

GG Broadway Terrace, Inc. v Favin
2018 NY Slip Op 31049(U)
May 21, 2018
Supreme Court, New York County
Docket Number: 654810/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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GG BROADWAY TERRACE, INC.,

Plaintiff,

Index No. 654810/16

-against-

LAURA FAVIN,

MOTION SEQ. 001

Defendant.

DECISION & ORDER

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Nancy M. Bannon, J.:

I. Introduction

This is a landlord-tenant dispute between the plaintiff, GG Broadway Terrace, Inc., as landlord, and the defendant, Laura Favin, as tenant, in connection with a one-year lease executed by the parties in July, 2006, with respect to an apartment at 5 Broadway Terrace in Manhattan (hereinafter the Premises). The defendant moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the complaint or, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the complaint, and for summary judgment on her counterclaims against the plaintiff.

The plaintiff cross-moves pursuant to CPLR 3012(d) for leave to serve and file a late reply to the defendant's counterclaims.

The defendant's motion is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(5), and the motion is otherwise denied, albeit without prejudice as to that

branch of the motion which is for summary judgment on the counterclaims. The plaintiff's cross-motion for leave to file a late reply to the counterclaims is granted.

II. Background

The parties executed a one-year lease in July, 2006, with respect to an apartment at the Premises. The lease was not renewed and, in 2009, the plaintiff commenced a non-payment proceeding against the defendant in Housing Court. One of the primary issues addressed in that proceeding was whether a person known as David Gottlieb was entitled to occupy the apartment. That proceeding was settled in July, 2009. The settlement agreement provided, among other things, that the plaintiff would not commence any further proceedings against the defendant related to her tenancy or to Gottlieb's occupancy. It further provided that the plaintiff "does unconditionally release, remise, and forever discharge" the defendant

"of and from any and all manner of claims, actions, causes of action, suits, debts, damages, accounts, bonds, covenants, contracts, agreements, promises, obligations, guarantees, liens, mechanics' liens, judgments, counterclaims, crossclaims, defenses and/or demands whatsoever, including claims for contribution and/or indemnity, and liabilities of any kind, if any, whether suspected or unsuspected, contingent or fixed, known or unknown, past or present, asserted or unasserted, contingent or liquidated, at law or in equity, or resulting from any assignment thereof that [plaintiff] now has or ever had against [defendant], whether based in contract, tort, statute, or any other

legal or equitable theory of recovery, which it has or may ever have had, owned or held at any time from the beginning of time to the date of execution hereof, as well as all future claims, liabilities, etc., relating in any way to David Gottlieb's presence in or occupancy of the Apartment."

It is undisputed that, at the time the settlement agreement was executed, the defendant was no longer living in the subject apartment, and that the apartment was occupied by a different person.

The plaintiff commenced the instant action in September, 2016, asserting a claim against the defendant to recover for use and occupancy from October, 2010, through August, 2013. The defendant denied all allegations of liability, and asserted counterclaims to recover for breach of the settlement agreement, emotional distress, and violation of General Business Law § 349, and for an award of attorneys' fees. She also requested sanctions and a permanent injunction. In her counterclaims, the defendant asserts that she was not the tenant from October, 2010, through August, 2013, that the plaintiff knew that she had long since vacated the apartment, and that all claims, past and future, that did relate to her tenancy had been resolved pursuant to the parties' settlement and mutual releases executed in 2009.

The plaintiff did not serve a reply to the defendant's counterclaims, and now seeks leave to do so.

The plaintiff states that its current managing agent began

managing the Premises after the settlement agreement was executed. The plaintiff's attorney states that neither he, nor the managing agent, were aware of the existence of terms of the settlement agreement at the time the instant action was commenced on the plaintiff's behalf. As such, they assert that they believed that defendant was a proper party. They also contend that the defendant refused to provide a copy of the settlement agreement upon request, thus prolonging the instant litigation. The plaintiff's attorney states that, once he became aware of the terms of the settlement, the plaintiff ceased prosecution of the instant action.

With respect to the plaintiff's failure to reply to the defendant's counterclaims, the plaintiff argues that the cause was law-office failure arising from the departure of the attorney handling this action from the firm representing it. They submit an affirmation from the current handling attorney explaining the circumstances of the departure of the former handling attorney.

III. Discussion

A. Defendant's Motion

Although the allegations of the complaint are sufficient to state a cause of action (see CPLR 3211[a][7]; 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]), it must nonetheless be dismissed on the ground of release. "Generally, a

valid release constitutes a complete bar to an action on a claim which is the subject of the release." Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 NY3d 269, 276 (2011). The action is thus barred by virtue of the mutual releases set forth in the parties' 2009 settlement agreement. See CPLR 3211(a)(5); Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., supra; Allen v Riese Org., Inc., 106 AD3d 514 (1st Dept. 2013). Since the complaint must be dismissed on this ground, there is no basis for dismissing the complaint pursuant to CPLR 3211(a)(1), since it would be "redundant to permit defendant to" rely on both "the affirmative defense of release as embodied in the document and a separate defense based solely on the existence of said document." Sotomayor v Princeton Ski Outlet Corp., 199 AD2d 197, 197 (1st Dept. 1993).

A motion for summary judgment on a pleading presupposes the joinder of issue thereon. See Wittlin v Schapiro's Wine Co., 178 AD2d 160 (1st Dept. 1991); see also Spagnoletti v Chalfin, 131 AD3d 901 (1st Dept. 2015). Since the plaintiff has not replied to the counterclaims, the defendant's motion for summary judgment on the counterclaims is procedurally inappropriate, and must be denied on that ground. Since the court, as set forth below, is granting the plaintiff's cross motion for leave to serve a late reply, the denial of summary judgment to the defendant is without prejudice to renewal after a reply has been served.

B. Plaintiff's Cross-Motion

With respect to the plaintiff's request for leave to serve a late reply, CPLR 3012(d) provides that "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In this regard, the plaintiff must establish a reasonable excuse for its default in replying, and a potentially meritorious defense to the counterclaims. See Simons v Doyle, 262 AD2d 236 (1st Dept. 1999). It is well established that "there exists a strong public policy in favor of disposing of cases on their merits." Gecaj v Gjonaj Realty & Mgt. Corp., 149 AD3d 600, 602 (1st Dept. 2017) (internal quotation marks and citation omitted).

The plaintiff has adequately shown that law-office failure provides a reasonable excuse for not timely serving a reply (see CPLR 2005; Chevalier v 368 E. 148th St. Assoc., LLC, 80 AD3d 411 [1st Dept. 2011]; Polir Constr., Inc. v Etingin, 297 AD2d 509 [1st Dept. 2002]), and it has adequately demonstrated that it may have a meritorious defense to some or all of the defendant's counterclaims, both for failure to state a cause of action, and based on the lack of knowledge of the terms of the settlement agreement and the defendant's purported refusal to provide evidence of such agreement. Leave to file a late reply to the counterclaims is thus granted. Whether the plaintiff's defenses

ultimately prove availing is not at issue on the cross motion. The court finds that disposition of defendant's counterclaims on the merits is the preferred course here, rather than a disposition based on a default.

IV. Conclusion

Accordingly, it is

ORDERED that the defendant's motion is granted to the extent that the complaint is dismissed on the ground of release (CPLR 3211[a][5]), the motion is otherwise denied without prejudice to renewal as to that branch of the motion which is for summary judgment on the defendant's counterclaims, the complaint is dismissed, the counterclaims are severed, and the Clerk of the court is directed to enter judgment accordingly; and it is further,

ORDERED that the plaintiff's cross-motion for leave to file and serve a late reply to the defendant's counterclaims is granted; and it is further,

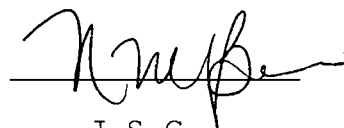
ORDERED that the defendant is directed to serve a copy of this order with notice of entry upon the plaintiff within 15 days of this order; and it is further,

ORDERED that the plaintiff is directed to serve a reply to the defendant's counterclaims within 10 days of service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the court.

DATED: May 21, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON