

Times Square Group, Inc. v. Yan Li Medicine, P.C., 98518/16

April 19, 2017

- Civil Court, Kings County, Part 52
- 98518/16
- Judge Mary V. Rosado
- For Plaintiff: Attorney for Petitioner: Eugene Kroner from the Law Offices of Vincent S. Wong.
- For Defendant: Attorney for Respondents: Matthew S. Porges from the Law Office of Matthew S. Porges.

Cite as: Times Square Group, Inc. v. Yan Li Medicine, P.C., 98518/16, NYLJ 1202783907373, at *1 (Civ., KI, Decided March 16, 2017)

The court has considered the following listed submissions of the parties, pursuant to CPLR §2219(a): Title Number Respondents' Order to Show Cause dated January 17, 2017; Respondent's Affirmation in Support dated January 11, 2017 and supporting Exhibits A-J; 1, 2

Petitioner's Affirmation in Opposition dated January 23, 2017 and supporting Exhibits 1-7; Ingaun Teoh's Affidavit in Opposition dated January 23, 2017; 3, 4

Respondents' Reply Affirmation in Further Support dated February 2, 2017 and supporting Exhibits A-F; Affidavit of Amgad E.F. Iskander's notarized February 1, 2017 5

DECISION AND ORDER

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Upon the foregoing papers, the Decision and Order of the Court is as follows:

This matter is a holdover action by Times Square Group, Inc., commercial sublandlord (hereinafter "Landlord"). Commercial sublessees Yan Li Medicine, P.C., Yan Li, "Jane Doe", and ABC Corp (hereinafter "Tenants") move for summary judgment and dismissal of the action.

Background

This case involves a dispute between Landlord and Tenants over commercial space subleased for a medical clinic including use of an elevator to bring patients and staff up to the second floor clinic. The parties entered into a sublease agreement dated July 9, 2016 for a term *2 of five years with an option for renewal for another five years, to commence at noon on July 1, 2016. A section of the sublease called "Maintenance and Repairs" outlined some of Tenants' responsibilities:

1. The subtenant agrees to surrender and deliver to the Sublandlord the Subleased Premises and all furniture and decorations within the Subleased Premises in as good a condition as they were at the beginning of the Term, reasonable wear and tear excepted. The subtenant will be liable to the Sublandlord and the Landlord for any damages occurring to the Subleased Premises or the contents of the Subleased Premises or to the building which are done by the Subtenant or the Subtenant's guests.

2. The Subtenant will immediately report all general maintenance issues and needed repairs to the Sublandlord and the Landlord. (See Respondent's Order to Show Cause, exhibit A).

However, by Notice to Cure dated October 11, 2016, Landlord stated that Tenants violated the "Maintenance and Repairs" portion of the commercial sublease because the elevator was "in a state of disrepair" and Tenants failed to repair it, causing the Department of Buildings (hereinafter "DOB") to issue a violation to the owner of the building on July 27, 2016. The Notice to Cure gave Tenants fifteen days to repair the elevator (see Respondent's Order to Show Cause, exhibit D). By Notice of Termination dated November 9, 2016, Landlord terminated Tenants' tenancy effective November 28, 2016, based on Tenants' failure to cure the violation (see Respondent's Order to Show Cause, exhibit E).

Parties' Contentions

Tenants move for dismissal of the action and argue that they received keys to the elevator when they moved into the subject premises on July 31, 2016, after the DOB violation was issued. In support of their argument, Tenants submit their own affidavit and two affidavits from people who allege they observed Dr. Li moving out of her old office in Chinatown on July 31, 2016. Tenants further supply an affidavit of an elevator maintenance inspector who stated that a *3 Department of Buildings inspection dated September 16, 2016 reported the elevator to be in satisfactory operating condition, and that the cabin and door of the elevator appeared to be in safe and in satisfactory condition when he inspected them on October 18, 2016, and on December 9, 2016.

Tenants allege that they did not have access to the elevator prior to the move-in date of July 31, 2016, and therefore could not have been responsible for any issues related to the DOB violation on July 27, 2016 (see Order to Show Cause exhibits E, G). Tenants also provided a certificate of liability insurance which reflects that their insurance policy became effective on August 1, 2016, and a receipt for \$440 for moving services on July 31, 2016 (see Order to Show Cause exhibits I, J).

In opposition to the Motion, Landlord provides his affidavit, in which he claims Tenants received keys to the premises, including keys to a fully functional and operational elevator on July 9, 2016. Landlord states that on July 10, 2016, Tenants changed the keys, began construction on the walls and pipes on the premises, and damaged the elevator. In support of his claims that Tenants were on the premises and had access to the elevator prior to the DOB violation, Landlord submits a copy of 1) a rent check from Tenants for the period from July 10, 2016 to July 30, 2016, 2) a screenshot of surveillance video taken on July 24, 2016 showing Tenants and others inside the premises, and 3) a screenshot of surveillance video taken of Tenants and others standing by the subject elevator on July 27, 2016, at 8:45 a.m., the morning the DOB violation was issued (see Landlord's affirmation in opposition, exhibits 5, 6 and 7).

In reply, Tenants provide an affidavit and supporting documents of Mr. Iskander, Dr. Li's husband. Based on those documents, Landlord met with the Tenants on July 9, 2016, but keys were not provided to Tenants at that time. On July 11, 2016, Tenants were given an elevator *4 key, but, after riding the elevator, Dr. Li observed the elevator to be "a very old, overly used, poorly refurbished piece of equipment" and "unsafe" (see Tenant's Reply affirmation, exhibit A and Iskander aff). These issues were discussed with Landlord who said he would resolve the issues (id.). Mr. Iskander alleges that he and Tenants were present at the subject premises on July 24, 2016 to demand a refund of the first rent payment due to the unsatisfactory conditions of the elevator (see Iskander aff at 6). He also states that the screenshot of Tenants and others standing outside the elevator on July 27, 2017 does not prove they had access to the elevator since they were under strict orders to post a sign indicating that the elevator was for the sole use of the clinic once they came into possession of the elevator key, and that sign is not shown in Landlord's July 27, 2016 screenshot. Mr. Iskander states that when he was on the premises on July 27, 2016, he saw men working on the elevator for Landlord (id. at 13-14). Mr. Iskander also alleges that he accepted the elevator key on July 28, 2016, after the elevator was shown to be in operating condition.

Discussion

It is well settled that, in order to succeed on a motion for summary judgment, a movant must establish her claim or defense sufficiently to warrant the court, as a matter of law, to direct judgment in her favor (CPLR §3212[b]), and she must do so by tender of evidentiary proof in admissible form (see *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The burden then shifts to the non-moving party to produce evidence in admissible form to demonstrate, based on affirmative proof, the existence of a disputed material issue of fact sufficient to require a trial (see *Garnham & Han Real Estate Brokers, Inc. v. Oppenheimer*, 148 AD2d 493, 494 [2d Dept 1989]; see also *SRM Card Shop, Inc. v. 1740 Broadway Assocs., L.P.*, 2 AD3d 136, 139-140 [1st Dept 2003]; CPLR 3212[b]).

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Applying these legal principles to this matter, based on the competing affidavits regarding the sequence of events that lead to Tenants' move into the subject property, issues of fact remain with regard to when the Landlord provided the elevator key to Tenants (see *McDonnell v. Chelsea Mfrs.*, 259 AD2d 674, 676 [2d Dept 1999]). Although Tenants provided evidence that items were moved into the subject premises on July 31, 2016, Tenants do not provide sufficient evidence to rebut Landlord's claims that Tenants received the elevator key, performed construction on the property, and damaged the elevator prior to the DOB violation.

Conclusion

In accordance with the foregoing, Tenants' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: March 16, 2017

Kings, New York

