

Lai v Watson
2021 NY Slip Op 32515(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 154279/2021
Judge: David Benjamin Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN, J.S.C., PART 58

Justice

-----X

INDEX NO. 154279/2021

DAVID LAI,

Plaintiff,

MOTION SEQ. NO. 001

- v -

KENNETH WATSON, JOHN DOE, and JANE DOE,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for SUMMARY JUDGMENT.

In this action seeking, inter alia, declaratory relief, plaintiff/landlord David Lai moves, pursuant to CPLR 3212, for summary judgment against defendants/tenants Kenneth Watson, John Doe, and Jane Doe. Defendant Watson opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a dispute between plaintiff, the owner of a residential building located at 33 West 127th Street in Manhattan ("the premises") and defendant, who took possession of apartment 4 at the premises pursuant to a one-year lease commencing September 1, 2017 and expiring on August 31, 2018. Doc. 1 at par. 3; Doc. 9. The lease provided, *inter alia*, that:

- 1) Defendant was required to pay rent for the entire lease term and, after the lease expired, he was required to pay "use and occupancy" ["U&O"] until he "actually move[d] out" (Doc. 9 at par. 18 [a]);

- 2) Defendant was required to pay “[a]ny legal fees and disbursements for legal actions or proceedings brought by [plaintiff] against [defendant] because of a lease default by [defendant] or for defending lawsuits brought against [plaintiff] because of [defendant’s] actions” (Doc. 9 at par. 20 [5]); and
- 3) Defendant was required to pay plaintiff for any “fees and expenses incurred by [plaintiff] because of [his] failure to obey any other provisions of [the] lease” (Doc. 9 at par. 20 [7]).

After the lease expired on August 31, 2018, defendant remained in possession of the apartment and continued to pay rent. Doc. 7 at pars. 6, 11. On December 22, 2020, plaintiff served defendant with a “Ninety (90) Day Notice of Termination and Non-Renewal” dated December 16, 2020 (“the 90-day notice”). Doc. 10. The 90-day notice advised defendant that he was required to vacate the apartment on or before March 31, 2021 or plaintiff would commence proceedings to remove him and that he would also seek U&O, costs, and attorneys’ fees if he refused to leave. Doc. 10. Defendant did not vacate the apartment by March 31, 2021 and has remained in possession to date. Doc. 7 at par. 8.

On May 3, 2021, plaintiff commenced the captioned action by filing a summons and complaint against defendants. Doc. 1.¹ In his complaint, plaintiff alleged, among other things, that: 1) defendant’s month to month tenancy was terminated pursuant to the 90-day notice as of March 31, 2021 and 2) he has not accepted any U&O from defendant since the termination of the month to month tenancy. Doc. 1 at pars. 8-9.

As his first cause of action, plaintiff alleged a cause of action for ejectment. Doc. 1 at pars. 11-13. As his second cause of action, plaintiff sought a judgment declaring that defendant’s lease was terminated as of March 31, 2021. Doc. 1 at pars. 14-18. As a third cause of action, plaintiff sought recovery of unpaid rent/U&O from the date of the termination of the lease until the entry

¹ In addition to Watson, plaintiff named as defendants “John Doe” and “Jane Doe” who, upon information and belief, were unknown individuals also living in the apartment. Doc. 1 at par. 6.

of judgment, in an amount to be determined by this Court and not less than \$14,500, plus interest. Doc. 1 at pars. 19-23. As a fourth cause of action, plaintiff sought costs and legal fees pursuant to paragraph 20 (5) of the lease in an amount to be determined by this Court. Doc. 1 at pars. 24-27.

Defendant joined issue by his answer, filed June 14, 2021, in which he denied all substantive allegations of wrongdoing and asserted as a defense that the 90-day notice was improper insofar as it was not served with a hardship declaration for defendant to complete in order to attest that he was unable to pay his rent. Doc. 5.²

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendant on the complaint. Docs. 6-17. In support of the motion, plaintiff submits an affidavit setting forth the facts giving rise to this claim (Doc. 7) and annexing as exhibits, *inter alia*: the deed establishing that plaintiff owns the apartment (Doc. 8); defendants' lease (Doc. 9); the 90-day notice (Doc. 10); the pleadings (Docs. 11, 14, 15); a statement of defendant's arrears reflecting that he owed \$23,200 in unpaid rent and U&O from November 1, 2020 through the end of June 2021 (Doc. 16); and a hardship declaration dated March 2, 2021 which defendant submitted to plaintiff (Doc. 17).

In an affidavit in support of the motion, plaintiff, who attests that he is owner of the premises, argues that the motion must be granted because defendant remained in possession after his lease was legally terminated as of March 31, 2021; as detailed in the rent ledger (Doc. 16), defendant failed to pay rent in the amount of \$14,500 from November 1, 2020 until the termination of the lease on March 31, 2021, and defendant has failed to pay U&O in the amount of \$8,700 from April 1, 2021 through the end of June 2021; and that he is entitled to costs and attorneys' fees pursuant to the lease. Doc. 7 at pars. 4, 13, 17. Additionally, plaintiff argues that, despite the hardship declaration, the veracity of which he disputes, the branch of his motion seeking a

² Although asserted in defendant's answer, this defense was not raised in opposition to the instant motion.

judgment of possession and writ of assistance can still be granted and that any actual eviction should be stayed until the expiration of any eviction moratorium currently in effect. Doc. 7 at pars. 14, 22.

In opposition, defendant argues, inter alia, that the complaint must be dismissed because this Court lacks subject matter jurisdiction over this action. Doc. 19 at par. 4. He further asserts that, since he continued to pay rent after the expiration of the lease, and plaintiff accepted the rent, the lease was renewed for another one-year period, and continued to be renewed on a yearly basis. Doc. 19 at pars. 5-6. Defendant also asserts that, since plaintiff terminated the lease “before the expiry of the renewed term, [he] has rendered himself liable to the [d]efendants for all rent owed for the unexpired portion of the [l]ease.” Doc. 19 at par. 6. Additionally, defendant asserts that he cannot be evicted at this time given his submission of a hardship declaration as well as New York State’s moratorium on residential evictions. Doc. 19 at pars. 7-9.

In a reply memorandum of law, plaintiff’s counsel asserts that plaintiff has established his prima facie entitlement to summary judgment and defendant has failed to raise an issue of fact. Doc. 24 at 4. Plaintiff’s counsel further asserts that defendant’s lease was not renewed for a one-year term after it expired but rather became a month-to-month tenancy pursuant to Real Property Law (“RPL”) § 232-c (Doc. 24 at 4-5); this Court has jurisdiction over the captioned action (Doc. 24 at 5-6); and that, although defendant filed a hardship declaration, a judgment of eviction should be granted “with enforcement being subject to any applicable restrictions and moratoriums in effect at the relevant time.” Doc. 24 at 7.

LEGAL CONCLUSIONS

Summary Judgment Standard

On a motion for summary judgment, the moving party bears the burden of making “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]; see *Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020]). If the moving party fails to make such a showing, the motion must be denied “regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). However, where “the moving party proffers the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). On the motion, the “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]).

Here, plaintiff’s affidavit and the exhibits annexed thereto establish his prima facie entitlement to summary judgment on his claims seeking monetary damages and a declaratory judgment against defendant.

Outstanding Rent/U&O

Initially, plaintiff demonstrates that defendant remained in possession of the apartment after the expiration of his one-year lease on August 31, 2018 and continued to pay rent as a month to month tenant through the end of October 2020, but did not pay rent from November 1, 2020 until the month to month tenancy was terminated on March 31, 2021. Doc. 16. Nor has defendant

paid U&O from April 1, 2021 until the present. Doc. 16.³ Therefore, plaintiff is entitled to payment of this outstanding rent and U&O.

Defendant's argument that his payment of rent after the expiration of the lease on August 31, 2018 gave rise to a one-year renewal of the agreement by operation of law is without merit. Although renewal by operation of law was the common-law rule, this was changed by statutory enactment over 60 years ago. RPL 232-c, enacted in 1959, provides, in pertinent part, that:

Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over * * * unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of * * * rent shall be a tenancy from month to month...

RPL 232-c "was enacted to change the common-law rule regarding tenancies created by operation of law as a result of the tenant's holding over (1959 Report of N. Y. Law Rev. Comm., p. 139 et seq.; N. Y. Legis. Doc., 1959, No. 65[D]; *Jaroslow v. Lehigh Val. R. R. Co.*, 23 N Y 2d 991)" (*Bay West Realty Co. v Christy*, 61 Misc2d 891, 894 [Civ Ct, New York County 1970]). "[T]he only tenancy that can now be created by operation of law as a result of the acceptance of rent from a holdover tenant is a periodic tenancy from month to month and 'no longer the tenancy from year to year implied at common law by operation of law' (*28 Mott St. Co. v. Summit Import Corp.*, 62 Misc 2d 345, 347)." (*Bay West Realty Co. v Christy*, 61 Misc2d at 894). Thus, defendants' counsel relies on authority which has not been recognized since the 1950's.⁴

Since defendant remained in possession of the apartment after the expiration of his lease on August 31, 2018 and continued to pay rent, and plaintiff accepted the rent, plaintiff created a month to month tenancy on the same terms, and subject to the same covenants, as the expired lease

³ Defendant does not dispute that these payments are outstanding.

⁴ The same is true with respect to defendants' contention that, since plaintiff terminated the lease "before the expiry of the renewed term, [he] has rendered himself liable to the [d]efendants for all rent owed for the unexpired portion of the [l]ease", as this argument also lacks legal support.

(See *Stephen LLC v Zazula*, 171 AD3d 488, 488 [1st Dept 2019] [citations omitted]). Defendant paid rent pursuant to the month to month tenancy from September 1, 2018 until October 31, 2020. As the rent ledger reflects, the defendant owes plaintiff rent pursuant to the month to month tenancy from November 1, 2020 until the termination of the month to month tenancy on March 31, 2021.⁵

Defendant also owes plaintiff U&O for the period of April 1, 2021 until the present. “The obligation to pay for [U&O] does not arise from an underlying contract between the landlord and the occupant[,] [but] [r]ather, an occupant's duty to pay the landlord for its [U&O] of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties’ (*Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, 559-560 [2d Dept 1999] [internal quotation marks and citation omitted]).” (*Carlyle, LLC v Beekman Garage LLC*, 133 AD3d 510, 511 [1st Dept 2015]). Since defendant occupied the apartment during a period in which no lease was operative, he is required to pay plaintiff U&O as compensation for his use of the apartment during that time at the rate of \$2,900 per month, the amount of his monthly rent at the time the lease was terminated.

As of the date plaintiff’s motion was filed, defendant owed \$14,500 in unpaid rent and \$8,700 in U&O through the end of June 2021, for a total of \$23,200. Doc. 16. Since this motion is being decided at the end of November 2021, defendant owes an additional \$14,500 for U&O from July-November 2021 ($\$2,900 \times 5$), increasing the total owed to \$37,700.

Declaratory Relief

RPL 232-a provides that:

No monthly tenant, or tenant from month to month, shall hereafter be removed from any lands or buildings in the city of New York on the grounds of holding over the tenant’s term unless pursuant to the notice period required by subdivision two of section two hundred

⁵ The termination of the lease is addressed in further detail below.

twenty-six-c of this article, or for a tenancy other than a residential tenancy at least thirty days before the expiration of the term, the landlord or the landlord's agent serve upon the tenant, in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy and that unless the tenant removes from such premises on the day designated in the notice, the landlord will commence summary proceedings under the statute to remove such tenant therefrom.

Although this statute, by its terms, applies to summary proceedings, the 30-day notice requirement therein has been held to apply to the termination of a month to month tenancy (*See Weiden v 926 Park Ave. Corp.*, 154 AD2d 308, 308-309 [1st Dept 1989]; *see also 430 Broome St. Realty Corp. v Bonnouvrier*, 17 Misc3d 1128(A) (Sup Ct New York County 2007 [York, J.] citing, *inter alia*, *Alleyne v Townsley*, 110 AD2d 674 [2d Dept 1985]). Here, plaintiff provided defendant not with 30, but with 90 days' notice of his intention to terminate the lease and he thus properly terminated the lease and is entitled to a judgment declaring that the lease was terminated as of March 31, 2021.

Ejectment/Judgment of Possession

Defendant argues that, under the COVID Emergency Eviction and Foreclosure Prevention Act (CEEFPA), L 2020, ch. 381, this Court may not consider any part of plaintiff's motion. In enacting CEEFPA, which imposed a moratorium on most residential eviction proceedings, the Legislature stated that its intent was "to avoid as many evictions and foreclosures as possible for people experiencing a financial hardship during the COVID—19 pandemic" (Ch 381, § 3). However, in August 2021, the U.S. Supreme Court enjoined CEEFPA, holding that its limits on a landlord's ability to challenge certifications of financial hardship submitted by tenants violated due process (*See Chrysaftis v. Marks*, ___ U.S. ___, 141 S. Ct. 2482, 210 L Ed 2d 1006, 2021 U.S. LEXIS 3635 [Aug. 12, 2021]).

On September 2, 2021, the Legislature enacted L 2021 ch 417, which restored a moratorium on most residential eviction proceedings. Among other things, L 2021, ch 417 allows tenants in residential eviction matters to file a hardship declaration representing that they experienced financial hardship during, or due to, the COVID-19 pandemic. As this Court explained in its well-reasoned decision in *Casey v Whitehouse Estates, Inc.*, 2021 NY Slip Op 21245, 2021 NY Misc LEXIS 4898 (Sup Ct New York County 2021 [Lebovits, J.]), “Chapter 417, part C, subpart A, § 4 provides that if the tenant provides a hardship declaration to the court in any pending ‘eviction proceeding in which an eviction warrant or judgment of possession or ejection has not been issued,’ the ‘eviction proceeding shall be stayed until at least January 15, 2022.’” However, noted Justice Lebovits:

The balance struck by the Legislature in chapter 417 turns on whether a residential tenant is or is not suffering hardship due to COVID-19 (*see* L 2021, ch 417, pt C, subpart A, §§ 4, 10); and, if she is suffering hardship, whether her eviction proceeding nonetheless should be permitted to continue because the tenant is alleged to have significantly damaged the property or to be engaging in persistent objectionable or nuisance-type behavior (*see id.* § 7).

(*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245 at *3 [2021]).

Additionally, noted Justice Lebovits, an exception set forth in section 10(a) of the statute allows a court to deny or vacate a stay if it “finds the respondent’s hardship claim invalid.” (*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245 at *3). However, Justice Lebovits further stated that “a landlord’s challenge to the tenant’s claim of hardship should be brought by motion” in which the landlord sets forth its “good faith belief that the respondent[s] ha[ve] not experienced a hardship” (*Id.*). Here, plaintiff does not allege that defendants damaged the premises or that they engaged in any nuisance-type activity envisioned by § 7. Although plaintiff states in his motion that he “dispute[s] the validity of the claims” set forth in defendants’ hardship declarations, he has set forth absolutely no basis for this contention, much less a “good faith belief” for his

representation, and thus cannot establish that § 10 (a) is applicable herein. Therefore, defendant is entitled to the protection of the statute until January 15, 2022 (or such future date to which the moratorium may be extended).

Justice Lebovits held that, despite the foregoing protection against eviction, ch 417 “does not stay, or otherwise limit, the award of money judgments for unpaid rent or U&O” and here, as in *Casey*, defendant acknowledged in his hardship declaration (Doc. 17) that, despite any eviction moratorium, a money judgment could still be rendered against him for any unpaid rent and/or U&O owed, as well as any fees, penalties, and interest (*Casey v Whitehouse Estates Inc.*, 2021 NY Slip Op 21245, at *6). Therefore, defendant is required to pay the outstanding rent and U&O he owes plaintiff at this time even if plaintiff cannot evict him.

Subject Matter Jurisdiction

Although defendant asserts that this Court lacks subject matter jurisdiction over this action, this contention is without merit. The “Supreme Court has unlimited general jurisdiction over all plenary real property actions, including those brought by a landlord against a tenant” (*See Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011] [citations omitted]). Although the Supreme Court has “discretion [to] decline to review an action it considers appropriately brought in Civil Court,” it is not required to do so (*Id.*). Additionally, the Supreme Court is specifically vested with the authority to grant declaratory relief such as that sought by plaintiff (*See CPLR 3001; Lex 33 Assocs., L.P. v Grasso*, 283 AD2d 272 [1st Dept 2001]).⁶ Even assuming, arguendo, that this Court did not have jurisdiction over this matter, it could not dismiss the action since defendant did not move or cross-move for such relief. (*See CPLR 2214; CPLR 2215; CPLR 3211[a][2]*).

⁶ The Civil Court may grant declaratory relief under very limited circumstances not applicable herein (*See CCA 212-a*).

Attorneys' Fees

Although the lease entitles plaintiff to recover attorneys' fees from defendant, the precise amount of such fees cannot be determined at this time. This is because the amount of fees, if any, to be incurred in evicting defendant remains to be determined. Thus, this branch of the motion is denied without prejudice as premature (*See generally Greenway Mews Realty, L.L.C. v Liberty Ins. Underwriters, Inc.*, 2021 NY Slip Op 30118[U] [Sup Ct New York County 2021 [Engoron, J.]]).

Accordingly, it is hereby:

ORDERED that the branch of the motion by plaintiff David Lai seeking a judgment of possession and writ of assistance as against defendant Kenneth Watson is denied without prejudice to re-file when the current moratorium/stay on evictions expires; and it is further

ORDERED that the branch of the motion by plaintiff David Lai seeking reimbursement from defendant Kenneth Watson for attorneys' fees he incurred in this action is denied without prejudice to re-file after such fees, if any, are incurred in connection with the eviction; and it is further

ORDERED and ADJUDGED and DECREED that the lease between plaintiff David Lai and defendant Kenneth Watson, dated September 1, 2017, was terminated as of March 31, 2021; and it is further

ORDERED that the branch of plaintiff David Lai's motion seeking a money judgment against defendant Kenneth Watson is granted, and plaintiff is awarded a judgment against

defendant Kenneth Watson in the total amount of \$37,700, representing unpaid monthly rent from November 1, 2020 (the date on which defendant stopped paying rent) until March 31, 2021 (the date on which defendant's lease was canceled) in the amount of \$14,500, as well as use and occupancy from April 1, 2021 until November 30, 2021, in the amount of \$23,200, plus pre-judgment interest from April 1, 2020, costs, and disbursements to be calculated by the Clerk; and it is further

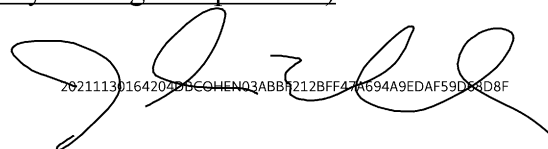
ORDERED that defendant Kenneth Watson must pay plaintiff the sum of \$37,700 by January 1, 2022, and, commencing December 1, 2021, shall pay use and occupancy to plaintiff in the amount of \$2,900 per month on a foregoing basis, *pendente lite*, and such payments shall be due by the 10th of each month; and it is further

ORDERED that the payments by defendant Kenneth Watson for outstanding rent and use and occupancy due January 1, 2022, as well as all future use and occupancy payments commencing December 1, 2021, shall be paid to plaintiff by either certified check, bank check, or wire transfer and, if mailed to plaintiff, must be sent to 15 East 127th Street Apt. A, New York, NY 10035 (the address on the lease), unless defendant has been provided with a more recent address for plaintiff, and shall copy counsel for plaintiff, Romer Debbas, LLP, 275 Madison Avenue, New York, New York 10016, on any such correspondence to plaintiff; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's

Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).



262111301642042BDCOHEN03ABB5212BFE474694A9EDAF59D68D8F

11/30/2021
DATE

HON. DAVID B. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE