SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DICKON TONG,

Plaintiff,

- v -

JEFFREY GRANAT, KATHRYN MCCLAIN, and RONALD MCCLAIN,

Defendants.

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INDEX NO. 650264/2021

MOTION DATE 09/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, and 118

were read on this motion and cross-motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Defendants' motion for summary judgment dismissing the complaint is granted, and plaintiff's cross-motion for summary judgment on the complaint is denied, per the following memorandum.

Background:

Plaintiff is the owner of a residential condominium apartment bearing the address 330 East 33rd Street, Apt. 4G, in Manhattan. By written lease dated June 10, 2019 (NYSCEF Doc. No. 61), plaintiff leased his premises to the defendants for a one-year term beginning July 1, 2019, and ending June 30, 2020. The lease rider contains an option to renew the lease for another one-year term, at a specified higher rent – "a maximum of $50/mo increase" (*id.*). The actual option language reads as follows:

> Tenants will have the option to renew the lease for a one year, from July 1, 2020 to June 30, 2021. Tenants must respond to landlord no less than 65 days prior to lease expiration and are in good standing (i.e. no lateness on rent payments or lease violations).

(*Id.*) A few days prior to the 65-day option deadline, defendants dispatched an April 23, 2020, email communication to plaintiff stating: "We write to inform you that we are opting to renew our apartment lease from July 1, 2020 to June 30, 2021" (NYSCEF Doc. No. 67).[1] That email communication forms the lynchpin of this controversy. Plaintiff posits that the foregoing email communication "served to trigger the one year extension on the lease"; yet, despite that exercise, "[d]efendants surreptitiously signed a new lease for another apartment" and, as a result, "failed to pay their rent" for the ostensibly renewed lease (Plaintiff's Aff. [NYSCEF Doc. No. 81] ¶¶ 10, 13). The complaint seeks $30,335.86 in unpaid rent under such renewed lease.

Notably, though: subsequent to said email communication, plaintiff, on April 29, 2020, sent a lease renewal form to the defendants, containing the legend "Tenant's Response to Owner," soliciting defendants to signify their "accept[ance]" of plaintiff's "offer" to extend the lease by way of signing that "Response" (NYSCEF Doc. No. 70). By email communication dated May 12, 2020 (NYSCEF Doc. No. 74), defendants wrote plaintiff, saying "We reject your offer to renew the lease. We have not signed any lease renewal. We will vacate the apartment by June 30, 2020 [the natural termination date of the parties' initial lease agreement]." The obvious basis for defendants' point of view derives from the fact that plaintiff elected to send them a formal "Tenant's Response to Owner," designed, in their understanding, to constitute the only contractually recognized means of signifying plaintiff's "offer" to extend their initial lease with him (NYSCEF Doc. No. 70) – notwithstanding defendants' prior email notice purporting to opt into a lease renewal (*see*, NYSCEF Doc. No. 67).

[1] The 65-day option deadline would have occurred just three days later, on April 26, 2020.

To put it plainly: plaintiff asserts that defendants' said email notice constituted, as he put it, the "trigger" of the renewal option (NYSCEF Doc. No. 81 ¶ 10); whereas defendants assert that the only possible trigger could be their signing of plaintiff's subsequently sent "Tenant's Response to Owner" (NYSCEF Doc. No. 70), which they decided not to sign. In defendants' view, the fact that they changed their minds between April 23rd (their email opt-in notice) and April 29th (their deliberately unsigned "Tenant's Response to Owner") is irrelevant. What *is* relevant, in their view, is the fact that they declined to sign the formal "Tenant's Response to Owner," devised by the plaintiff himself to function as the lease renewal mechanism. Indeed, the lease itself speaks in terms of a tenant's "respon[se] to landlord," needed to exercise the extension option (NYSCEF Doc. No. 61). No provision is made in the lease for exercise of option by way of initiatory communication from tenant to landlord.

Defendants have moved for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment on the complaint.

Discussion:

It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "The court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement" (*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]). Here, plaintiff's proffered interpretation of the renewal provision, specifically, that defendants triggered a lease renewal simply by expressing their intention, finds no support in the unambiguous terms of the lease. The lease provides instead that tenants must *respond* to landlord within the specified time to do so in order to renew the lease. The cases cited by landlord are not to the contrary, as they indicate that mere notice is

insufficient unless it is done in compliance "with the terms of the lease" (*American Realty Co. v 64 B Venture*, 176 AD2d 226, 227 [1st Dept 1991], *lv denied* 79 NY2d 756 [1992]; *see also, J.N.A. Realty Corp. v Cross Bay Chelsea, Inc.*, 42 NY2d 392, 396 [1977] ["It is a settled principle of law that a notice exercising an option is ineffective if it is not given within the time specified"]). As the lease never renewed, defendants have established *prima facie* entitlement to dismissal of the complaint for unpaid rent from the purported renewed term of the lease (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

While it is true that parties can modify the terms and conditions of their contract – in this case, theoretically, through defendants' April 23rd email communications opting to renew (*see*, NYSCEF Doc. No. 67) (*see, Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312 [1989] [contract can be modified with consent of the parties]; *Chase v Skoy*, 146 AD2d 563 [2d Dept] [modification of contract can be proven circumstantially by the parties' conduct], *appeal dismissed* 73 NY2d 995 [1989]) – here, where plaintiff subsequently sent defendants the type of formal renewal document contemplated by the lease, for their signature (the "Tenant's Response to Owner"), it cannot be said that that very lease was modified to permit less formal means of exercising the renewal option (*see, Wynkoop Hallenbeck Crawford Co. v Western Union Telegraph Co.*, 268 NY 108 [1935] [an ostensible modification must be viewed in connection with the original contract to ascertain the true intent of the parties]). Plaintiff clearly required formal responsive exercise of option, even in the aftermath of tenants' informal initiatory exercise.

Plaintiff fails to raise a material issue of fact in opposition, or in support of his cross-motion for summary judgment (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). Absent a renewed lease, plaintiff has no grounds for recovery under breach of

contract theory.[2] Although plaintiff introduces new claims for damage to the apartment on this motion practice, such damage was never alleged in the complaint. A party may not recover under a new theory of liability presented for the first time at summary judgment (*Marti v Rana*, 173 AD3d 576, 577 [1st Dept], *lv denied* 34 NY3d 906 [2019]). Moreover, plaintiff's delay in presenting this claim until now has prejudiced defendants' ability to seek discovery relevant to it (*Yousefi v Rudeth Realty, LLC*, 61 AD3d 677, 678 [2d Dept 2009] ["in this case, the plaintiffs' inexcusable delay in presenting the new theory of liability warranted the Supreme Court's rejection of the argument"]).

Finally, the defendants consent to the dismissal of their first three counterclaims for relief, other than for attorneys' fees (reply memorandum of law, NYSCEF Doc. No. 114 at 12-13). The lease provides that tenants "have the right to collect reasonable legal fees and expenses incurred in a successful defense by [tenants] of a lawsuit brought by [landlord] against [tenants]" (lease, NYSCEF Doc. No. 61, ¶ 20 [b]). Having established entitlement thereto, the issue of defendants' reasonable attorneys' fees will be set down for a further hearing before the undersigned.

Accordingly, it is

ORDERED that the defendants' motion is granted, and the plaintiff's cross-motion is denied; and it is further

[2] Plaintiff attests that he "relied on [defendants'] written notice of renewal and did not seek to make preparations to re-rent the apartment, look for a new tenant, renovate and repair at that time" (NYSCEF Doc. No. 81 ¶ 16), and could not find a replacement tenant until November 7, 2020, on account of his reliance upon defendants' April 23rd email communication (*id.*, ¶ 14). Insofar as plaintiff hints at an alternative cause of action for detrimental reliance, no such cause of action has been asserted; nor has plaintiff gone the distance of demonstrating that such reliance would have been reasonable, given the lease's renewal option provision (NYSCEF Doc. No. 61) and plaintiff's own ratification of same by way of his dispatch to the defendants of a "Tenant's Response to Owner" (NYSCEF Doc. No. 70) (*see, Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 [1st Dept 2015] [the reliance must be reasonable]).

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing this action; and it is further

ORDERED that the issue of defendants' reasonable attorneys' fees pursuant to the lease is severed and set down for a further hearing before the undersigned; and it is further

ORDERED that the parties shall appear for said hearing in Room 1166, 111 Centre Street on June 6, 2023, at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

5/8/2023
DATE

LOUIS L. NOCK, J.S.C.

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