Inc.**

2017 NY Slip Op 32510(U)

November 28, 2017

Supreme Court, New York County

Docket Number: 156301/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

HARLINGTON REALTY CO. LLC,
Plaintiff,

INDEX NO. 156301/2016

MOTION DATE 05/09/17

- v -

LAWRENCE PLUMBING SUPPLY INC. and EDWARD HONIG,
Defendants.

MOTION SEQ. NO. 001

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26

were read on this motion to/for DISMISS

In this action by plaintiff-landlord Harlington Realty Co. LLC seeking, among other things, to recover allegedly past due rent on a commercial lease, defendants Lawrence Plumbing Supply Inc., the tenant, and Edward Honig, a guarantor, move, pre-answer, to dismiss the complaint, "for an inquest to determine the exact amounts owed by Lawrence Plumbing through the date on which it lawfully vacated the premises, as offset by the security deposit which [p]laintiff continues to hold (four months' rent)," and for costs and attorneys' fees. Plaintiff opposes. After a review of the papers submitted, as well as the relevant statutes and case law, the motion is denied in its entirety.

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Ray v Ray, 108 AD3d 449, 451 (1st Dept 2013); see Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414 (2001); Leon v Martinez, 84 NY2d 83, 87-88

(1994). Initially, defendants' argument that this suit is premature is without merit, as it is well settled that "the right to sue for past due rents accrues upon the failure of the tenant to pay, and the past due rents may be sued for in monthly suits upon each default or in a joinder of causes of action for any sums past due." *Muss v Daytop Vil.*, 43 AD2d 945, 945 (2d Dept 1974); *see Ross v Ross Metals Corp.*, 87 AD3d 573, 576 (2d Dept 2011); *Runfola v Cavagnaro*, 78 AD3d 1035, 1035-1036 (2d Dept 2010).

Defendants' principal theory on this motion is premised on their assertion that, by letter dated November 30, 2015, Lawrence Plumbing advised plaintiff that it was exercising its right to surrender the premises on 120 days' notice. (Doc. No. 9.) However, the letter directed plaintiff to apply the security deposit to the rent payments and advised plaintiff that no additional rent would be forthcoming until plaintiff advised Lawrence Plumbing of the final balance remaining until the surrender date. Defendants do not point to any provision in the lease or limited lease guaranty that expressly permitted Lawrence Plumbing to demand that the security deposit be utilized as rent. Indeed, one provision of the guaranty requires that "Annual Base Rent and Additional Rent is paid in full to the surrender date." (Doc. No. 22.) Although the parties to a lease may agree that the tenant's security deposit may be used towards the final months of rent owed, assuming that the remainder of the lease terms are complied with (*see generally Walker v 18th St. Holding Corp.*, 267 App Div 141, 146 [1st Dept 1943]; *Brill v Schlosser*, 4 Misc 247 [App Term 1903]; 1 Dolan, *Rasch's Landlord and Tenant---Summary Proceedings* § 13:8 [5th ed.]), the more standard construction is that the tenant must wait until the conclusion of the lease to demand the return of the security deposit (*see generally Senz, Inc. v Hammer*, 265 NY 344 [1934]; *Hand v Rifkin*, 263 NY 416, 419 [1934]; *Lenco, Inc. v Hirschfeld*, 247 NY 44 [1928]). Since the terms of the purported surrender notice do not comport with either a plain reading of

the lease and guaranty or with the governing legal principles, resolution of this action pursuant to CPLR 3211 (a) is inappropriate.

This does not end the inquiry, however. This Court must express its concern that, in the letters between the parties, plaintiff failed to specify that its objection to the surrender notice was based on the request to apply the security deposit to the rent. The papers currently before this Court suggest that the first time that this precise objection was raised was in opposition to the instant motion. Had plaintiff made its position clear to Lawrence Plumbing at an earlier date, Lawrence Plumbing could have corrected its surrender notice. The documentary evidence submitted therefore suggests that, although it may have been improper for Lawrence Plumbing to demand that plaintiff apply the security deposit to the rent, plaintiff either waived its right to object to the surrender notice on this basis or it violated the covenant of good faith and fair dealing by failing to timely notify Lawrence Plumbing of the specific reasons why it was rejecting its surrender notice.

While it appears that the majority of the relevant communications between the parties may already be contained in the papers comprising the instant application and opposition thereto, and the issues before this Court seem to be primarily legal ones concerning contract interpretation, defendants did not request that their motion be treated as one for summary judgment, and it is not clear that the parties have deliberately charted a summary judgment course. *See Berman v Children's Aid Socy.*, 151 AD3d 680, 681 (1st Dept 2017); *Cooney v City of N.Y. Dept. of Sanitation*, 127 AD3d 629 (1st Dept 2015); *compare William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 962-963 (2d Dept 2015). For these reasons, the dispute cannot be resolved within the context of the instant motion, and defendants are required to answer the complaint.

Accordingly, it is hereby:

ORDERED that the motion to dismiss the complaint is denied in its entirety; and it is further


ORDERED that counsel for plaintiff is directed to serve defendants with a copy of this order with notice of entry, within 20 days after it is entered; and it is further

ORDERED that defendants shall file and serve an answer to the complaint within 10 days after they are served with notice of entry of this order (*see* CPLR 3211 [f]); and it is further

ORDERED that the parties are directed to appear for a conference on Wednesday, January 10, 2018 at 11:00 a.m., at 80 Centre Street, Room 280.

This constitutes the decision and order of the court.

11/28/2017
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	

APPLICATION: CHECK IF APPROPRIATE: