

900 Eighth Ave. Condominium LLC v Cuervo
2023 NY Slip Op 32856(U)
August 15, 2023
Supreme Court, New York County
Docket Number: Index No. 153479/2021
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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INDEX NO. 153479/2021

900 EIGHTH AVENUE
 CONDOMINIUM LLC,

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
 MOTION**

DANIEL CUERVO,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 31

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff, the landlord of apartment 35E located at 260 West 54th Street, New York, NY 10019, commenced this action against defendant, the lessee of the subject apartment, seeking damages based on breach of contract (first and second causes of action), as well as, attorney’s fees (third cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

In his answer, defendant, among other things, denies the allegations asserted in the complaint and asserts affirmative defenses. He claims that he has filed a hardship declaration after experiencing financial losses due to the COVID-19 pandemic. Defendant also asserts that his rent should be abated because his shower was not working for six months, forcing him to shower elsewhere during that time. Defendant further asserts “I believe 10% roughly \$500 from my monthly rent should be deducted since I was unable to use my shower.” (NYSCEF Doc. No. 26, *answer*).¹

Plaintiff now moves, pursuant to CPLR 3212, for an order entering judgment against defendant on its claims for rent and additional rent and/or use and occupancy from September 1, 2020 through July 31, 2021, in the sum certain of \$80,843.89, plus interest; amending the complaint to conform to the evidence set forth in the affidavit of Kimberly Cafaro (“Cafaro”), authorized representative of plaintiff, to reflect the \$80,843.89 in rent and additional rent owed; an order pursuant to CPLR 3211(b) and CPLR 3013, for an order dismissing the defenses alleged in defendant’s answer, insofar as they are bare legal conclusions with no factual basis; as well as, legal fees incurred by plaintiff in this action (NYSCEF Doc. No. 3, *notice of motion*).

Annexed to the affirmation of Joshua Zukofsky, Esq., plaintiff submits, *inter alia*, a copy of the lease executed between the parties for the subject premises, dated April 14, 2019 (NYSCEF Doc. No. 6, *lease*) and a rent ledger (NYSCEF Doc. No. 7, *ledger*).

¹ This court notes that, although it appears that answer was served in May 2021, same was not filed until December 2021.

Cafaro, the registered managing agent for plaintiff, submits an affidavit wherein she confirms that the rent ledger was prepared in the ordinary course of business. She further avers that “[d]efendant’s claims regarding the shower are untrue. At no point in time was [d]efendant’s shower ever inoperable or not in working order. Plaintiff, for a short period of time, was upgrading the water heater in the [b]uilding, but that did not affect [d]efendant’s ability to use his shower.” (NYSCEF Doc. No. 5, *Cafaro’s affidavit*).

By memorandum of law, plaintiff argues that there is no dispute that defendant owes \$80,843.89 in rent for the period from September 2020 through July 2021, plus legal fees incurred by plaintiff. As to defendant’s two defenses, plaintiff maintains that these defenses should be dismissed as unavailing and that they do not preclude the granting of the motion for summary judgment. First, the claim relating to the hardship declaration lacks merit because this is not an eviction action; thus, the filing of a hardship declaration does not prevent plaintiff from seeking arrears. Plaintiff relies on the affidavit of Cafaro to argue that the affirmative defense premised on the non-working shower should be disregarded and, to the extent defendant argues it is entitled to a set-off in the amount of \$500.00, defendant would still owe plaintiff over \$80,000.00 in rent/use and occupancy (NYSCEF Doc. No. 11, *memorandum of law in support*).

In opposition to the motion, defendant, appearing *pro se*, submits an affidavit wherein he asserts, among other things, that he is entitled to a rent abatement due to issues in the apartment that were reported to management. He claims that even the city issued summons to plaintiff for the lack of repairs (NYSCEF Doc. No. 20, *defendant’s affidavit*).

In reply, plaintiff argues that the motion should be granted because there are no material issues of fact with respect to the calculation of outstanding arrears due and that defendant has failed to raise an issue of fact sufficient to defeat its motion. Addressing defendant’s affidavit, plaintiff contends that he relies exclusively on his own unsubstantiated claims and expressions of hope, which are insufficient to raise an issue of fact. The claim that there were conditions in the apartment that required repairs is rebutted by Cafaro, and defendant fails to state, with any specificity, what conditions needed repair, when plaintiff was notified, when defendant provided access and what damages defendant allegedly suffered (NYSCEF Doc. No. 21, *affirmation in reply*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (See *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

CPLR 3025(c) provides that “[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.” After the filing of this motion, plaintiff submitted a letter to the court with an updated ledger reflecting a new balance of \$30,960.39 (NYSCEF Doc. No. 29,

updated ledger). Therefore, that branch of the motion seeking to conform the complaint to the proof is granted to the extent it seeks to amend the pleadings to reflect an outstanding balance of \$30,960.39.

That branch of the motion seeking summary judgment is granted. Plaintiff has established its *prima facie* entitlement to summary judgment on its breach of contract claims. This court agrees with plaintiff that defendant's reliance on the filing of a hardship declaration as a defense in this breach of contract action does not lie. Furthermore, in his answer, defendant claims that "[he] was not able to use [his shower . . . [d]ue to problems that [he] had previously brought to [the] landlords' attention . . . [which] forc[ed] [him] to shower elsewhere for 6 months." However, in opposition to the motion, defendant argues that there were "two issues" in the apartment that entitle him to an abatement. His affidavit, however, fails to state with any specificity the issues that were allegedly present in the apartment, which he contends were reported to management and for which the city allegedly issued a summons. The affidavit is conclusory and unsubstantiated by other proof and, thus, the court finds it insufficient to defeat the present motion because "[i]n order to create a genuine issue of fact, defendant is required to offer more than his own conclusory and unsubstantiated statements" (*Nat'l Westminster Bank USA v Sardi's, Inc.*, 174 AD2d 470, 471 [1st Dept 1991], citing *State Bank of India v Patel*, 167 AD2d 242, 243 [1st Dept 1990].)

Plaintiff has also established its entitlement to legal fees under the lease (§ 20 of the lease). However, that branch of the motion shall be referred to a special referee to hear and determine. Accordingly, it is hereby

ORDERED that plaintiff's motion seeking to conform the complaint to the proof is granted to the extent that the complaint shall reflect arrears in the amount of \$30,960.39; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant in the amount of \$30,960.39 plus statutory interest thereon, together with costs and disbursements as calculated by the Clerk of the Court; and it is further

ORDERED that that branch of the motion seeking attorney's fees is granted and shall be referred to a special referee to hear and determine; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant and the Clerk of the Court; and it is further

ORDERED that counsel for the plaintiff shall, within twenty (20) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

ORDERED that service upon the Clerk of the Court and the Special Referee 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).

August 15, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE