

Blitt v Golden Horse Realty, Inc.
2021 NY Slip Op 32539(U)
November 30, 2021
Supreme Court, New York County
Docket Number: Index No. 157972/2020
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JONATHAN BLITT

Plaintiff,

- v -

GOLDEN HORSE REALTY, INC.,

Defendant.

INDEX NO. 157972/2020

MOTION DATE 08/23/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff moves pursuant to CPLR § 3212 for summary judgment and a money judgment due to Defendant's failure to comply with the June 24, 2020 Surrender Agreement (NYSCEF Doc. No. 2). In opposition, Defendant contends that Plaintiff has not adequately pled a claim for breach of contract as Plaintiff did not timely vacate the apartment as required under the Surrender Agreement. Defendant further argues that as the \$125,000.00 payment required under the Surrender Agreement was made on January 26, 2021, Plaintiff's complaint should be dismissed.

The Surrender Agreement

Defendant and Plaintiff entered into a Surrender Agreement dated June 24, 2020 (NYSCEF Doc. 2). Paragraph 4 of the Agreement states:

Provided that Owner and Tenant have fully complied with their obligations under this Agreement, on or before March 15, 2021 (the "Vacate Date"), Tenant shall deliver vacant possession of the Unit to the Owner by delivery of the keys and Surrender

Acknowledgement (in the form annexed hereto as Exhibit "A") to Owner. (*Id.*).

Paragraph 8 of the Agreement states that upon receipt of a notarized Surrender Affidavit to Owner (to be signed by both Tenant and Owner), and the delivery of the Unit, building and mailbox keys, and the complete and total vacancy of the Unit on or before the Vacate Date "TIME BEING OF THE ESSENCE," the Owner will pay Tenant \$155,000.00 ("Payment") pursuant to the terms of this Agreement. Specifically:

(A) Owner will pay to Tenant, by certified check or escrow check from Owner's counsel, \$30,000.00 toward the Payment, to be paid upon execution of this Agreement payable to "Vernon & Ginsburg, LLP, as attorneys for Jonathan Blitt" ("Signing Payment")

(B) Upon Tenant's timely vacatur of the Unit and provision to Owner of a fully executed Surrender Affidavit in the form annexed hereto as Exhibit "A," and surrendering the keys to the Unit, the Building and the mailbox, if any, to Owner, on or before the Vacate Date, Owner shall tender a check to Tenant made payable to "Vernon & Ginsburg, LLP, as attorneys for Jonathan Blitt" in the amount of \$125,000.00 (the "Vacate Payment") (*Id.*).

Paragraph 9 of the Agreement provides details as to how the Owner should be notified of the vacate date:

Within the earlier of (i) December 1, 2020, or (ii) two (2) weeks after notice is sent by email to the Owner's attorneys (Golino Law Group, LLC, by Santo Golino at sgolino@golinolaw.com) ("Owner's Counsel"), memorializing that Tenant wishes to schedule a date within forty five (45) days to vacate and surrender vacant possession of the Unit to the Owner, whichever is earlier, Owner shall deposit the sum of \$125,000.00 (One hundred and twenty-five thousand dollars, i.e. the Vacate Payment), in escrow with its attorneys (the "Escrow Funds"), Golino Law Group, LLC ("Escrow Agent"). All interest accrued thereon shall be the property of Owner. Escrow Agent shall provide proof within three (3) business days of the deposit that the Escrow Funds were deposited in escrow by email notice to Tenant's Counsel at dvernon@vgllp.com (*Id.*).

Further, Paragraph 10 details payment that should be made if the Vacate Date is earlier than March 15, 2021:

If the Tenant accelerates the Vacate Date and vacates the Unit on a date earlier than March 15, 2021, then Owner agrees to give Tenant a Rent Credit for the Waived Rent by multiplying the amount of daily pro-rata rent by the number of days Tenant is vacating before March 15, 2021. By way of example, if Tenant gives notice pursuant Paragraph 15 above that he intends to vacate on January 31, 2021, then Owner will provide credit of \$2,046.75 which is \$47.59 per day multiplied by 43 days. (*Id.*).

Plaintiff contends that he is due a Vacate Payment of \$125,000.00 and an additional payment for vacating early calculated as follows: the daily additional amount of \$47.59 per day from July 25, 2020 (the early Vacate Date Tenant alleges that he gave notice of) to March 15, 2021. Plaintiff states that this amount totals \$11,088.47, which was allegedly due on July 25, 2020 when Tenant was ready, willing, and able to vacate and gave proper notice thereof. In support of his contentions, Plaintiff submits his affidavit, which fails to state that he returned the keys or a Surrender Affidavit.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 [1st Dept 2010]) and bare allegations or

conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

Plaintiff has not sufficiently demonstrated an entitlement to summary judgment on his complaint. Further, Plaintiff's burden, on a motion for summary judgment on affirmative defenses is identical to a similar motion on the main claims. Plaintiff must prove that he is entitled to judgment as a matter of law, and the absence of any triable issues of fact (*Tift v Benson*, 109 AD2d 1006 [3d Dept 1985]; *Vertical Computer Systems, Inc. v Ross Systems, Inc.*, No. 600644/03, 2006 WL 6157480 [2006]). It is well settled that in order to defeat a motion for summary judgment, a party must come forward with evidentiary proof in admissible form sufficient to raise triable issues of fact (*Kruse v Capuozzo*, No. 100674/09, 2010 WL 1437733 [2010]).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied.



11/30/2021
DATE

SHAWN KELLY, J.S.C.

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