SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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TOD WILLIAMS and BILLIE TSIEN,

Plaintiffs,

- v -

HOTEL DES ARTISTES, INC.,

Defendant.

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INDEX NO. 159094/2018

MOTION DATE 06/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HOTEL DES ARTISTES, INC.

Plaintiff,

-against-

JOSEPH COFFEY and KELLY COFFEY,

Defendants.

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Third-Party
Index No. 595555/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46

were read on this motion for PARTIAL SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that plaintiffs' motion for summary judgment on liability on their first cause of action for breach of contract is granted, based on the following memorandum decision.

Background

Plaintiffs Tod Williams and Billie Tsien ("plaintiffs") are propriety lessees of apartment 414 (the "apartment") located in the cooperative building known as Hotel des Artistes, located at 1 West 67th Street, New York, New York. Defendant Hotel Des Artistes ("defendant") is the cooperative corporation and lessor. Plaintiffs commenced this action seeking reimbursement

from defendant for damage to the walls, ceilings, and floors of their apartment caused by water leaking from the apartment above them, owned by third-party defendants Joseph and Kelly Coffey (the "Coffeys").

The proprietary lease provides, in relevant part, that "the Lessor shall keep in good repair the . . . main drain pipes and electrical conduits, plumbing, heating, and other apparatus without the demised premises and intended for the general service of the building and plumbing and heating pipes and radiators, and electrical conduits in the demised premises" (NYSCEF Doc. No. 29, Art. 1, ¶ FIRST). "In case the apartment, including fixtures and equipment owned by and installed by the Lessor, shall be partly damaged by fire or other cause not the fault of the Lessee, it shall be repaired or replaced as promptly as is reasonably possible at the expense of the Lessor so as to conform substantially to the condition of the building and of the apartment at the time of such damage" (NYSCEF Doc. No. 29, Art. 1, ¶ THIRD). Further, no rent under the lease shall be owed if the apartment is rendered untenantable by damage until such time as the apartment is again tenantable (*id.*).

On February 10, 2018, a fire broke out in the Coffeys' apartment (NYSCEF Doc. No. 30). According to the Fire Incident Report prepared by the Fire Department of the City of New York ("FDNY"), the "fire originated on the fifth floor . . . in closet of apartment 516 . . . in combustible materials (electrical wiring)" and spread throughout the apartment and to the apartment above it. In fighting the fire, large amounts of water caused "extensive damage to the walls, ceiling, floors and various furnishings and fixtures in [plaintiffs'] apartment" (NYSCEF Doc. No. 28, ¶ 8). The damage was so extensive, in fact, that plaintiffs were unable to live in the apartment from mid-February through August 2018, when plaintiffs substantially completed

repairs to the apartment (*id.*, ¶ 9). Plaintiffs continued to pay the monthly maintenance on the apartment while it was untenantable (*id.*, ¶ 10).

Plaintiffs commenced this action against defendant for breach of the lease, alleging defendant failed to reimburse them for the damages to the walls, floors, and ceilings of the unit as required by Article I of the lease. Defendant subsequently commenced a third-party action against the Coffeys, alleging that the circuit breaker panel in their apartment had been negligently installed by the Coffeys as part of a renovation and this negligence caused the fire (NYSCEF Doc. No. 14). Plaintiffs now move for partial summary judgment on liability for breach of the lease and request a hearing or reference to a Judicial Hearing Officer or Special Referee to conduct a hearing on damages.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

Discussion

A breach of contract requires allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Here, plaintiffs have established a

prima facie case for liability by submission of the affidavit of plaintiff Billy Tsien (NYSCEF Doc. No. 28), the proprietary lease (NYSCEF Doc. No. 29), the FDNY Fire Incident Report (NYSCEF Doc. No. 30), the repair estimate and invoices (NYSCEF Doc. No. 31), and the breakdown explaining which of the repair expenses are being sought in this action and which are not (NYSCEF Doc. No. 32). Taken together, the documentary evidence establishes that under the proprietary lease, if the walls, ceilings, or floors of the apartment were damaged by fire or any other cause not the fault of plaintiffs, it was defendant's obligation to cover the cost of repairs (NYSCEF Doc. No. 29, Art. I, ¶ THIRD). A fire occurred at the building, and because of that fire, plaintiffs' apartment was damaged (NYSCEF Doc. No. 30-32). The FDNY report, which no party disputes, indicate that the fire originated outside of plaintiffs' apartment (NYSCEF Doc. No. 30); even giving the nonmoving parties the benefit of the most favorable reading of these documents, no reasonable jury could find that plaintiffs were responsible for the damage to their apartment. Accordingly, defendant is prima facie liable pursuant to the terms of the lease.

In opposition, neither defendant nor the Coffeys raise a material issue of fact requiring trial. As an initial matter, none of the opposing parties submitted admissible evidence in opposition to the motion, relying solely on attorney affirmations. It is settled law that "a party appearing in opposition to a motion for summary judgment must lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact" (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). An affirmation of counsel without personal knowledge of the facts is insufficient to raise a triable issue of material fact (*e.g. Van Guilder v Sands Hecht Const. Corp.*, 199 AD2d 164, 164 [1st Dept 1993]).

Moreover, defendant, who also disputes plaintiffs' reading of the lease, fails to cite any provision of the lease relieving it of liability under these circumstances. Defendant argues that it is not liable under the lease to replace any fixtures or equipment installed in the apartment by plaintiffs (NYSCEF Doc. No. 40, ¶¶ 8-9), however plaintiffs explicitly state that they are only seeking recovery for repairs to the walls, ceilings and floors of the apartment, not for any fixtures or equipment that they themselves installed (NYSCEF Doc. No. 28, ¶¶ 8, 12-13; NYSCEF Doc. No. 32). Any discrepancy regarding the exact amount of damages does not materially effect whether defendant is obligated to pay some amount of repair costs under the lease in the first instance.

Defendant's further reliance on Article II, ¶ SEVENTH, as amended, to show that it is not obligated under the lease is also unavailing. The relevant provision provides that defendant will repair damages to the walls, ceilings and floors of the apartment in the event of the negligence of defendant or its employees, "or by reason of accidents to the electrical, plumbing, heating and other apparatus which the Lessor is obligated to maintain as provided in paragraph FIRST of Article I" (NYSCEF Doc. No. 29 at 45-46). However, this amendment also specifically exempts from its reach Article I, ¶ THIRD, on which plaintiffs rely. Article I, ¶ THIRD does not require a finding of negligence or accident, but only requires that the damage to the apartment be from "fire or other cause not the fault of the Lessee" (NYSCEF Doc. No. 29, Article I, ¶ THIRD). Accordingly, the amendment to Article II, ¶ SEVENTH does not relieve defendant of liability. Whether or not defendant is separately able to recover from the Coffeys for their alleged negligent installation of the circuit breaker panel that caused the fire has no impact on defendant's liability to plaintiffs, and in any event is not before the Court on the instant motion.

Finally, both defendant and the Coffeys argue that further discovery is necessary to oppose the motion, pursuant to CPLR 3212(f). In order to succeed on this ground, it is the opposing party's burden to demonstrate that "facts essential to justify opposition to the motion may lie within [defendant's] exclusive knowledge or control" (*Barreto v City of New York*, 194 AD3d 563, 564 [1st Dept 2021]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion" (*Morales v Amar*, 145 AD3d 1000, 1003 [2d Dept 2016]). "[U]nsupported assertion[s] fall[] far short of the showing needed to withstand a motion for summary judgment on the ground of a need for discovery" (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]).

Here, defendant and the Coffeys have raised only unsupported assertions and mere hopes that further discovery will disclose evidence related to defendant's liability, which is the sole issue on the instant motion. More specifically, as set forth above the only way for defendant not to be liable would be if plaintiffs caused their damages. Potential discovery as to the issues of plaintiffs' specific damages will not disclose evidence that plaintiffs caused the fire or the ensuing water damage (*Trainer v City of New York*, 41 AD3d 202 [1st Dept 2007] ["plaintiff has not shown that the items she continued to seek in discovery would bear on the issue of the Transit Authority's liability"]). Moreover, defendants and the Coffeys do not identify any specific facts bearing on defendant's liability that are solely in plaintiff's possession

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on the first cause of action as follows; and it is further

ORDERED that the defendant is found liable to plaintiff on the first cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the action shall continue as to the second cause of action; and it is further

ORDERED that counsel are directed to appear for a virtual status conference via Microsoft Teams on June 8, 2022, at 10:00 AM.

This constitutes the Decision and Order of the court.

ENTER:

Louis L. Nock

5/18/2022
DATE

LOUIS L. NOCK, J.S.C.

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