CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

CLOVER 2 LLC,

Index No.: L&T 063123-19/NY

Petitioner-Landlord,

–against-

DECISION/ORDER

SPACE HUNTERS, INC.,

Respondent-Tenant,

JOHN DOE AND JANE DOE,

Respondents-Undertenants.

HON. ELENA BARON
Judge, Civil Court

In this commercial holdover proceeding petitioner Clover 2 LLC moves for summary judgment against respondent Space Hunters, Inc., seeking possession of the premises described in the petition as the second floor in the building located at 343 Lexington Avenue, New York, New York 10016 (premises), the fair market value of use and occupancy of the premises commencing June 1, 2019 pendente lite, and a money judgment for attorneys' fees to be determined at a hearing. In addition, petitioner moves to strike respondent's affirmative defenses pursuant to CPLR 3211(b). Respondent opposes the motion. Petitioner's motion is granted for the reasons stated below.

A. Background

Respondent entered into a lease with Cloverleaf Properties, Inc. (Cloverleaf) on August 13, 2013 (Petitioner's motion, exhibit D [lease]). The lease had a five-year term commencing on September 1, 2013 and ending on August 31, 2018 (*id.*). On June 16, 2014, Double Crown Properties, Inc., as successor by merger to Cloverleaf deeded the building at 343 Lexington Avenue to petitioner (*see* petitioner's motion, exhibit C [deed]).

Pursuant to paragraph 74 of the rider to the lease, respondent had the "right to extend the term of this Lease for one (1) additional term of five (5) years commencing on September 1, 2018 (hereinafter referred to as the 'Extension Term Commencement Date') and ending on August 31, 2023" so long as respondent met the following conditions:

> (1) respondent was required to give Petitioner "written notice (hereinafter called the 'Extension Notice') of its election to

extend the term of this Lease, by certified mail, return receipt requested, which notice must be given no later than March 1, 2018" with time being of the essence;
(2) respondent had to have "timely paid its rent and additional rent during the original term of the lease in accordance with the term of the Lease";
(3) respondent could not be "in default (after the giving of any required notice and the expiration of any applicable grace period) under this Lease as of the time of both the giving of the Extension Notice and the Extension Term Commencement Date";
(4) respondent had to be "in actual occupancy of the demised premises as of the time of the giving of the Extension Notice; and
(5) petitioner could not have commenced any proceedings or actions to collect its rent during the original term of the Lease. (*Id.*).

Respondent's principal, John McDermott, avers in a sworn affidavit, submitted in opposition to petitioner's motion, that he exercised respondent's right to renew the lease by written notice sent on February 15, 2018. Additional copies of the notice were allegedly sent to petitioner and petitioner's attorney on February 23, 2018. Mr. McDermott attaches copies of what he claims to be the return receipts for the mailings of the aforementioned notices.

On or about May 30, 2018, Cloverleaf, petitioner's predecessor, commenced a holdover proceeding (prior proceeding) against respondent under index number LT-063404-18, seeking possession of the premises, use and occupancy after May 31, 2018, and attorneys' fees (petitioner's motion, exhibit H).

On April 19, 2018, Cloverleaf served upon respondent a Notice to Cure Default stating that respondent violated various provisions of the lease by, among other things, using the premises for sleeping, residential, and/or overnight accommodations, and by placing two fixed signs and one neon rolling sign in the window of the premises wrongfully misrepresenting the address of the building as "344 Lex. Ave" or "344" (petitioner's motion, exhibit E).

On May 8, 2018, Cloverleaf served upon respondent a second Notice to Cure Default stating that respondent violated various provisions of the lease by, among other things, failing to pay Base Rent for May, 2018 in the amount of $5,965.19, and by failing to pay a late charge for the May 2018 rent (petitioner's motion, exhibit F).

On May 22, 2018, Cloverleaf served upon respondent a Notice of Termination of Lease stating that Cloverleaf elected to terminate Tenant's tenancy as of May 29, 2018 due to Tenant's failure to cure the defaults set forth in the aforementioned notices to cure. Cloverleaf further stated that it would commence a summary proceeding if respondent failed to vacate the premises on or before May 29, 2018 (petitioner's motion, exhibit G).

After a two-day trial, by order dated April 11, 2019, the court (Hon. D. Ramseur, J.C.C.) dismissed the proceeding on the ground that Cloverleaf lacked standing to maintain the

proceeding since it was not the owner of the premises. Despite this holding, the court addressed the merits of the proceeding and determined that termination of the lease was justified as respondent violated the lease by regularly sleeping in the premises, affixing a "344" sign, and regularly paying rent late (petitioner's motion, exhibit I).

On April 29, 2019, petitioner served upon respondent a Thirty-Day Notice of Termination of Tenancy stating that petitioner elected to terminate the tenancy held "under a monthly hiring, as of May 31, 2019" and that "pursuant to the Decision and Order" in the prior holdover proceeding, "the Court found respondent to be in default of the Lease justifying termination of the tenancy" on the grounds stated above (petitioner's motion, exhibit J). Petitioner further stated that "the above violations determined by the Court render Tenant's purported exercise of its option to renew the Lease for an additional five (5) year term null and void pursuant to Article 74(A) of the Lease" (*id.*).

In June 2019, petitioner commenced this holdover proceeding on the ground that respondent continues in possession of the premises without petitioner's permission despite the termination of the tenancy on May 31, 2019 (*see* petitioner's motion, exhibit A). In its petition, petitioner sought possession of the premises, the reasonable value of use and occupancy commencing June 1, 2019, and attorneys' fees and costs (*id.*). Respondent answered, asserting four affirmative defenses, which will be discussed below.

B. Motion to Strike Affirmative Defenses

Pursuant to CPLR 3211(b), a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. The petitioner bears the burden of demonstrating that the defenses are without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 [1st Dept 2011]). In deciding the motion, the respondent "is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*id.*). "A defense should not be stricken where there are questions of fact requiring trial" (*id.*).

Respondent's first affirmative defense alleges that the petition "fails to state a cause of action for which relief can be granted" and that petitioner "otherwise" lacks standing and/or capacity to maintain this action. Petitioner has demonstrated that this defense lacks merit as a matter of law. First, petitioner has sufficiently stated a cause of action based on respondent's alleged holdover after the termination of the lease. Second, petitioner has standing to maintain this action since it became the owner of the premises after the lease was entered into between Cloverleaf and respondent. As the court (Hon. D. Ramseur, J.C.C) previously held, after the conveyance of the property to petitioner, Cloverleaf was no longer the petitioner and thus did not have standing to maintain a summary proceeding (*see* RPAPL 721[1]; *Muzio v Rogers*, 20 Misc 3d 143[A], 2008 NY Slip Op 51763[U] [App Term, 9th & 10th Jud Dists 2008]).

Respondent's third affirmative defense states that the petition is defective because "it fails to adequately allege and describe, inter alia, the Petitioner, the Respondent, the Petitioner's interest in the premises, the Respondent's interest in the premises, the premises herein concerned, or the circumstances or manner in which the purported notices allegedly served were made" (petitioner's motion, exhibit B, ¶ 16). In opposition to the motion, respondent asserts that the petition lacks a description of the relationship between Cloverleaf and petitioner.

The court finds that petitioner has demonstrated that the third affirmative defense lacks merit as a matter of law. The petition states all that is required under RPAPL 741. The statute does not require petitioner to state its relationship to Cloverleaf in the petition, or the manner in which the purported notices were served. In any event, petitioner submitted a copy of the deed, which shows the relationship between petitioner and Cloverleaf (*see id.*, exhibit C). Additionally, the petition attached a copy of the Thirty-Day Notice of Termination of Tenancy and a copy of its affidavit of service, which shows the manner in which the notice was served (*see id.*, exhibit A).

Respondent's fourth affirmative defense states that petitioner "reinstated" the tenancy "after its purported termination, by delivering rental invoices to [Tenant] containing demands for rent and additional rent purportedly due under the Lease, and thereafter receiving and retaining payments for same" (petitioner's motion, exhibit B, ¶ 17). Petitioner has demonstrated that this defense lacks merit as a matter of law. The verified petition states that no rent or use and occupancy was received after the lease was terminated on May 31, 2019 (*id.*, exhibit A, ¶ 13). Further, as petitioner notes, pursuant to RPAPL 711(1), even if petitioner accepted rent after the commencement of this proceeding, such acceptance would not terminate the proceeding. It is noteworthy that respondent makes no argument with respect to this affirmative defense in its opposition papers. There is no evidence that petitioner delivered rental invoices to respondent after the purported termination of the tenancy or received and retained rental payments after that date.

Respondent's second affirmative defense states that the "purported Third-Day Notice of Termination of Tenancy was defective and improper" (Petitioner's motion, exhibit B, ¶ 15). As petitioner asserts, this affirmative defense is insufficient as a matter of law because it is a conclusion of law with no supporting facts (*see 170 W. Vil. Assoc. v G & E Realty, Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008]).

Even if the affirmative defense is facially sufficient, petitioner has demonstrated that it lacks merit as a matter of law. In opposition to the motion, respondent argues that the notice of termination was improper because it was not a month-to-month respondent at the time the notice was issued; rather, respondent asserts that it had properly renewed the lease for an additional five-year term on February 15, 2018. In reply, however, petitioner submitted a certified transcript of the trial in the prior holdover proceeding. During that trial, respondent's principal admitted that he paid rent late "through the years" (12/20/18 tr at 19, lines 2-11), in "15, 16, and 17" (*id.* at 23, lines 13-21). His testimony in the prior proceeding constitutes an informal judicial admission, which is admissible in this proceeding as evidence of the facts admitted, since

the evidence is relevant to the issue of whether respondent met the conditions for the lease renewal (*see generally GJF Const., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011]; *People v Foy*, 212 AD2d 446, 447 [1st Dept 1995], *lv denied* 85 NY2d 938 [1995]). As noted, under article 74(A) of the rider to the lease, respondent had the right to extend the lease so long as he, among other things, paid rent and additional rent on time during the original term of the lease in accordance with the term of the lease. As petitioner's managing member notes in an affidavit in support of petitioner's motion, article 44(C) of the rider to the lease states that "monthly installments of annual rental shall be paid by Tenant to Landlord on or before the first day of each month without notice or demand by Landlord." Petitioner's managing member avers that the prior proceeding was based, in part, on respondent's failure to timely pay the rent and the accompanying late charge (petitioner's motion, Issembert affidavit at ¶ 21). In opposition to the motion, respondent does not dispute that it failed to timely pay rent. Accordingly, the court finds that respondent was not entitled to renew the lease, and his alleged lease renewal in February 2018 is invalid. Thus, the original lease term expired on August 31, 2018, and respondent was a month-to-month respondent at the time petitioner served the Thirty-Day Notice of Termination of Tenancy in April 2019 (*see e.g. JPMorgan Chase Bank, N.A. v Rocar Realty Northeast, Inc.*, 47 AD3d 425, 428 [1st Dept 2008], *lv dismissed* 11 NY3d 761 [2008]). Further, petitioner provided the requisite 30-day notice of termination for month-to-month tenants (*see id.* at 427). Accordingly, petitioner has established that the 30-day notice of termination was proper.

C. Motion for Summary Judgment

Petitioner made a prima facie showing that it properly terminated the month-to-month tenancy on May 31, 2019 and that respondent failed to vacate the premises after that date (*see* RPAPL 711[1]). In opposition, respondent failed to raise a triable issue of fact. As noted, respondent's alleged lease renewal was invalid. Given this holding, it is not necessary to address whether the court's (Hon. D. Ramseur, J.C.C.) decision in the prior proceeding has preclusive effect in this proceeding.

Petitioner is entitled to the fair and reasonable value of the premises during the period of use and occupation from June 1, 2019 to the time the warrant is issued (*see* RPAPL 749[3]; *1400 Broadway Assoc. v Henry Lee and Co. of NY, Inc.*, 161 Misc 2d 497, 499 [Civ Ct, NY County 1994]). Petitioner has the burden of proving the reasonable value of use and occupancy (*Beacway Operating Corp. v Concert Arts Soc., Inc.*, 123 Misc 2d 452, 453 [Civ Ct, NY County 1984]). Because petitioner does not state or provide any evidence of the fair market value of the premises, the court will rely on the rent provided in the lease at the time the lease expired — that is, $5,965.19 per month (*see* Petitioner's motion, exhibit D at article 42[A][5]) (*see* 123 Misc 2d at 453 [rent reserved under lease has some probative value]).

Petitioner has shown that it is entitled to attorneys' fees pursuant to article 19 of the lease, to be determined at a hearing.

D. Conclusion

Because respondent failed to vacate the premises after petitioner properly terminated the month-to-month tenancy upon 30-days notice, petitioner is entitled to a judgment of possession against respondent, warrant to issue forthwith. Further, petitioner is entitled to use and occupancy from June 1, 2019, at the rate of $5,965.19 per month. The Clerk is directed to enter judgment accordingly.

Lastly, petitioner is entitled to attorneys' fees, to be determined at a hearing at 2:30 p.m. on October 25, 2019 in part 52, room 775, at 111 Centre Street, New York, New York 10013.

The foregoing constitutes the Decision and Order of this Court.

DATED: October 1, 2019

ELENA BARON
JUDGE, CIVIL COURT