Pollack v Ovadia
2019 NY Slip Op 31688(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 162668/2015
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32
Justice

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INDEX NO. 162668/2015

DEBORAH POLLACK and SIMCHA POLLACK,

Plaintiffs,

- v -

ARIEL OVADIA,

Defendant.

DECISION, ORDER and JUDGMENT AFTER TRIAL

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Plaintiffs, defendant's former landlords, brought this action for past due rent and additional rent and attorneys' fees after defendant vacated the apartment. The matter was tried before this Court on March 29 and May 22, 2019. Plaintiffs were represented by counsel and presented one party-witness, Deborah Pollack, one of the former landlords. The defendant appeared self-represented; he testified on his own behalf. In this opinion, the defendant is referred to as "tenant" or "defendant"; the plaintiffs as "landlord(s)", "plaintiff(s)" or, by their names when appropriate.

Based upon the evidence introduced at trial and having had the opportunity to observe the demeanor and credibility of the witnesses' testimony, the court finds as follows:

The parties entered into a written lease for one year, from January 15, 2014 to January 14, 2015 for apartment 11D at 220 Riverside Boulevard in Manhattan; the rent was $5200 each month and, upon signing, the tenant also paid a month for security and the last month's rent.

According to the lease, the tenant had an option to renew the lease for one year at the rate of $5408 per month. In order to exercise that option, the tenant was required to provide the landlord with 60 days prior written notice and to supplement the security deposit and last months' rent an additional $208 each (the difference in the old and new rent). Sixty days' notice meant that the notice should have been given by mid-November of 2014.

Everyone agreed that the tenant remained in the premises until September 2015 and that he never supplemented the last month's rent or security deposit.

The first contested issue at the trial was whether the lease was renewed for the full year or whether the tenant was a month to month tenant. The documents tell that story. The Court finds that the lease was renewed for a full year, even though the notice was not timely given and even though the security deposit and last month's rent were not supplemented. This is because of Exhibit 8, an email exchange between the parties. On December 1, 2014, Mr. Pollack wrote to the defendant pointing out that the defendant did not timely exercise the renewal option, but offered a six month renewal instead: "Nevertheless, I am willing to discuss with you a six month renewal (to 7/14/15), but with no option to extend for another six months after that." Instead of accepting that offer of six months, the defendant insisted on a full year; in an emailed response to the six month offer, the tenant wrote back the next day "We will renew for one year". The next email on this topic admitted into evidence was Mrs. Pollack's email dated January 11, 2015 stating "I am writing to confirm the terms of your renewal of the lease … commenc[ing] on January 15, 2015 and expiring on January 14, 2016… You are also required to supplement the security deposit …"

The Court finds that the although the tenant did not properly exercise the option

or supplement the security and last month's rent, the landlord waived strict compliance and honored the renewal term of one year; the tenant demanded a year and started paying the higher rent when the new term began. And until the tenant decided he wanted to leave early, he was quite happy with that arrangement. Certainly, the tenant cannot complain that the landlord did not evict him for failing to supplement the security and last month's rent. The testimony of Mr. Pollack was credible throughout the trial; on this point, as the landlord, she decided that as long as the tenant was paying the rent, it wasn't worth the time or aggravation to chase the $416. She asked for it in writing, made clear it was expected, and preserved her rights to it. That was sufficient.

The last time the tenant paid rent was May 2015. His lease term expired in January 2016. Seven months of rent at $5,408 per month is $37,856.00. A late fee of $270.40 for seven months is $1,892.80 (there is a late fee for the last month because it was not fully prepaid as tenant never supplemented it). Together the late fees and rent due is $39,748.80. However, the tenant is entitled to a credit for his (unsupplemented) security deposit and last month's rent of $10,400 in total. Therefore, the net in rent and late fees is $39,748.80 - $10,400 = $29,348.80.

The tenant claimed that he gave the landlord plenty of notice that he was leaving. In an email to the landlord dated May 4, 2015, the tenant said "Our home purchase is immediate, but as a courtesy, we are giving you 90 days notice of our move". Although the 90 days would have been early August, the tenant left in September. To the extent that the tenant claims a surrender of the leasehold, that claim is unproven. There is a difference between abandoning a leasehold and surrendering it. When a tenant is obligated under a lease, he must pay the rent. If he moves out and abandons the space, he still must pay the rent. On the other hand, if a tenant wants to leave the premises and avoid future rental obligations, then he must surrender the premises to the

landlord and the landlord must accept the surrender. See *Guadagni v. Chong*, 2 Misc3d 126(A), 784 NYS2d 920 [App Term, 9th & 10th Jud Dists 2003]. Therefore, to relieve him of liability for future rents, the tenant bears the burden of proving that the landlord has accepted a surrender. See *HIP Hop Fries Shop, Inc. v. Gibbons Realty Corp.*, 3 Misc3d 1011(A), 2004 NY Slip Op 51325(U) [Civ Ct, NY Cty 2004] ("The party claiming surrender of possession must prove not only the surrender by the tenant, but also the acceptance of that surrender by the landlord."); *Byrnheim-Linden Realty Corp. v. Great Eastern Contracting Co., Inc.*, 41 Misc3d 361, 362, 245 NYS2d 490, 492 [Dist Ct, Nassau Cty 1962].

Whether a landlord has accepted a tenant's abandonment so as to result in a surrender depends on the landlord's intent. See *Precision Dynamics Corp. v. Retailers Representatives Inc.*, 120 Misc2d 180, 182, 465 NYS2d 684, 686 [Civ Ct, NY Cty 1983]. A landlord's acceptance must be shown either by an express written agreement or by acts and conduct clearly indicating an intention to accept the tenant's surrender. *Id.* In the absence of a writing, there must be some unequivocal act on the landlord's part which unmistakably demonstrates his intention to terminate the lease and the relationship of landlord and tenant. See *Building Supervision Corp. v. Skolinsky*, 50 Misc2d 375, 377, 270 NYS2d 454, 457 [Civ Ct, NY Cty 1966]. Although the tenant here showed proof that he notified the landlord that he would be breaking his lease at some future point, he failed to show any proof that he surrendered the premises to the landlord and that the landlord accepted the surrender.

The tenant was also responsible for electric. At the trial, the landlord only sought the unpaid electric charges for when the tenant was actually in possession, that is, from March to September. The Court finds $658 in electric charges was proven.

The claim for a refrigerator restocking fee is denied. There was not sufficient proof of the payment of a restocking fee.

The claim for damages, namely $700 for holes to the walls, is also denied. There was insufficient proof that plaintiffs had to pay $700 to patch the walls where defendant hung pictures and other items.

That brings the Court to the claim for attorney's fees and expenses of $55,296.36 (this amount does not include the second day of the trial). There is no doubt that the tenant has caused a vast amount of litigation here, including an appeal. There is also no doubt that everyone involved is stubborn. However, the Court finds that the attorney fees charged here are not reasonable.

Notably, no contemporaneous records of the timekeeper were introduced; only the bills addressed to the clients (and actual receipts for expenditures) were provided. The bills were a narrative of what was done by date, and within the paragraph (in parenthesis) was the time spent on each item.

The short cross-examination by the self-represented defendant demonstrated excessive billing and inconsistencies in the attorney's testimony and billing. At $400/hour, the attorney testified that his minimum time entered was .2 hours; this means even a two word text, if billed, was billed at $80. He repeatedly testified that his minimum billing was .2; however, when confronted with time entered on 3/28/17 showing a time entered of .1, the attorney shrugged it off as an error. Efiling documents was charged .3 (18 minutes) on June 6, 2016; clearly, it doesn't take 18 minutes to click and drag a document. While the attorney testified that he had decades of experience in real estate law, he charged five and a half hours to draft a simple breach-of-lease complaint. On January 25, 2015 he charged 2.9 hours to draft an RJI and Request

for Preliminary Conference and review an answer with counterclaims and drafted a reply thereto (later, another 1.3 hours was spent revising the reply and mailing it out). On January 31, 2015 he charged 2.4 hours ($1,000) for doing research to determine the consequences of a landlord commingling the security deposit with his own funds (GOL 7-103) and another .6 hours for various clerical work in copying the RJI and related documents drafted a few days earlier. Another example of inefficient use of time is about 36 hours billed preparing for the simple trial, including an entry for "starting to organize file" on 3/12/19 (4.2 hours).

To be clear, the Court is not at all finding that the billing was fraudulent. Rather, it seems as if the attorney was inefficient in use of his time; the Court observed that the attorney was not terrifically organized at the trial, either, and the trial took longer than it should have taken. Yet throughout the case the attorney billed as if he did not have to justify the bills to the client because the tenant was going to pay it all in the end anyway. In other words, instead of writing off time he wasted, or writing off time he spent doing clerical work, or not charging .2 for returning a text, he billed it.

The Court must determine what are the reasonable attorneys' fees. Here, although the attorney billed a total of $53,179.20, the Court finds reasonable fees for this case, with simple issues but vigorously litigated, including an appeal, are $31,000 (this includes the second day of trial although not yet billed). The expenses are all justified and $2,117.16 is allowed.

Therefore, the plaintiffs have met their burden of proof showing that defendant is obligated under the lease to pay (i) late fees and net rent due (crediting tenant's security and last month partial prepayment) of $29,348.80 plus interest from September 15, 2015 (the midpoint of months due), plus (ii) electric of $658 plus interest from September 15, 2015, plus (iii) reasonable attorneys' fees of $31,000 plus interest from the date judgment is entered and (iv)

expenses of $2,117.16 plus interest from the date judgment is entered, for a total of $63,123.96 plus the applicable interest calculations.

Accordingly, it is hereby

ORDERED and ADJUDGED that plaintiffs have judgment against defendant for $63,123.96 plus interest as set forth in the previous paragraph, and the clerk is directed to calculate and enter said judgment upon presentation of the proper papers therefor.

This is the Decision, Order and Judgment of the Court.

Dated: June 3, 2019

NYC

6/3/2019
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE