

Almark Holding Co. LLC v Jung Moon

2023 NY Slip Op 34165(U)

November 17, 2023

Supreme Court, New York County

Docket Number: Index No. 160457/2021

Judge: Francis A. Kahn III

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

-----X
 ALMARK HOLDING CO. LLC, INDEX NO. 160457/2021
 Plaintiff, MOTION DATE _____
 MOTION SEQ. NO. 002

- v -

JUNG MOON, KWANG MOON, JANE DOE, JOHN DOE, **DECISION + ORDER ON MOTION**
 Defendant.

-----X
 The following e-filed documents, listed by NYSCEF document number (Motion 002) 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
 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This is an action for, *inter alia*, a judgment of ejectment and a money judgment for use and occupancy related to a premises located at 284 Mott Street, Apartment 10 PHQ, New York, New York. Plaintiff filed affidavits of service of the summons and complaint on Defendants Jung Moon (“Jung”) and Kwang Moon (“Kwang”) on December 15, 2021, and January 13, 2022, respectively. Defendant Jung filed, *pro se*, a document titled “Affidavit Answer to Summons” on January 13, 2022.

Thereafter, Defendants Jung and Kwang moved to dismiss the complaint pursuant to CPLR §3211[a][8], for a traverse hearing as well as an award of costs and expenses associated with the motion. Plaintiff opposed the motion and cross-moved for no less than thirteen different forms of relief including leave to amend the complaint, declaratory relief, summary judgment and a default judgment. Defendants opposed the cross-motion. After filing the motion, Defendants Jung and Kwang filed, by counsel, an amended answer without court leave. By order dated November 17, 2022, this Court denied Defendants’ motion to dismiss and granted Plaintiff’s motion only to the extent of permitting filing of an amended complaint.

Now, Plaintiff moves for, by notice of motion, for the following relief:

- (a) Pursuant to CPLR 3025(c), amendment of the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is to be determined;
- (b) Pursuant to CPLR §3212, summary judgment against JUNG JOO MOON, M.D., M.M.S (“Dr. Moon”) on the first cause of action in the Amended Complaint for ejectment;
- (c) Pursuant to CPLR §3212, summary judgment on the following causes of action in the Amended Complaint:

- (i) On those portions of the second and fourth causes of action against Dr. Moon and KWANG MOON (the "Guarantor") (collectively "Defendants"), respectively, for rent / holdover use and occupancy for May 1, 2022 through January 31, 2023 at \$3,295.00 per month totaling \$29,655.00, which sum continues to accrue while Dr. Moon remains in possession;
- (ii) On those portions of the second and fourth causes of action for rent against the Guarantor for February 1, 2021 through April 30, 2022, as months provisionally approved for payment by the Office of Temporary Disability Assistance ("OTDA") through the Emergency Rent Assistance Program ("ERAP") that Landlord did not accept, at \$3,295.00 per month totaling \$49,425.00;
- (iii) On that portion of the fifth cause of action against Defendants for attorneys' fees and expenses pursuant to the lease and the guaranty through January 25, 2023 of \$34,100.86, plus re-letting expenses, if any, and leave to enter an independent judgment against Defendants for said fees and expenses, separate and apart from a judgment for rent/use and occupancy, after a hearing to determine the fees due, and/or submission of attorneys' affirmation and invoices;
- (iv) Dismissal of all defenses and counterclaims;
- (v) Statutory interest, costs and disbursements; and

Defendants Jung and Kwang opposed the motion positing there are issues of fact requiring a trial and that the motion seeks damages not prayed for in the complaint.

The branch of the motion for leave to amend the complaint to plead the continuing damages in this case is denied as unnecessary. Real Property Law §220 provides that "[t]he landlord may recover a reasonable compensation for the use and occupation of real property" per an agreement other than a deed. RPAPL §601 provides that "[i]n an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property". As an adjunct to this statutory authority, a court "has broad discretion in awarding use and occupancy pendente lite" (*Ballinteer Corp v SNRP W. 37 LLC*, 217 AD3d 597, 598 [1st Dept 2023]; *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept, 2000]).

As to the branch of the motion for summary judgment, a movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make the requisite showing requires denial of the motion, regardless of the sufficiency of the opposition papers (*see id.* at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the opponent to produce evidentiary proof that establishes the existence of a material issues of fact (*see eg Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

A cause of action for ejectment is recognized at common law in New York and is codified under Article 6 of the Real Property Actions and Proceedings Law which is titled "Action to Recover Real Property" (*see Calvi v Knutson*, 195 AD2d 828, 831 [3d Dept 1993]; *Alleyne v Townsley*, 110 AD2d

674, 675 [2d Dept 1985]). “In order to maintain a cause of action to recover possession of real property, the plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseised by the defendant or his predecessors, and of which the defendant is in present possession” (*Jannace v Nelson, L.P.*, 256 AD2d 385, 385-386 [2d Dept 1998]; *see also Merkos L'Inyonei Chinuch, Inc., v Sharf*, 59 AD3d 408, 410 [2d Dept 2009]).

In support of the motion, Plaintiff submitted the affidavit of David Lipsic (“Lipsic”), the managing director of non-party Abington Properties, the alleged managing agent of the real property at issue. Lipsic’s affidavit, along with the documents contained in the Court record, demonstrate Plaintiff is the owner of the property, that Jung was a tenant at the property via written lease, that the term of occupancy in the lease expired, and that Jung remains in possession of the property. As such, Plaintiff demonstrated, in the first instance, entitlement to summary judgment on the ejectment cause of action (*see eg City of New York v Anton*, 169 AD3d 999, 1001-1002 [2d Dept 2019]).

In opposition, Jung failed to raise any issue of fact (*see Noamex, Inc. v Domsey Worldwide, Ltd.*, 192 AD3d 817 [2d Dept 2021]). Indeed, the legal arguments within the affirmation in opposition are entirely conclusory on this point and fail to explain how the evidence in opposition raises an issue of fact (*cf. Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [1st Dept 2010]). Jung’s reliance on the Emergency Rental Assistance Program (“ERAP”)(Part BB, Subpart A, § of chapter 56 of the Laws of 2021, as modified by L. 2021, C. 417) and the conditional approval of an application submitted thereunder is unavailing as Plaintiff demonstrated that it did not participate in the program and that it did not intend to be bound by the condition of accepting ERAP payments (*cf. H&P 29th St. Assoc. LLC v Yagci*, ___ Masc3d ___, 2023 NY Slip Op 31098[U][Sup Ct NY Cty 2023]). In any event, Plaintiff is not seeking to recover from Jung any sums from the periods subject to exclusion by declining to participate in ERAP.

As to the branch of the motion against Kwang on the guaranty, “[o]n a motion for summary judgment to enforce a written guaranty all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], *quoting City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Lipsic’s affidavit and the record documents demonstrated a *prima facie* case for summary judgment on the cause of action based upon the guaranty. Based upon the finding *supra*, no issue of fact was established in the opposition papers. Even if this were not the case, Kwang’s reliance on ERAP is misplaced as a guarantor cannot rely on any defenses personal to the borrower “unless it extends to a failure of consideration for the principal contract, and therefore for the guarantor’s contract” (*I Bldg, Inc. v Hong Mei Cheung*, 137 AD3d 478 [1st Dept 2017]).

As to the branch of Plaintiff’s motion to dismiss Defendants’ affirmative defenses, CPLR §3211[b] provides that “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit”. For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov*, 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept 2017]). When evaluating such a motion, a “defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed” (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

Contrary to Defendants' assertions, all the affirmative defenses and counterclaims are entirely conclusory and unsupported by any facts in the answer or by the papers submitted in opposition. As such, these affirmative defenses are nothing more than an unsubstantiated legal conclusion which is insufficiently pled as a matter of law (*see Board of Mgrs. of Ruppert Yorkville Towers Condominium v Hayden*, 169 AD3d 569 [1st Dept 2019]; *see also Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 AD3d 561 [1st Dept 2020]; *170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372 [1st Dept 2008]; *see also Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2d Dept 2008]). Further, to the extent that no specific legal arguments were proffered in support of any affirmative defense or counterclaims, those defenses and claims were abandoned (*see U.S. Bank N.A. v Gonzalez*, 172 AD3d 1273, 1275 [2d Dept 2019]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044 [2d Dept 2012]; *Wells Fargo Bank Minnesota, N.A v Perez*, 41 AD3d 590 [2d Dept 2007]).

As the amount of use and occupancy, Plaintiff demonstrated that Defendant Jung is responsible for the sum of \$29,655.00 representing the period of May 1, 2022, through January 31, 2023. Defendant Kwang is responsible for the sum of \$49,425.00 representing the period of February 1, 2021, through April 30, 2022. As to attorney fees and other expenses, Plaintiff has not proffered a sufficient affirmation of legal service and other corroborating documentation to permit the Court to make such an award.

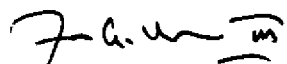
Accordingly, it is

ORDERED that Plaintiff's motion is granted as provided supra, and it is

ORDERED that the issue of Plaintiff's attorney's fees and other expenses is set for a hearing before the Court on **December 12, 2023 @ 2:15 p.m.** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street. Any documentary evidence sought to be used during the hearing shall be efiled under a cover letter no later than December 1, 2023. In lieu of a hearing, the parties may have his issue determined upon written submissions, if the parties agree to same in a written stipulation efiled no later than December 1, 2023.

11/17/2023

DATE



FRANCIS A. KAHN, III, A.J.S.C.

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

HON. FRANCIS A. KAHN III
J.S.C.