

10 E. 13th St. LLC v Bidjoka

2020 NY Slip Op 31593(U)

May 26, 2020

Supreme Court, New York County

Docket Number: 155641/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

10 EAST 13TH STREET LLC

Plaintiff,

- v -

JOSEPH BIDJOKA,

Defendant.

-----X

INDEX NO. 155641/2018
MOTION DATE 07/31/2019
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, 10 East 13th Street LLC (the Plaintiff)'s motion for summary judgment is granted solely to the extent of its claim for breach of contract for outstanding rent charges of \$46,568.40, but otherwise denied.

The Relevant Facts and Circumstances

Reference is made to a Standard Form of Apartment Lease (NYSCEF Doc. No. 39; the Original Lease), dated April 10, 2015 as extended pursuant to a certain Lease Renewal (NYSCEF Doc. No. 40; the Lease Renewal; the Lease Renewal, together with the Original Lease, collectively, the Lease), dated May 10, 2016, each by and between Pan Am Equities as Managing Agent for 10 East 13th Street, LLC as owner and Joseph Bidjoka as tenant, pursuant to which Mr. Bidjoka would pay monthly rent of \$4,995 for the lease term beginning on April 15, 2015 and ending on May 31, 2016, and pay monthly rent of \$5,095 for the lease term beginning on June 1, 2016 and ending on May 31, 2017.

The Lease provided that failure to adhere to certain conditions constituted a default by the tenant:

16. DEFAULT

1. You default under the Lease if You act in any of the following ways:
 - a. You fail to carry out any agreement or provision of this Lease;
 - b. You or another occupant of the Apartment behaves in an objectionable manner;
 - c. You do not take possession or move Into Apartment fifteen (15) days after beginning of this Lease;
 - d. You and other legal occupants of the Apartment move out permanently before this Lease ends;

If You do default in any one of these ways, other than a default in the agreement to pay rent, Owner may serve You with a written notice to stop or correct the specified default within ten (10) days. You must then either stop or correct the default within 10 days, or, if You need more than 10 days, You must begin to correct the default within 10 days and continue to do all that is necessary to correct the default as soon as possible

...

3. If You do not pay Your rent when this Lease requires after a personal demand for rent has been made, or within three (3) days after a statutory written demand for rent has been made, or If the Lease ends, Owner may do the following: (a) enter the Apartment and retake possession of it if You have moved out; or (b) go to court and ask that You and all other occupants In the Apartment be compelled to move out.

Once this Lease has been ended, whether because of default or otherwise, You give up any right You might otherwise have to reinstate or renew the Lease.

(NYSCEF Doc. No. 39, at 4).

The Lease also provided for certain remedies if the tenant was in default:

17. REMEDIES OF OWNER AND YOUR LIABILITY If this Lease is ended by Owner because of Your default, the following are the rights and obligations of You and Owner:

- A. You must pay Your rent until this Lease has ended. Thereafter, You must pay an equal amount for what the law calls “use and occupancy” until You actually move out.

- B.** Once You are out, Owner may re-rent the Apartment or any portion of It for a period of time which may end before or after the ending date of this Lease. Owner may re-rent to a new tenant at a lesser rent or may charge a higher rent than the rent in this Lease,
- C.** Whether the Apartment is re-rented or not, You must pay to Owner as damages:
1. The difference between the rent in this Lease and the amount, if any, of the rents collected in any later lease or leases of the Apartment for what would have been the remaining period of this Lease; and
 2. Owner's expenses for advertisements, brokers fees and the cost of putting the Apartment in good condition for re-rental; and
 3. Owner's expenses for attorney's fees.
- D.** You shall pay all damages due in monthly installments on the rent day established in this Lease. Any legal action brought to collect one or more monthly installments of damages shall not prejudice in any way Owner's right to collect the damages for a later month by a similar action. If the rent collected by Owner from a subsequent tenant of the Apartment is more than the unpaid rent and damages which You owe Owner, You cannot receive the difference, Owner's failure to re-rent to another tenant will not release or change Your liability for damages, unless the failure is due to Owner's deliberate Inaction.

(*Id.*, at 5).

Further, the tenant was to reimburse the landlord for the cost of any repairs to the apartment resulting from any misuse or negligence pursuant to the Original Lease:

19. FEES AND EXPENSES

- A. Owner's Right.** You must reimburse Owner for any of the following fees and expenses incurred by Owner:
1. Making any repairs to the Apartment or the Building which result from the misuse or negligence by You or persons who live with You, visit You, or work for You;
 2. Repairing or replacing property damaged by Your misuse or negligence;
 3. Correcting any violations of city, state or federal laws or orders and regulations of insurance rating organizations concerning the Apartment or the Building which You or persons who live with You, visit You, or work for You have caused;
 4. Preparing the Apartment for the next tenant if You move out of Apartment before the Lease ending date;

5. Any legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of Your actions;
6. Removing all of Your property after this Lease Is ended;
7. All other fees and expenses incurred by Owner because of Your failure to obey any other provisions and agreements of this Lease;

These fees and expenses shall be paid by You to Owner as additional rent within thirty (30) days after You receive Owner's bill or statement. If this Lease has ended when these fees and expenses are incurred, You will still be liable to Owner for the same amount as damages

(Id.).

The Plaintiff commenced an eviction proceeding because Mr. Bidjoka failed to pay monthly rent as it became due (NYSCEF Doc. No. 37, ¶ 8). On October 4, 2017, the City of New York Office of the Marshall executed a warrant declaring that the Plaintiff had possession of all rooms at 10 East 13th Street (NYSCEF Doc. No. 41, the **Warrant**) and on October 5, 2017, Mr. Bidjoka was evicted from his apartment (NYSCEF Doc. No. 37, ¶ 8).

The Plaintiff filed its summons and complaint on June 15, 2018 for (1) breach of the Lease and (2) an account stated, both in the sum of \$57,703.40. Mr. Bidjoka did not file a timely response to the complaint such that the court granted the Plaintiff's motion for default judgment pursuant to a decision and order, dated December 6, 2018 (NYSCEF Doc. No. 14; the **Default**).

On January 11, 2019, Mr. Bidjoka moved to vacate his Default and pursuant to a so-ordered stipulation (NYSCEF Doc. No. 29), dated January 17, 2019, the Plaintiff agreed to vacate the Default. After the completion of discovery, the Plaintiff filed the note of issue on June 27, 2019 and subsequently moved for summary judgment on July 31, 2019.

Two days before the return date of this motion, Mr. Bidjoka requested by letter to Plaintiff's counsel and the court (NYSCEF Doc. No. 47), dated August 28, 2019, to adjourn the motion because he had been unaware of the return date and he sought time to retain legal counsel. By letter (NYSCEF Doc. No. 49), e-filed on January 9, 2020, Mr. Bidjoka requested to adjourn the hearing scheduled on January 10, 2020 due to illness and advised that he intended to file opposition. In accordance with Mr. Bidjoka's request, the motion was adjourned to March 31, 2020 (NYSCEF Doc. No. 49).

However, prior to the date of the rescheduled oral argument, by order dated, March 13, 2020, and in response to the world wide pandemic associated with COVID-19, Chief Administrative Judge Lawrence Marks ordered that all motions be heard on submission and without argument, and by order, dated March 22, 2020 (the **March 22 Order**) Chief Administrative Judge Marks ordered that no filings in "non-essential" (as defined by the Chief Administrative Judge) court matters be suspended until further notice.

Inasmuch as Mr. Bidjoka had not filed further opposition to this motion as of the date of Chief Administrative Judge Marks's March 22 Order, the court emailed Mr. Bidjoka to inquire whether he intended to file opposition to the instant motion and he confirmed that he would file opposition by email on March 27, 2019. The matter was subsequently adjourned to May 25, 2020 to permit Mr. Bidjoka and the Plaintiff to file their respective opposition and reply papers.

Discussion

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. Breach of Contract

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff’s performance, (3) the defendant’s breach and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

In support of its motion for summary judgment, the Plaintiff adduces documentary evidence of the Lease, which lasted from April 15, 2015 to May 31, 2017, and the Warrant indicating that the Plaintiff regained legal possession of the premises on October 4, 2017. Jason Harounian, agent of the Plaintiff, attests that Mr. Bidjoka did not surrender his apartment after the Lease ended on May 31, 2017 and remained there until the Plaintiff was forced to commence an eviction proceeding (NYSCEF Doc. No. 37, ¶ 13). The Plaintiff also attached a ledger of Mr. Bidjoka’s outstanding rent charges, amounting to \$46,568.40 for the period of May 2016 to October 2017 minus relevant deductions. Mr. Bidjoka has not made any payment although the Plaintiff issued a demand for the outstanding sum (NYSCEF Doc. No. 37, ¶ 10).

In opposition, Mr. Bidjoka submits an unsigned, unsworn and unnotarized two-page document that is insufficient to raise a triable issue of fact in opposition to the instant motion (*see Pollack v Ovadia*, 173 AD3d 464, 464 [1st Dept 2019] [affirming motion court’s denial of defendant’s

motion for summary judgment because pro se defendant's unnotarized affirmation was properly rejected], citing *Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 [1981]). The unsigned, unsworn and unnotarized affidavit also cannot be excused by mere lack of access to a notary as (1) it would still be unsigned, (2) unsworn and (2) New York State Governor Andrew Cuomo has permitted documents to be notarized remotely to address the current situation with Covid 19 (see Executive Order 202.7).

Under these circumstances, the Plaintiff has proved the existence of a valid lease, the Plaintiff's performance and Mr. Bidjoka's breach by his failure to pay rent. As a result, the Plaintiff is entitled to judgment for \$46,568.40 on its claim for breach of contract to the extent that rent payments are outstanding for the duration of Mr. Bidjoka's Lease and until he was evicted on October 5, 2018.

Although the Plaintiff further claims that it is entitled to recovery for restoration charges after Mr. Bidjoka was evicted pursuant to an invoice, dated November 22, 2017, amounting to \$11,135 (NYSCEF Doc. No. 42), this invoice is insufficient to establish a prima facie case for recovery of the restoration charges because the record is silent as to whether the fees charged resulted from the misuse or negligence of Mr. Bidjoka, in accordance with the terms of the Lease (NYSCEF Doc. No. 6, ¶ 19). By way of example, the restoration invoice includes a new refrigerator and the installation of a ceramic back splash tile, which may have been necessitated by age and ordinary wear and tear.

Accordingly, the Plaintiff is entitled to summary judgment on its claim for breach of contract solely to the extent that it covers outstanding rent charges of \$46,568.40.

B. Account Stated

An account stated is the parties' agreement to an account based on their prior transactions with respect to the correctness of the account items and balance due (*Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 250 [1st Dept 2007]). On a motion for summary judgment, a party establishes entitlement to an account stated by providing evidence of the relevant invoices, receipt by the defendant, and lack of objection by the defendant for a substantial period of time (*L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]).

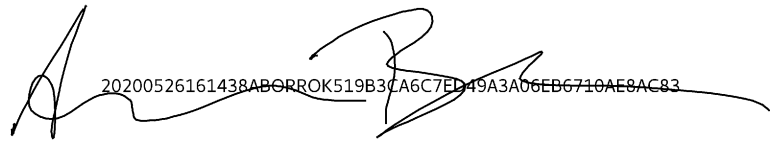
The Plaintiff did not establish that it is entitled to an account stated because there is no evidence that it submitted regular invoices to Mr. Bidjoka and that these invoices were properly received. Accordingly, the branch of the Plaintiff's motion for summary judgment on its claim for an account stated is denied.

Accordingly, it is

ORDERED that the Plaintiff's motion for summary judgment is granted solely to the extent of its claim for breach of contract for outstanding rent charges of \$46,568.40, but otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of 10 East 13th Street LLC and against Joseph Francis Bidjoka in the amount of \$46,568.40, plus statutory interest of 9% from the date of entry of judgment, plus costs and disbursements as calculated by the Clerk. The Plaintiff shall have execution thereof, and further

ORDERED that upon service of a copy of this decision and order on the Clerk of Trial Support, the Clerk shall place this matter on the Part 40 Trial Calendar for the earliest available trial date.


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5/26/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: