SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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RYAN URBAN

Plaintiff,

- v -

BRADLEY ZIPPER,

Defendant.

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INDEX NO. 153041/2021

MOTION DATE 09/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, and after oral argument, which took place on December 23, 2022 where Altagracia B. Pierre-Outerbridge, Esq. appeared for the Plaintiff Ryan Urban ("Plaintiff") and Ryan W. Lawler, Esq. appeared for Defendant Bradley Zipper ("Defendant"), Plaintiff's motion seeking summary judgment is denied as premature. The parties are directed to appear for a preliminary conference. Defendant Bradley Zipper's ("Defendant") cross-motion seeking costs in relation to defending the instant motion is denied as premature.

I. Background

Plaintiff initiated this action on March 28, 2021 to recover a $70,000.00 security deposit. Defendant owns a four-story townhouse located at 4 Centre Market Place, New York, New York (the "Premises") (NYSCEF Doc. 1 at ¶ 7). Pursuant to a written residential lease, Plaintiff rented the Premises from Defendant for a six-month term commencing on March 15, 2019 and ending on September 14, 2019 (NYSCEF Doc. 3). The monthly rent was set at $35,000.00 (NYSCEF Doc. 1 at ¶ 11). Plaintiff tendered a $70,000.00 security deposit (*id.* at ¶ 12). Plaintiff allegedly paid an

additional $35,000.00 so that a half bathroom on the third floor of the Premises would be altered to a full bathroom (*id.* at ¶ 17). Plaintiff alleges that during his tenancy, there were problems with lighting in the bedroom, and issues with the toilet, shower, ice maker, television sets, and front door (*id.* at ¶¶ 20-21). Nonetheless, Plaintiff alleges he performed under the Lease, including by "returning the Subject Premises to Defendant in the same or better condition it was when he leased it, except for ordinary wear and tear" (*id.* at ¶ 27).

Plaintiff alleges that in August of 2019, his assistant Charlene Goldner ("Goldner") told Defendant's real estate agent, Brandon Trentham ("Trentham") that Plaintiff intended to terminate the lease and vacate on September 1, 2019 (*id.* at ¶ 28). Plaintiff alleges he was not informed of his right to a walkthrough inspection prior to vacating (*id.* at ¶¶ 29-30).

Plaintiff alleges that he vacated and surrendered possession on September 7, 2019 but was not provided an itemized statement indicating the basis for withholding his security deposit until October 1, 2019 (*id.* at ¶¶ 32-33). Plaintiff seeks a return of his $70,000.00 security deposit, $140,000 in penalties for Defendant's willful retention of his security deposit, and $35,000.00 paid for bathroom renovations which allegedly never occurred.

On June 1, 2021, Defendant filed his Answer with Counterclaims (NYCEF Doc. 6). In his Counterclaim, Defendant alleges Plaintiff failed to return the Premises in the same condition as when he first occupied it (*id.* at ¶ 5). Defendant alleges Plaintiff allowed a leak from the third-floor bathroom to flood the second and third floors, resulting in significant damage (*id.* at ¶ 11). Defendant alleges Plaintiff severely damaged the kitchen floor tile and cabinets (*id.* at ¶ 12). Defendant alleges Plaintiff installed an unauthorized hot tub on the deck of the Premises (*id.* at ¶ 13). Defendant alleges that he incurred costs to remove the hot tub and repair damage caused by the hot tub (*id.* at ¶ 13). In total, Defendant alleges it cost more than $275,000 to repair the damage

caused by Defendant (*id.* at ¶ 15). Defendant also asserts that the third-floor half bathroom was converted into a full bathroom, contrary to Plaintiff's allegation (*id.* at ¶ 8).

On September 9, 2021, Plaintiff filed this motion for summary judgment (NYSCEF Doc. 8). Plaintiff seeks summary judgment on his first cause of action for failure to return Plaintiff's security deposit within 14 days (NYSCEF Doc. 9 at ¶ 13). Plaintiff argues that because Defendant failed to provide an itemized statement within 14 days of Plaintiff's surrender of the premises, Defendant has forfeited the right to retain any portion of the security deposit (*id.* at ¶ 22). Plaintiff seeks summary judgment on his second cause of action because Defendant mingled the security deposit with his personal money (*id.* at ¶ 25). Plaintiff claims that his attorney demanded a statement from Defendant proving the security deposit is being held in escrow, but Defendant refused to produce such proof (*id.* at ¶¶ 27-28). Plaintiff claims he is entitled to summary judgment on his third cause of action because Defendant did not inform Plaintiff of his right to have a walkthrough of the property. Plaintiff argues he should be granted summary judgment on his fifth cause of action for attorneys' fees if he prevails on summary judgment (*id.* at ¶ 41). Plaintiff also seeks summary judgment dismissing Defendant's counterclaims since allegedly Defendant has already been reimbursed for damages by Plaintiff's insurance carrier.

On October 20, 2021, Defendant cross-moved for attorneys' fees (NYSCEF Doc. 32). Defendant opposed Plaintiff's motion by highlighting the existence of material issues of fact. Defendant argues that even though Goldner contacted Defendant to schedule a walk-through inspection, she never scheduled the inspection (NYSCEF Doc. 33 at ¶ 5). Defendant also asserts Plaintiff did not stop living at the Premises until September 15, 2019, and even after he stopped living at the Premises, he left behind a hot tub on the roof deck, and air mattresses, bed linens, and camera equipment in the basement (*id.* at ¶ 8). Defendant cites to the Lease which states that

Plaintiff is "not moved out until all persons, furniture and other property of [Plaintiff's] are also out" (*id.* at ¶ 10). Defendant asserts that it sent an itemized statement on October 1, 2019, which pursuant to the terms of the lease, was timely considering Plaintiff failed to move out.

Defendant also submitted evidence that it did not misappropriate the security deposit as alleged by Plaintiff, and that Defendant vehemently denies receiving a demand for proof that the security deposit is in escrow. Defendant argues Plaintiff's own agent's statements show he was on notice of his right to an inspection and therefore Defendant cannot be punished for failing to inform Plaintiff. Defendant argues that the counterclaims should not be dismissed since the damages to repair the premises cost more than the reimbursement received by insurance. Defendant argues that Plaintiff makes these assumptions without any discovery (NYSCEF Docs. 35-37).

II. Discussion

A. Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.,* 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.,* 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.,* 1 NY3d 381 [2004]).

B. Plaintiff's Motion

There is an issue of fact as to when Plaintiff effectively vacated the Premises which precludes summary judgment on Plaintiff's first cause of action. Goldner stated Plaintiff intended to vacate on September 1, 2019 (NYSCEF Doc. 1 at ¶ 28; *see also* NYSCEF Doc. 39). The lease term ended on September 14, 2019. Plaintiff testified in his affidavit he vacated on September 7, 2019 (NYSCEF Doc. 12). Defendant's agent claims that Plaintiff failed to return the mailbox keys and he sought to check the mailbox on September 19, 2019 (NYSCEF Doc. 38 at ¶ 7). Defendant's agent also asked Plaintiff to return the mailbox key on September 30, 2019, although it appears this did not happen (*id.* at ¶ 8).

Most importantly, the clear and unambiguous terms of the lease, to which Plaintiff, a sophisticated businessperson agreed, explicitly states:

> "When this Lease ends, you must remove all of your movable property. You must also remove at your own expense, any wall covering, bookcases, cabinets, mirrors, painted murals or any other installation or attachment you may have installed in the apartment, even if it was done with owner's consent. You must restore and repair to its original condition those portions of the Apartment affected by those installations and removals. You have not moved out until all persons, furniture and other property of yours is also out of the Apartment. If your property remains in the Apartment after the Lease ends, Owner may either treat you as still in occupancy and charge you for use or may consider that you have given up the Apartment and any property remaining in the Apartment…You agree to pay Owner for all costs and expenses incurred in removing such property. The provisions of this article will continue to be in effect after the end of this Lease." (NYSCEF Doc. 12 at ¶ 9[b])

Defendant claims that not only was movable furniture left, but that Plaintiff left an installed hot tub on the deck of the Premises. Plaintiff has failed to rebut this issue. Therefore, by operation of the lease, and viewing the facts in the light most favorable to the non-moving party, Defendant had the option to treat Plaintiff as if he had not moved out (*George Beck Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978] [unambiguous terms of a lease will not be disregarded for

the purposes of alleviating a hard or oppressive bargain]; *see also Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020] [rule of enforcing a complete, clear and unambiguous written agreement has even greater force in the context of real property transactions, where commercial certainty is of paramount concern]). As there are issues of fact regarding the date when Plaintiff effectively moved out of the premises, the Court is unable to grant summary judgment on Plaintiff's first cause of action.

Summary judgment on Plaintiff's second cause of action, which alleges improper commingling of the security deposit with personal funds, is also denied (*see* NYSCEF Docs. 35-37). Plaintiff has not eliminated all issues of fact showing that the security deposit is not in escrow. Nor could Plaintiff demonstrate this as there has been no discovery exchanged.

Summary judgment on Plaintiff's third cause of action is denied. The First Department has held that a failure to provide written notice of the right to request an inspection before a tenant vacates an apartment does not mandate forfeiture of the right to retain any portion of the security deposit (*14 East 4th Street Unit 509 LLC v Toporek,* 203 AD3d 17 [1st Dept 2022]). As Plaintiff has not prevailed, an award of attorneys' fees is premature.

The Court finds that dismissal of the counterclaims is premature. Plaintiff asserts the counterclaims should be dismissed because Defendant has already been reimbursed by insurance. However, Defendant asserts that the insurance proceeds did not cover the total amount of damages inflicted on the Premises by Plaintiff. Although the insurer has initiated a subrogation action against Plaintiff in the amount of $295,608.81, there are no documents submitted regarding how the insurer reached that number. Without a documented breakdown of the insurer's damages in the subrogation action and Defendant's damages in this action, the amount sought in the insurer's subrogation action cannot serve as a basis for dismissal of Defendant's counterclaims.

C. Defendant's Cross-Motion

The Court declines to award attorneys' fees at this juncture. The Lease provides that Defendant is entitled to recovery any legal fees and disbursements for legal actions as a result of a lease default by Plaintiff, but Defendant has not yet prevailed on its counterclaims or dismissal of Plaintiff's action. Therefore, the Court finds it premature to award Defendant attorneys' fees.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety as premature, with leave to renew upon completion of discovery; and it is further

ORDERED that Defendant's cross-motion seeking attorneys' fees is denied; and it is further

ORDERED that the parties are directed to submit a proposed preliminary conference order to the Court on or before April 19, 2023 via e-mail to SFC-Part33-Clerk@nycourts.gov. In the event the parties are unable to agree to a proposed preliminary conference order and require a conference with the Court, the parties are directed to appear for an in-person preliminary conference on April 26, 2023 at 9:30 a.m. in 60 Centre Street, Room 442; and it is further

ORDERED that within ten days of entry, counsel for Defendant shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/3/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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

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