

**251 E. 77th St., LLC v Occupational Therapy &  
Social Work Assoc., PLLC**

2017 NY Slip Op 31868(U)

August 30, 2017

Supreme Court, New York County

Docket Number: 651158/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46  
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251 EAST 77th STREET, LLC,  
  
Plaintiff

Index No. 651158/2016

- against -

DECISION AND ORDER

OCCUPATIONAL THERAPY & SOCIAL WORK  
ASSOCIATES, PLLC d/b/a THERAPLAY,  
  
Defendant  
  
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LUCY BILLINGS, J.S.C.:

The court grants the motion by plaintiff landlord limited liability company (LLC) for summary judgment on defendant tenant professional LLC's liability for unpaid rent from November 2015 through March 2016. C.P.L.R. § 3212(b) and (e). Plaintiff establishes this claim through its member's affidavit that the parties orally agreed to a month-to-month tenancy for a specific amount of rent, which defendant failed to pay. International Plaza Assoc., L.P. v. Lacher, 104 A.D.3d 578, 579 (1st Dep't 2013); Yetnikoff v. Mascardo, 63 A.D.3d 473, 475 (1st Dep't 2009).

The affidavit of defendant's member supports its defense and counterclaims of partial constructive eviction by alleging that flooding and water damage, of which plaintiff was aware, prevented defendant from fully using the rented space. Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77, 83 (1970); Schwartz v. Hotel Carlyle Owners Corp., 132 A.D.3d 541, 542 (1st Dep't 2015); 225 E. 64th St., LLC v. Janet H. Prystowsky, M.D.,

P.C., 96 A.D.3d 536, 537 (1st Dep't 2012); Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d 167, 172 (1st Dep't 2010). Plaintiff's member, however, attests that plaintiff repaired the cause of the flooding in June 2015, which defendant fails to rebut with any showing that the condition continued into November 2015. 225 E. 64th St., LLC v. Janet H. Prystowsky, M.D., P.C., 96 A.D.3d at 537; Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 172.

Nonetheless, defendant's member further alleges a lack of heat in the premises during November 2015 through January 2016, as well as plaintiff's awareness of this condition through defendant's notification of plaintiff's agents and employees, and raises factual issues regarding plaintiff's responsibility to provide heat. Plaintiff, moreover, admits that its renovation of the elevator prevented access to the lower level of the rented premises that defendant used to provide therapy to disabled children and fails to show that this condition did not continue at least through 2015. See Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 172. Defendant's member does not attest that any of the other conditions of which defendant complained constructively evicted it from part of the premises.

Although the inoperable elevator prevented defendant's use of the lower level, defendant never alleges that the lack of heat or even the flooding prevented use of the entire rented premises. Defendant also admits that it was never actually evicted from the premises. See Eastside Exhibition Corp. v. 210 E. 86th St.

Corp., 18 N.Y.3d 617, 622-23 (2012); Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d at 82-83; Marchese v. Great Neck Terrace Assoc., L.P., 138 A.D.3d 698, 699-700 (2d Dep't 2016); Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d 453, 453 (2d Dep't 2005). Therefore the constructive eviction defense and counterclaims entitle defendant to only a partial abatement of the rent claimed. Defendant fails to identify any undisclosed evidence necessary to oppose summary judgment on liability for rent from November 2015 to March 2016, or on the extent of defendant's constructive eviction, to render summary judgment premature pending disclosure. C.P.L.R. § 3212(f); Santana v. Danco Inc., 115 A.D.3d 560, 560 (1st Dep't 2014); Emery v. Parker, 107 A.D.3d 635, 636 (1st Dep't 2013); Griffin v. Pennoyer, 49 A.D.3d 341, 341 (1st Dep't 2008); Artigas v. Renewal Arts Realty Corp., 22 A.D.3d 327, 328 (1st Dep't 2005).

Plaintiff also establishes without rebuttal the absence of merit to defendant's first four affirmative defenses, as well as its fifth affirmative defense insofar as it claims actual eviction and its seventh affirmative defense and second counterclaim also claiming actual eviction. Defendant waived its first affirmative defense of inadequate service by failing to move to dismiss the complaint on that ground within 60 days after filing an answer. C.P.L.R. § 3211(a)(8) and (e). Plaintiff's un rebutted account of an oral agreement to a month-to-month tenancy that defendant breached defeats defendant's second and

third affirmative defenses of lack of privity of contract and failure to state a claim. The complaint filed March 7, 2016, well within the limitations period of six years applicable to a breach of contract claim, C.P.L.R. § 213(2), also defeats defendant's fourth affirmative defense that plaintiff's action is barred by the statute of limitations. Defendant cites no statutory, regulatory, or contractual basis to support the ninth affirmative defense and fourth counterclaim of attorneys' fees. Mount Vernon City School Dist. v. Nova Cas. Co., 19 N.Y.3d 28, 39 (2012); Baker v. Health Mgt. Sys., 98 N.Y.2d 80, 88 (2002); Atlantic Dev. Group, LLC v. 296 E. 149th St., LLC, 70 A.D.3d 528, 529 (1st Dep't 2010).

The factual issues regarding partial constructive eviction due to the lack of heat and the elevator renovation, however, prevent summary judgment dismissing defendant's other counterclaims and fifth affirmative defense insofar as it claims a set-off against the amount of rent owed. Therefore the court grants plaintiff's motion for summary judgment on defendant's liability for unpaid rent and summary judgment dismissing defendant's first through fourth affirmative defenses, fifth affirmative defense insofar as it claims actual eviction, seventh affirmative defense and second counterclaim, and ninth affirmative defense and fourth counterclaim. C.P.L.R. §§ 3211(b), 3212(b) and (e). The court denies plaintiff's motion for summary judgment insofar as it seeks the full rent for November 2015 through March 2016 and dismissal of defendant's

fifth affirmative defense of constructive eviction, sixth affirmative defense and first counterclaim, and third affirmative defense and eighth counterclaim. C.P.L.R. §§ 3211(b), 3212(b).

DATED: August 30, 2017



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
**J.S.C.**