

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 46

-----x

357 WEST 54TH STREET LLC,

Index No. 162831/2015

Plaintiff

- against -

DECISION AND JUDGMENT

MADALINA R. IACOB,

Defendant

-----x

LUCY BILLINGS, J.S.C.:

Plaintiff, the owner of 357 West 54th Street in New York County, sues to recover from defendant, plaintiff's former tenant, civil penalties assessed against plaintiff by the New York City Environmental Control Board (ECB) for illegal conversion of apartment 11 rented to defendant in plaintiff's building, from a permanent residence to transient use. N.Y.C. Admin. Code §§ 28-210.3, 28-301.1. These civil penalties break down into non-discretionary penalties set by the ECB Buildings Penalty Schedule, 1 R.C.N.Y. § 102-1(g), and ECB's discretionary civil penalties of \$1,000.00 per day. N.Y.C. Admin. Code § 28-202.1.

I. THE APPLICABLE STATUTES AND REGULATIONS

New York City Administrative Code § 28-210.3 provides that:

It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes.

Administrative Code § 28-301.1 provides that: "The owner shall

be responsible at all times to maintain the building . . . in a safe and code-compliant manner . . . ."

Administrative Code § 28-201.2.1(16) classifies a "violation of section 28-210.3 that involves . . . a second or subsequent violation of section 28-210.3 by the same person at the same dwelling unit or multiple dwelling" as a Class 1 immediately hazardous violation. See 1 R.C.N.Y. § 102-01(b)(1).

Administrative Code § 28-202.1(1) sets forth the civil penalties for immediately hazardous violations: "not less than one thousand dollars nor more than \$25,000 . . . for each violation. In addition . . . , a separate additional penalty may be imposed of not more than \$1,000 for each day that the violation is not corrected." 1 R.C.N.Y. § 102-01(g)(1) specifies that the daily penalties:

will accrue at the rate of \$1,000 per day for a total of forty-five days running from the date of the Commissioner's order to correct set forth in the NOV [Notice of Violation], unless the violating condition is proved . . . at the hearing to have been corrected prior to the end of that forty-five day period, in which case the daily penalties will accrue for every day up to the date of that proved correction.

## II. THE UNDISPUTED EVIDENCE AT TRIAL

After appearing for a final pretrial conference at which a trial date of November 30, 2018, was set, defendant failed to appear and offer evidence at trial. The admissible credible evidence offered through plaintiff's witnesses proved as follows.

Defendant executed a lease with riders for apartment 11 at 357 West 54th Street commencing March 1, 2013, through February 28, 2014, Ex. 2, and received a copy along with keys to the

apartment. She later executed two renewal leases for March 1, 2014, through February 28, 2015, and March 1, 2015, through February 28, 2016. The lease's Addendum provides that: "Tenant understands that they [sic] may NOT sublet the apartment." Ex. 2, Addendum to Lease at 2. Defendant wrote her initials next to this provision, specifically acknowledging her agreement to the prohibition against subletting.

A. The Penalties Attributable to Defendant's Breach of the Lease's Prohibition Against Subletting

After the New York City Department of Buildings (DOB) issued Notices of Violation (NOVs) to plaintiff, and after a hearing on the NOVs, ECB issued a Decision and Order dated November 27, 2015, imposing four non-discretionary, set civil penalties totalling \$16,250.00. Ex. 6. Of that amount, \$8,000.00 was for plaintiff's violation of Administrative Code § 28-210.3, \$3,000.00 for its violations of Administrative Code § 28-301.1, and \$4,000.00 for its violation of New York City Building Code § 907.2.8, which specifies requirements for fire alarm systems in buildings occupied by transients. The one violation of Administrative Code § 28-210.3, an immediately hazardous violation, was subject to the additional discretionary daily penalties if it involved "a second or subsequent violation of section 28-210.3 by the same person at the same dwelling unit or multiple dwelling." N.Y.C. Admin. Code § 28-210.3. Based on plaintiff's prior violation of Administrative Code § 28-210.3 in apartment 15 at its same building, ECB imposed an additional discretionary daily penalty of \$45,000.00.

After DOB issued further NOV's to plaintiff, and after a hearing on these NOV's, ECB issued a second Decision and Order dated June 1, 2016, imposing three more non-discretionary, set civil penalties totalling \$15,850.00. Ex. 13. Of this amount, \$8,000.00 was for plaintiff's violation of Administrative Code § 28-210.3, \$250.00 for its violation of Administrative Code § 28-301.1, and \$1,600.00 for its violation of Building Code § 907.2.8. Based on plaintiff's prior violation of Administrative Code § 28-210.3 in apartment 11, ECB added a discretionary daily penalty of \$6,000.00, amounting to total penalties of \$21,850.00 for this second set of violations.

After DOB issued further NOV's to plaintiff, and after a hearing on these NOV's, ECB issued a third Decision and Order dated June 15, 2016, imposing four more non-discretionary, set civil penalties totalling \$17,500.00. Ex. 11. Of this amount, \$8,000.00 again was for violation of Administrative Code § 28-210.3, \$5,500.00 for violations of Administrative Code § 28-301.1, and \$4,000.00 for violation of Building Code § 907.2.8. This time ECB added a discretionary daily penalty of \$7,000.00 based on plaintiff's prior violation of Administrative Code § 28-210.3 in apartment 11, amounting to total penalties of \$24,500.00 for this last set of violations.

Thus the penalties attributable to the transient use of apartment 11 during defendant's tenancy were \$16,250.00 pursuant to ECB's order dated November 27, 2015; \$21,850.00 pursuant to ECB's order dated June 1, 2016; and \$24,500.00 pursuant to ECB's

order dated June 15, 2016: a total of \$62,600.00. Plaintiff has paid all these penalties. Exs. 15, 17.

Administrative Code § 28-210.3 prohibits "any person or entity who owns or occupies a . . . dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use of occupancy such . . . dwelling unit for other than permanent residence purposes." N.Y.C. Admin. Code § 28-210.3 (emphasis added). Thus the prohibition extends to owners of apartments that tenants sublease for transient use and as well as to the tenants subleasing the apartments for transient use. Pamela Equities Corp. v. Environmental Control Bd. of the City of N.Y., 59 Misc. 3d 1007, 1013 (Sup. Ct. N.Y. Co. 2017). The fact that tenants are prohibited from this subleasing does not absolve apartment owners of their affirmative obligation to "be responsible at all times to maintain the building . . . in a . . . code-compliant manner." N.Y.C. Admin. Code § 28-301.1. The prospect of daily penalties even for unknowing violations encourages owners' proactive efforts to know what is occurring in their buildings, to assure compliance with the Administrative Code, and to discover and correct immediately hazardous violations promptly. Pamela Equities Corp. v. Environmental Control Bd. of the City of N.Y., 59 Misc. 3d at 1013.

The undisputed fact that plaintiff violated Administrative Code § 28-210.3 in two apartments in its building evinces the owner's lax oversight of the apartments' use. Even if the

wrongdoing was unknowing and unintentional and only negligent, the potential daily penalties deter even negligent conduct. The court need not conclude that, because plaintiff did not know of the transient use, plaintiff ought not to have known. Id.

Nevertheless, there are factors that offset any laxity, negligence, or other wrongdoing by the owner in carrying out its responsibility to maintain a code-compliant building. N.Y.C. Admin. Code § 28-301.1. Here plaintiff owner took the ultimate preventive measure to assure defendant tenant's compliance with the prohibition against transient use by a provision in her lease that any subletting constituted a default that would lead to termination of her tenancy. While between plaintiff and defendant versus the City, plaintiff and defendant may be equally responsible for transient use of apartment 11 through subletting, between plaintiff and defendant, the lease assigns responsibility to defendant for the consequences of any prohibited subletting.

Plaintiff also transmitted written warnings personally to defendant and posted warnings in the building. Ex. 13 at 1-2. Although plaintiff conceded that it did not undertake to discover transient use by monitoring the entry and egress of occupants who were not tenants' household members, once DOB issued its first NOV, plaintiff inspected defendant's apartment repeatedly for subtenants and found none. As soon as plaintiff was armed with ECB's initial determination of prior transient use, plaintiff promptly took corrective legal action to enjoin defendant from subletting for transient use and to evict her from the apartment.

Id.

Consequently, the court awards plaintiff \$62,600.00 against defendant on plaintiff's second claim for breach of the parties' lease provision that prohibited subletting. In a breach of contract action such as this one, the court also must award interest to make the injured party whole. C.P.L.R. § 5001(a); J. D'Addario & Co., Inc. v. Embassy Indus., Inc., 20 N.Y.3d 113, 117-18 (2012); St. Stephen Community A.M.E. Church v. 2131 8th Ave., LLC, 123 A.D.3d 642, 642-43 (1st Dep't 2014). Preverdict interest "shall be computed from the earliest ascertainable date the cause of action existed," C.P.L.R. § 5001(b); Village of Ilion v. County of Herkimer, 23 N.Y.3d 812, 821 (2014); Solow Mgt. Corp v. Tanger, 19 A.D.3d 225, 226 (1st Dep't 2005). See Levin & Glasser, P.C. v. Kenmore Prop., LLC, 70 A.D.3d 443, 445-46 (1st Dep't 2010). Since damages are an element of a claim for breach of contract, FranPearl Equities Corp. v. 124 W. 23rd St., LLC, 164 A.D.3d 1190, 1190 (1st Dep't 2018); Forty Cent. Park S., Inc. v. Anza, 130 A.D.3d 425, 426 (1st Dep't 2010); VisionChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d 49, 58 (1st Dep't 2013); Viacom Outdoor Inc. v. Wixon Jewelers, Inc., 82 A.D.3d 604, 604 (1st Dep't 2011), "interest upon damages incurred . . . shall be computed from the date incurred." C.P.L.R. § 5001(b); Solow Mgt. Corp v. Tanger, 19 A.D.3d at 226. See Building Serv. Local 32B-J Pension Fund v. 101 L.P., 148 A.D.3d 594, 595 (1st Dep't 2017).

The earliest date that plaintiff shows it incurred damages

from defendant's subletting is when it had paid at least \$62,600.00 of the penalties assessed as of November 29, 2018. At this point, moreover, defendant, having filed her answer March 9, 2016, was well aware that plaintiff through its complaint was demanding more than that amount from defendant for the penalties imposed by ECB due to defendant's conduct. See Village of Ilion v. County of Herkimer, 23 N.Y.3d at 821-22. Therefore the court awards a judgment of \$62,600.00 with interest at 9% per year from November 29, 2018. NZM Retirement Plan v. Adoni, 162 A.D.3d 506, 507 (1st Dep't 2018); Building Serv. Local 32B-J Pension Fund v. 101 L.P., 148 A.D.3d at 595; Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 359 (1st Dep't 2006); Siegel v. Laric Entertainment Corp., 307 A.D.3d 861, 863 (1st Dep't 2003).

B. Attorney's Fees Attributable to Defendant's Breach of the Lease's Prohibition Against Subletting

The lease's Addendum further provides that: "Tenant agrees to pay all legal fees, including attorney's fees and court costs incurred in the enforcement of any clause and/or requirement(s) set out in this lease." Ex. 2, Addendum to Lease at 2. Again defendant wrote her initials next this provision, specifically acknowledging her agreement to pay attorney's fees and court costs incurred in the enforcement of any provision in the lease, including, as here, the prohibition against subletting.

Based on the billing records, Ex. 18, and testimony of plaintiff's attorney, plaintiff reasonably has incurred at least \$15,329.90 in attorney's fees and expenses in this action to enforce the lease prohibition against subletting. The attorney's



fees sought are modest given defendant's many motions throughout the action, each of which required plaintiff's response and appearance in court. The bills are free from charges for duplicative or otherwise unnecessary services and are based on an hourly rate that is below the market rate for an attorney as experienced as plaintiff's attorney. Zacharius v. Kensington Publ. Corp., 167 A.D.3d 452, 453 (1st Dep't 2018); Community Counseling & Mediation Servs. v. Chera, 115 A.D.3d 589, 590 (1st Dep't 2014); 542 E. 14th St. LLC v. Lee, 66 A.D.3d 18, 24-25 (1st Dep't 2009); Solow Mgt. Corp v. Tanger, 19 A.D.3d at 226.

Plaintiff seeks \$16,684.90 in attorney's fees and expenses. \$1,355.00 of this amount, however, is for plaintiff's proceeding against ECB and DOB to vacate or reduce the penalties assessed. These fees and expenses were not "incurred in the enforcement of any clause and/or requirement(s) set out in this lease." Ex. 2, Addendum to Lease at 2. See 135 E. 57th St., LLC v. 57th St. Day Spa, LLC, 126 A.D.3d 471, 472 (1st Dep't 2015).


Consequently, the court awards plaintiff an additional \$15,329.90 against defendant on plaintiff's third claim for attorney's fees and court costs as provided in the parties' lease.

### III. DISPOSITION

In sum, the court awards plaintiff a judgment against defendant on plaintiff's second and third claims of \$77,929.90, with interest on \$62,600.00 at 9% per year from November 29, 2018. The court dismisses plaintiff's first claim for an

injunction against defendant's subletting, since defendant no longer leases or occupies an apartment owned by plaintiff. PNY III, LLC v. Axis Design Group Intl., LLC, 148 A.D.3d 550, 550 (1st Dep't 2017); Puello v. Georges Units, LLC, 146 A.D.3d 561, 562 (1st Dep't 2017); Astil v. Kumquat Props., LLC, 125 A.D.3d 522, 523 (1st Dep't 2015). Upon the absence of proof, the court also dismisses defendant's counterclaim for attorneys' fees and expenses for a successful defense of this action. N.Y. Real Prop. Law § 234.

DATED: February 14, 2019



---

LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.