

STATE OF NEW YORK
COUNTY OF RENSSELAER

CITY COURT
CITY OF TROY

CHASITY MORAN,

Petitioner,

DECISION AND ORDER

-against-

Index No.: CV1816-20

LAMBERT BUILDING CO., LLC,

Respondent.

Matthew J. Turner, JCC

Petitioner commenced this action by Order to Show Cause seeking, among other relief, to be restored to the premises located at 108 4th Street, Apt. 2, Troy, New York. She alleges that she was a lawful tenant of the premises and that Respondent illegally evicted her. She seeks to be restored to the premises as well as treble damages associated with the alleged illegal eviction, civil penalties as well as attorneys' fees and costs. Respondent opposes the relief sought, alleging that the Petitioner voluntarily agreed to terminate the landlord tenant relationship and agreed to voluntarily vacate the premises effective at the end of the day, September 30, 2020. In exchange for this alleged agreement to vacate, Respondent agreed to terminate

Petitioner's lease agreement that was not due to expire until May 31, 2021, as well as forgive any unpaid rent that had accrued.

On May 27, 2020 Petitioner and Respondent, a Limited Liability Company through its sole Member and representative, Michael E. Ginsburg, (hereinafter, Respondent's representative), entered into a Lease Agreement for premises at 108 4th Street, Apt. 2, Troy, NY 12180. Petitioner intended to live at the premises along with her young son. The Lease was to commence on June 1, 2020 for a one-year term from June 1, 2020 through May 31, 2021. The Yearly Rent was to be \$15,720.00 with a Monthly Rent recited in the agreement of \$1,320.00. Significantly, the Lease Agreement at Paragraph 3 provided:

"The whole amount of annual rent is due and payable when this Lease is effective. Payment of rent in installments is for Tenant's convenience only. If Tenant defaults, Landlord may give notice to Tenant that Tenant may no longer pay rent in installments. The entire rent for the remaining part of the Term will then be due and payable."

Petitioner, who worked as a Certified Nursing Assistant at a local nursing home, was exposed to COVID-19 in August 2020. Due to this exposure, Petitioner was forced to leave work and quarantine. As a result, Petitioner communicated to Respondent that she would be unable to pay her September rent on September 1. Petitioner indicated in a text message to Respondent's representative that she intended to have the September rent within two weeks. When the September rent had not been paid by September 15, Respondent, in accordance with the lease provision set forth above, provided Petitioner with notice that the convenience providing for monthly installments of rent was being revoked. Together with the September 16, 2020 notice Respondent included a proposed Verified Complaint seeking damages in the amount of \$13,100.00. The amount sought

represented the balance of rent due on the Lease Agreement. Of greatest significance for this action, the proposed Verified Complaint served on September 16 and the one ultimately filed with the Court and served upon Petitioner, did not seek possession of the premises. It was not a Summary Proceeding, commonly known as an eviction, but was an action for money damages based on an alleged breach of contract.

When Respondent's representative provided the notice and proposed Verified Complaint to the Petitioner a conversation ensued. During that conversation Petitioner indicated that she could have the September rent paid but also expressed that it would be difficult to have October's rent paid by October 1, as required by the Lease Agreement. With this indication, Respondent's representative and Petitioner had additional discussions on September 16 about Petitioner's other options including terminating the lease and vacating the premises by September 30, 2020. With this option, Petitioner would not be responsible for the \$13,100.00 set forth in the proposed Verified Complaint. Petitioner and Respondent's representative agreed on this option.

The following week, on September 23, 2020, Respondent's representative sent a text message to Petitioner inquiring how Petitioner was coming with her plans to vacate the premises by the following Wednesday, September 30, 2020. Petitioner's response was, "I'll be out by then".

On September 29, 2020 Petitioner sent Respondent's representative a text message indicating that she would not be out the next day and that she needed more time. Respondent's representative reminded Petitioner of her agreement to vacate by September 30, 2020 and that the expectation was that she would vacate by that date. Petitioner responded that she had dropped something in the mailbox where she would leave information for Respondent. The something referred to

was The Center for Disease Control and Prevention's Temporary Halt In Evictions to Further Spread of Covid-19 form, (CDC form), signed and dated September 30, 2020.

With the passing of September 30, 2020, there is no evidence that Respondent or Respondent's representative prevented Petitioner access to the premises. There is also no evidence that Respondent served upon Petitioner an action seeking to evict Petitioner. The evidence does show that Respondent sent an e-mail to the Capital District DSA, (Democratic Socialists of America), on October 1, 2020 alleging, "my landlord is trying too, [sic], illegally evict me he gave me a 3 day notice stating that I needed to pay 13,000 to be able to stay in the apartment or leave in 3 days. I couldn't work for 3 weeks because I had to quarantine.". There is no evidence in the record that the DSA responded to this e-mail or if so, what the response was. Petitioner does acknowledge though that she and her son left to go to New York City from October 1, 2020 until October 5 or 6, 2020 for her cousin's birthday celebration.

Respondent's representative testified that on September 30, 2020 he went to the premises. Upon entering the premises, he discovered that most of Petitioner's belongings were out of the premises. Significant to him, particularly because Petitioner resided there with her young son, was the fact that there was nothing to sit on, no place for a child or an adult to sleep, no edible food in the kitchen, no toiletries or shower curtain in the bathroom and only disassembled furniture. Wanting to get the premises ready to re-rent Respondent had maintenance individuals in the premises on September 1 as well as October 1st and 2nd and then again on October 9th and 10th. On all of these occasions, the premises remained in the same condition as it had been on September 30 when he initially entered other than what food had been left in the refrigerator was further spoiling and the dirty dishes left in the sink were attracting more of a fly infestation. Respondent's representative testified that during this period there was

no indication that Petitioner, or anyone on her behalf, had returned to the premises.

On October 13, 2020 Respondent's representative returned to the premises and still found no evidence that anyone other than Respondent's maintenance providers had entered the premises since September 30, 2020. This was confirmed through conversations with other tenants at the premises. As a result, Respondent's representative changed the lock to the exterior of the building but not Unit 2, the space Petitioner had leased.

Shortly thereafter, Petitioner contacted Respondent's representative initially on her own and then with the assistance of tenant advocacy group United Tenants to make arrangements to remove the remainder of Petitioner's belongings from the premises. In making these arrangements Respondent's representative testified that no offers were made to pay rent for October or to relet the premises. What Petitioner was interested in, according to Respondent's representative, was the opportunity to retrieve her belongings, an opportunity he was happy to provide. This opportunity was provided on October 22, 2020 but apparently was interrupted by a protest at the premises organized on Petitioner's behalf.

Petitioner commenced this action seeking a judgment placing her back into possession of the premises, civil penalties arising out of the alleged illegal eviction, actual damages for the alleged loss or damage of her belongings, consequential damages, treble damages and attorney's fees as well as dismissal of Respondent's Counter Claims. Respondent seeks a judgment dismissing Petitioner's action and a judgment on its Counter Claims that seeks from the Petitioner rent for the months of September 2020, when she was in actual possession, the month of October 2020, as a result of having failed to remove all of her belongings from the premises, damages incurred in cleaning the premises as well as attorney's fees. For the reasons that follow, the

Court dismisses Petitioner's action and awards judgment on Respondent's second Counter Claim.

A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminate (Riverside Research Institute v. KMGGA, Inc., 68 NY 2d 689 [1986]; Fragomeni v. AIM Services, Inc., 135 AD 3d 1272 [3d Dept 2016]; Brock Enterprises LTD v. Dunham's Bay Boat Company, Inc., 292 AD 2d 681 [3d Dept 2002]). Whether a surrender by operation of law has occurred is a determination to be made on the facts (Riverside Research Institute v. KMGGA, Inc., *supra*; Brock Enterprises LTD v. Dunham's Bay Boat Company, Inc., *supra*).

Here the facts are, in the Court's opinion, that the parties came to an agreement on September 16, 2020 to terminate the lease agreement. This opinion is supported by the decisions each party made inconsistent with a continuation of the landlord-tenant relationship. On Respondent's side it was agreeing to forego any additional rent from the Petitioner. As the Court understands the agreement, that was to include the amount attributable to September's rent despite the fact that Petitioner had clearly been in possession during September and Respondent would have been entitled to payment for the fair use and possession of the premises for that period. Presumably Respondent is in the business of keeping the premises occupied and collecting rents associated with that occupancy. In giving up the rent, as well as Petitioner's occupancy and the prospect of future rents, Respondent was acting in a manner inconsistent with continuing the landlord-tenant relationship with this tenant.

On Petitioner's side it is clear from her testimony and, more importantly from her actions, that rather than wanting to remain in a landlord-tenant relationship with Respondent, what she was really looking for was additional time to complete the process of vacating. A

process that appeared, in evaluating the testimonial and photographic evidence to be 90 to 95 percent complete. In her text to Respondent on September 23rd she affirmed that she would be out by the 30th. In explaining why she had provided Respondent with the CDC form she indicated that she was hoping that it would afford her more time, not reestablish the landlord-tenant relationship. More important in the Court's opinion were Petitioner's actions. Most significantly, Respondent provided both testimony and photographic evidence of the state of the premises on September 30, 2020. Without any furniture or edible food for herself or her child it is impossible for the Court to conclude that Petitioner intended to stay in possession. It is clear to the Court from the evidence that Petitioner had been making every effort to vacate the premises by September 30, as she had agreed but, as often happens when moving, the job was larger than anticipated. Furthermore, Petitioner testified about her fear, for herself and her child, about the ongoing threat posed by the Covid-19 pandemic yet she acknowledged leaving the area to celebrate her cousin's birthday in New York City. Throughout the pandemic public health officials and government officials have warned about the dangers posed by gathering for events including birthdays, funerals, graduation parties, etc. Events that are important, but which pose a risk. Finally, both Respondent's representative, as well as other tenants in the building, testified that neither Petitioner nor anyone else was coming to her apartment after September 30. What little contact there was with Petitioner, or representatives on her behalf, was in an effort to reclaim the few remaining belongings that remained at the premises and that Respondent had stored in the garage.

Although Petitioner may not have initially understood the implications of Respondent's proposed Verified Complaint, Respondent still had the right, according to the contract it entered into with the Petitioner, to bring the action. Similarly, Petitioner would have been well within her rights to remain in the premises. Had Respondent

entered the premises on September 30, 2020 and found the indicia of occupancy by Petitioner, it would have been powerless, given the various moratoria on eviction proceedings, to displace the Petitioner.

Given all the foregoing, it is the Court's opinion that the facts demonstrate that both Petitioner and Respondent acted in a manner inconsistent with maintaining the landlord-tenant relationship past September 30, 2020. That Petitioner's action claiming that she was illegally evicted is dismissed and Respondent is awarded judgment in the amount of \$270.00 dollars on its Second Counter Claim consistent with the evidence that Respondent was required to clean the premises in order to relet.

The foregoing shall constitute the decision and order of the Court.

The original decision and order are returned to the court clerk for filing and entry in the court records. Copies of the decision and order shall be mailed to the attorneys of record. The signing of this decision and order and delivery of the decision and order and all motion papers to the court clerk shall be deemed to constitute entry and filing under CPLR §2220. Filing by counsel is dispensed with however counsel is not relieved from the applicable provisions of that rule regarding service of a copy with notice of entry.

SO ORDERED:

DATED: February 19, 2021

Troy, New York

A handwritten signature in black ink, appearing to read 'M. J. Turner', is written over a horizontal line. The signature is stylized and cursive.

Hon. Matthew J. Turner

Troy City Court Judge