CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : PART 52BU/63

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ALI BAHRI a/k/a PASCAL BAHRI,

Petitioner-Tenant,

-against-

KATHERINE BRODY and
VISTA REAL ESTATE, INC.,

Respondents-Landlords.

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L&T Index No. 060640/05

DECISION & ORDER

2005 APR 21 AM 9:30

BARBARA JAFFE, J.:

For petitioner:
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For respondents:
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A bench trial was held before me on March 28, 2005, on petitioner's motion, brought by order to show cause, for an order pursuant to Real Property Action and Proceedings Law (RPAPL) § 713(10) removing respondents from possession of "carriage house 1" at 3 West 15th Street (a/k/a 98 Fifth Avenue), restoring petitioner to exclusive possession of such premises, and compelling respondents to restore the premises to the condition in which they were found, together with restoration of all of the furniture, clothing, personal property and effects, fixtures, and improvements. Respondents counterclaim for $16,100, representing accrued rent through March 31, 2005 and legal fees. On April 4, 2005, the parties submitted to the court memoranda of law.

Testifying for petitioner was petitioner; testifying for respondents were respondent Katherine Brody and Michael Brody. I find as follows:

On or about May 1, 2003, the parties entered into a one-year commercial lease of an office at a monthly rent of $2,200. (Pet. Exh. 1). The monthly rent was raised to $2,300 upon renewal of the lease for another one-year term in 2004, to expire April 30, 2005. (Pet. Exh. 2). The lease prohibits the use of the space for any purpose other than an office, and further provides

in the eighth paragraph that the landlord's failure to insist upon the strict performance of any of the lease covenants, or to exercise any option, "shall not be construed as a waiver or a relinquishment for the future of such covenant or option." (Pet. Exh. 1).

The second paragraph of the lease requires the tenant to:

> take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition, which repairs shall be, in quality and class, equal to the original work; promptly pay the expense of such repairs; suffer no waste or injury . . . suffer the Landlord to make repairs and improvements to all parts of the building, and to comply with all orders and requirements of governmental authority applicable to said building or to any occupation thereof; suffer the Landlord to erect, use, maintain, repair and replace pipes and conduits in the demised premises and to the floors above and below; forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by Tenant and also for any matter or thing growing out of the occupation of the demised premises . . .

The eighteenth paragraph provides as follows:

> That during seven months prior to the expiration of the term hereby granted . . . workmen may enter at any time, when authorized by the Landlord or the Landlord's agents, to make or facilitate repairs in any part of the building; and if the said Tenant shall not be personally present to open and permit an entry into said premises, at any time, when for any reason an entry therein shall be necessary or permissible hereunder, the Landlord or the Landlord's agents may forcibly enter the same without rendering the Landlord or such agents liable to any claim or cause of action for damages by reason thereof (if during such entry the Landlord shall accord reasonable care to the Tenant's property) and without in any manner affecting the obligations and covenants of this lease; it is, however, expressly understood that the right and authority hereby reserved, does not impose, nor does the Landlord assume, by reason thereof, any responsibility or liability whatsoever for the care or supervision of said premises, or any of the pipes, fixtures, appliances or appurtenances therein contained or therewith in any manner connected.

Petitioner lived in the space, which had been equipped with a sink, washing machine, clothes dryer, stove, and kitchen for the convenience of the prior tenant, a television producer. Petitioner also owned and operated a spa, Purecells Inc. (Purecells), located at 4 West 16th Street. In June 2004, petitioner filed for bankruptcy relief with respect to Purecells, and in August 2004, he was evicted from those premises.

In early September 2004, respondent Brody, the owner and manager of 3 West 16th Street, received inquiries about petitioner from his creditors. Concerned about petitioner's ability to pay rent, Brody asked her son, Michael, to call on petitioner, which he did in mid-September.

Petitioner cracked open the door and told Michael that he would be moving out. When Michael asked for the keys to the space, petitioner told him to call back in an hour. When Michael called back, petitioner did not answer the telephone.

Brody then asked Isaac Mohammed, the broker through whom petitioner rented the space, to call petitioner. According to petitioner, Mohammed called and informed him that men wearing dark suits and sunglasses and driving a large black car, apparently from the Secret Service, were seeking information about him. Petitioner also testified that he immediately called Brody, who confirmed Mohammed's information, and told her that he would be two weeks late with September's rent. Petitioner theorizes that upon learning of the impending Purecells bankruptcy, Brody anticipated that he would no longer be able to pay rent and thus, sought to scare him from the space by exploiting his fear of being illegally arrested as a foreign national of middle-eastern ancestry.

Brody testified that she had only asked Mohammed to find out about petitioner's situation, and denied having told petitioner that the Secret Service was looking for him. She also testified that petitioner told her that he would be moving out. None of the parties called Mohammed as a witness, nor did they ask the court to draw any inferences from the others' failure to call him.

No evidence was adduced that at the time of her telephone conversation with petitioner, Brody had reason to believe that Purecells was petitioner's sole source of income, or that the inquiries she received were directed toward his personal finances rather than toward Purecells'. Thus, as there was an insufficient basis upon which to believe that petitioner, who had been renting the space from Brody since May 2003, would abandon it or continue to breach his obligation to pay rent, petitioner's argument that Brody was motivated to scare him into leaving the space is unpersuasive.

Additionally, petitioner never paid September's rent, nor any rent thereafter, and such a failure to pay rent more clearly reflects an intent to vacate rather than an intent to pay rent late.

Petitioner's advice to Brody that he intended to vacate the space (which was corroborated by Michael) diminishes Brody's motive to scare petitioner into leaving, as petitioner would be doing what he asserts Brody wanted him to do: vacate the space.

In sum, Brody had no reason to take any action against petitioner beyond commencing a nonpayment proceeding. I therefore reject petitioner's testimony that Mohammed and Brody told him that the Secret Service was asking about him. While petitioner may have been fearful, Brody is not responsible for his fear.

After his conversation with Brody, petitioner immediately left the space and went to stay with a friend in Westchester. He left no forwarding address with respondents or the post office. On September 28, respondents served petitioner with a five-day rent demand for September's rent. Several weeks later, petitioner began working at a restaurant in Manhattan. On October 18, respondents served petitioner with a notice of petition and petition, thereby commencing a nonpayment proceeding against him. (L&T 093706/04). Petitioner never filed an answer. Although Brody asked her lawyer to seek a default judgment, a warrant never issued.

Toward the end of October 2004, while petitioner was still in Westchester, Brody was alerted to the presence of a water leak in the space. At Brody's request, Mohammed called petitioner on his cell phone seeking access to the space to stop the leak. Petitioner withheld his consent and told Mohammed that he would immediately return. On October 21, 2004, workers from the New York City Department of Environmental Protection entered the space by breaking one of the two locks for which petitioner had the only key. The water was turned off. Plumbers hired by respondents fixed the leaks on October 21 and 22, 2004. (Resp. Exhs. A1, A2). Some time after October 22, Brody had the broken lock replaced, and she obtained a new key from a locksmith.

Petitioner returned to the space on October 22, entered it with his key, and found that his furniture had been moved and portions of the ceiling had fallen. The space was damp; moldy papers were strewn about the floor. The space was neither damp nor moldy when petitioner left

it. Absent any evidence to the contrary, the dampness was caused by the leak.

Petitioner returned to his friend's apartment in Westchester. Although he testified that he unsuccessfully tried to call Brody, and left many messages asking what had happened to the space, I reject that testimony. As petitioner failed to explain why he did not go to respondent's office, which was next door at 2 West 16th Street, it is more reasonably inferred that he was avoiding respondents, having by that time failed to pay October's rent as well.

On or about November 24, 2004, Brody was alerted to a gas leak in the space.[1] She entered with her superintendent and saw that the space appeared to have been ransacked: everything was wet and moldy; clothes were all over the floor. She had the plumbers return to make necessary repairs.

Petitioner returned to the space on January 9 or 11, 2005. He was unable to enter as one of his keys no longer worked, but he was able to see through the front window that his furniture was gone and that several garbage bags were stacked in the middle of the room. Again, he did not go to Brody's office for a copy of the new key, thereby indicating his preference to risk the loss of his personal property by deterioration from dampness and mold.

On February 10, 2005, respondents commenced a new nonpayment proceeding. (L&T 55150/05). Petitioner commenced the instant proceeding on March 7, 2005. Petitioner obtained a warrant of eviction which issued March 17, 2005, but never executed. The space was never re-let.

Petitioner denies having been served with any rent demand or notice of petition and petition. He also claims that all of his documentation, including his passport, green card, and business files, and four computers are missing from the space. Brody claims that had petitioner contacted her, she would have given him the new key and pursued her nonpayment proceeding. It is undisputed that petitioner has paid no rent to respondent since August 2004.

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[1] Although Brody testified that she learned of the gas leak in December, the bill for its repair is dated November 24, 2004.

Pursuant to RPAPL § 713(10):

> A special proceeding may be maintained under this article . . . upon the following grounds:
>
> 10. The person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer . . .

In order to find in petitioner's favor, the court must first determine whether respondents were "in possession" of the space after they entered it to make the repairs. Petitioner asserts that by changing the lock and destroying or removing his property, respondents gained possession to his exclusion. Respondents maintain that petitioner abandoned the space.

While the changing of locks to premises may constitute prima facie evidence of an illegal eviction or lockout, such conduct must be intended to oust the tenant. (*C.E. Towers Co. v Trinidad and Tobago*, 903 F Supp 515 [SDNY 1995]). Here, respondents proved, by a preponderance of the credible evidence, that Brody changed the lock for the purpose of effecting emergency repairs, which respondents were authorized to do regardless of the nature of petitioner's tenancy.

Petitioner knew that Brody intended to enter the space to stop a leak, and upon arriving there on October 22, he must have seen that one of the locks had been broken and would need to be replaced. Respondents had no knowledge of petitioner's whereabouts, and had nowhere to send the key. They knew, however, through Mohammed, that petitioner was aware of their need to enter the space to make the repairs. Thus, respondents reasonably anticipated that petitioner would contact them for the key. As petitioner never requested the key and respondents had no address for him, respondents did not withhold it from him. In *Malik v Hillside Clearview Apts Realty*, 192 Misc 2d 181, 182 (Hous Part, Civ Ct, Queens County 2002), by contrast, the landlord denied the petitioners' request for keys following the changing of locks.

For all of these reasons, petitioner has failed to sustain its burden of proving that respondents were in possession of the space to his exclusion after performing the repairs.

Moreover, petitioner's seven-month absence, in conjunction with his expressed intent to vacate and his failure to pay rent or leave a forwarding address, reflects that he abandoned the space, whether residential or commercial. As he claims to have been aware of the condition of the space in late October 2004 and was working in Manhattan since October 2004, his failure to take any action to assert his rights with respect to the space or his property warrants a finding that he had no intention of returning to it.

In *Matter of Ga Young Lee v Charl-Ho Park*, 2005 WL 724468 (3d Dept 2005), the petitioners satisfactorily explained their absence from the premises as resulting from their attempts to obtain loans from friends and relatives in order to save their business. Here, by contrast, although petitioner had filed for bankruptcy with respect to Purecells and testified that he had no money to hire an attorney, he never testified that he was unable to pay rent. Rather, he claimed to have fled to Westchester due to his fear of being illegally arrested. Petitioner's proof on that score is too insubstantial to preclude a finding that he abandoned the space.

For all of these reasons, the court finds that petitioner has failed to sustain his burden of proving an illegal lockout. Accordingly, the petition is dismissed.

As respondents have sufficiently proved their entitlement to accrued rent, and have established proper service of all notices, judgment is granted them on their counterclaim in the amount of $16,100. A hearing is ordered on respondents' claim for reasonable attorney fees. The parties are ordered to appear in this part, room 1169, on Friday, April 29, 2005 at 9:30 a.m.

This constitutes the decision and order of the court.

Barbara Jaffe, JCC
HON. BARBARA JAFFE

DATED: April 18, 2005
New York, New York