

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 52

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FIFTH PARTNERS, LLC, :
 : Index No. LT-060476-18/NY
 Petitioner-Landlord, : Motion Sequence No. 001
 :
 -against- : **DECISION, ORDER, AND**
 PRIVCO MEDIA LLC, : **JUDGMENT**
 :
 Respondent-Tenant, :
 :
 -and- :
 ABC INC., :
 :
 Respondent-Occupant. :
-----X

LOUIS L. NOCK, J.

Petitioner Fifth Partners, LLC (the “Landlord”), moves: (i) to amend its commercial non-payment petition to include all base rent and additional rent due through the date of the instant motion; (ii) to dismiss the defenses of respondent Privco Media LLC (the “Tenant”) pursuant to CPLR 3211(b); (iii) for summary judgment granting a judgment of possession and a money judgment pursuant to CPLR §§ 3212 and 409(b); and (iv) for a separate money judgment for legal fees. Tenant opposes the motion, asserting the existence of issues of fact as to its affirmative defense of actual or constructive eviction.

Tenant had also lodged a challenge as to service of process. By decision and order dated July 12, 2018, this court directed that a traverse hearing be convened. Said hearing was convened on August 20, 2018, which concluded with this court’s on-the-record finding that service of process was effected, paving the way for the instant disposition of Landlord’s above-described motion.

Amendment of the Petition:

The non-payment petition in this proceeding, dated April 23, 2018, alleges an arrearage in rent and additional rent of \$26,635.72, correlating to March and April 2018. Landlord's instant motion, dated May 22, 2018, seeks an order amending the petition's arrearage amount to be \$39,650.98, to reflect May 2018 obligations, as well. Landlord furnishes the affidavit of its principal, Ryan Mehra, sworn to May 22, 2018 (the "Mehra Aff."), itemizing the details of the alleged May 2018 obligations, and referring to specific provisions of the lease relating to rent and related accruals.

A party may move to amend its pleading to have it conform to the proof (CPLR 3205 [c]). In addition, and in any event, the policy of this state is for amendment of pleadings to be freely given (CPLR 3025 [b]; *e.g.*, *Fahey v County of Ontario*, 44 NY2d 934 [1978]). Accordingly, leave is hereby granted to amend the petition to be alleging \$39,650.98 in rent and additional rent arrears as of May 22, 2018 – the date of Landlord's motion.

First Affirmative Defense:

This defense attacks the validity of the rent demand, noting that the demand appends an "Authorization" form listing Landlord's counsel as an agent for Fifth Partners LP – not as an agent for Fifth Avenue Partners LLC, the petitioner in this case. But this apparent typographical or clerical error cannot work a forfeiture of the entire proceeding because, as Landlord demonstrates, its counsel is a duly authorized agent of it, as well (Notice of Motion Exh. J). The added appendage of an "Authorization" form to the actual body of a statutory three-day rent demand is not required. What is required is that the demand be executed either by the landlord or its agent; and, as already noted, proof has been submitted by Landlord to show that its

counsel, who signed the demand, is its agent for these purposes (Notice of Motion Exh. J). Therefore, the first affirmative defense is dismissed.

Second and Third Affirmative Defenses:

These defenses challenge service of predicate notice and service of the notice of petition and petition. As indicated at the outset of this decision, the August 20, 2018, traverse hearing held in this matter concluded with a finding of proper service of those jurisdictional items. Therefore, these defenses are dismissed.

Fourth Affirmative Defense:

This defense very tersely alleges that “Respondent has a complete defense based on documentary evidence.” Such a pleading, without any detail or explication whatsoever, fails the threshold pleading requirement that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of” the matters “intended to be proved” (CPLR 3013). Therefore, this defense is dismissed.

Fifth Affirmative Defense & First Counterclaim:¹

Alleging an actual, or a partially constructive, eviction, the seminal allegation underlying this defense/counterclaim is:

Petitioner has failed to provide services and meet its repair and maintenance obligations under the lease, including, but not limited to, elevator service, clean and functioning rest rooms and air conditioning, thus breaching the lease and denying Respondent the use and enjoyment of the premises.

(Answer ¶ 18; *see, id.* ¶ 21.) The answer seeks dismissal of the petition or a rent abatement/offset (Answer ¶ 22).

Although this court’s July 12, 2018, decision found the counterclaim to be related to the claims, thereby preserving Tenant’s right to interpose a jurisdictional challenge to service of

¹ Although styled in the answer as the “First Counterclaim,” it is the only counterclaim.

predicate notice and of process; that does not mean that such counterclaim can survive a motion to dismiss if ample grounds exist to support such a motion. Here, such grounds do exist.

Lease ¶ 4 vests Tenant with exclusive responsibility to repair and maintain the rest room facilities. Lease ¶ 46.2.1, in like fashion, vests Tenant with exclusive responsibility to implement nonstructural repairs to “plumbing, electrical work, fixtures and all interior repairs”

Lease ¶ 46.3 requires Tenant to maintain an annual service contract for air conditioning units, and vests Tenant with exclusive responsibility to bear the costs of any air conditioning repairs not covered by such contract.

Regarding elevator service: to be sure, a landlord *is* generally responsible to repair common elements within a building that are used by its commercial tenants, and that are within its control (*e.g., Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57 [1966]). Elevators would fall into that category. However, no such responsibility accrues unless and until the landlord is notified of a need for such repair (2 Robert F. Dolan, *Rasch’s Landlord and Tenant – Landlord’s Duties* § 18:29 at 52 [5th ed 2017]). Landlord’s supporting affidavit attests that no notice of any elevator problem has ever been received by it, at all;² and further attests that: (i) a brand new elevator system was installed in 2015; (ii) an elevator service contract is actively maintained by Landlord; and (iii) to its knowledge, the elevators are functioning fine (Mehra Aff. ¶ 29). No conflicting affidavit from anyone with personal knowledge is submitted by Tenant. Nor does Tenant’s counsel’s affirmation proffer any affirmative statement – let alone showing – that Landlord’s sworn affidavit attestations are untrue. Seeing as Landlord has

² Lease article 42, titled “Notices,” requires written notice “by registered or certified mail, return receipt requested, or by overnight courier or mail service” Landlord has attested by supporting affidavit that no notice, in any form whatsoever, has ever been received by it regarding the elevator service (Mehra Aff. ¶ 29).

supported its motion through the sworn affidavit of its principal, Tenant's failure to submit anything of evidentiary consequence to rebut that *prima facie* support fails to sustain Tenant's now-shifted burden to "lay bare [its] proof and demonstrate the existence of triable issues of fact" regarding the elevator service (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also, Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]).³

Furthermore, any theory of active or constructive eviction, or breach of a covenant of quiet enjoyment, premised upon the bald allegation of faulty elevator service, cannot stand where, as here, the commercial tenant remained in full possession (*e.g., 127 Restaurant Corp. v Rose Realty Group, LLC*, 19 AD3d 172 [1st Dept 2005]).

Accordingly, Landlord's motion to dismiss this defense and counterclaim is granted.

Conclusion:

Based on all the foregoing: (i) Landlord's motion to amend the petition to reflect an arrearage, as of May 22, 2018, in the amount of \$39,650.98, is granted, and the petition is deemed so amended, as of May 22, 2018; (ii) Landlord's motion dismissing defenses and counterclaim is granted; and (iii) Landlord's motion for summary judgment of possession and warrant of eviction, and for judgment for all rent and additional rent due to the date of its motion, is granted.

³ Lease ¶ 31 contractually recognizes Landlord's common law responsibility to provide necessary elevator service. But, again: Tenant has utterly failed to affirmatively rebut Landlord's *prima facie* support regarding the newness and adequacy of the elevators (*Alvarez, supra; Zuckerman, supra*). Moreover, that lease paragraph conditions Landlord's elevator responsibility on Tenant's reciprocal responsibility to be in a state of non-default under the lease. The non-payment petition in this proceeding clearly alleges Tenant's non-payment defaults, which is supported in the Mehra Affidavit. Landlord's submission concerning Tenant's non-payment of rent and related charges remains unrebutted by any probative submission from Tenant in this motion practice.

Lease ¶¶ 19 and 64 entitle Landlord, as the prevailing party, to an award of its reasonable legal fees. That prong of Landlord's motion seeking such an award is granted. The amount of such award will be determined at a fee hearing to be scheduled by Landlord's counsel.

Insofar as unpaid rent and additional rent have accrued from the date of the motion practice to the date hereof, Landlord may move, on notice, for amendment of the within judgment. If Landlord does so, it should prominently request on its notice of motion that such motion be referred to the undersigned.

Accordingly, it is hereby

ORDERED that Landlord's motion to amend the petition to reflect an arrearage, as of May 22, 2018, in the amount of \$39,650.98, is granted, and the petition is deemed so amended, as of May 22, 2018; and it is further

ORDERED that Landlord's motion dismissing defenses and counterclaim is granted; and it is further

ORDERED and ADJUDGED that Landlord's motion for summary judgment of possession and warrant of eviction, and for judgment for all rent and additional rent due through May 22, 2018, in the principal amount of \$39,650.98, is granted, and that Petitioner-Landlord have judgment therefor and execution thereon against Respondent-Tenant, and that a warrant of eviction issue forthwith; and it is further

ORDERED that Landlord's motion for an award of its reasonable legal fees incurred in this proceeding is granted, and that the amount of such award will be determined at a fee hearing to be scheduled by Landlord's counsel; and it is further

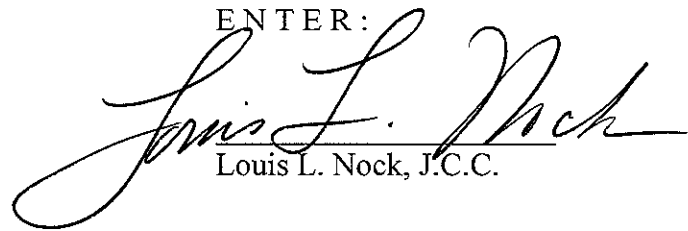
ORDERED that, insofar as unpaid rent and additional rent have accrued from the date of the motion practice to the date hereof, Landlord may move, on notice, for amendment of the

within judgment, and that if Landlord does so, it should prominently request on its notice of motion that such motion be referred to the undersigned; and it is further

ORDERED that the claims against respondent ABC Inc. be severed and dismissed.

This shall constitute the decision, order, and judgment of the court.

Dated: New York, New York
October 30, 2018

ENTER:

Louis L. Nock, J.C.C.