

New York Law Journal

Select 'Print' in your browser menu to print this document.

Copyright 2010. ALM Media Properties, LLC. All rights reserved. New York Law Journal Online
Page printed from: <http://www.nylj.com>

[Back to Article](#)

Pritzker v. Park South Lofts LLC

| 12-10-2010
Justice Solomon

[*Click here to see Judicial Profile*](#)

[Read the Full-Text Opinion](#)

Ex-tenant plaintiff and defendant landlord entered into a lease providing for the rental of a three-story condo unit in a Manhattan building. Plaintiff filed a complaint alleging that defendant failed to return his \$84,000 security deposit once he vacated the unit. The court found that plaintiff is entitled to the \$84,000 on his claims of conversion and violation of General Obligations Law §703-1. The court noted that defendant had decided, after plaintiff vacated the apartment, that a portion of the deposit would be used to repair damage allegedly caused during plaintiff's tenancy. However, defendant retained the entire deposit, an amount greatly exceeding defendant's estimate of the costs of repair, and continues to retain it to guarantee the attorney's fees to which it believes it may become entitled in this action. The court noted that whether defendant kept that portion of the deposit that exceeds its estimated repair costs or whether it withdrew it and placed it in another account, it seems clear that defendant exerted dominance over that sum and did not view it as segregated from its own money except, perhaps, in an accounting sense.

New York Law Journal

Select 'Print' in your browser menu to print this document.

© 2010 New York Law Journal

Page printed from: www.nylj.com

[Back to Decision](#)

Matthew Pritzker, Plaintiff v. Park South Lofts LLC, Defendant, 117192/09

Justice Jane S. Solomon

117192/09

12-10-2010

Cite as: Pritzker v. Park South Lofts LLC, 117192/09, NYLJ 1202475879547, at *1 (Sup., NY, Decided November 19, 2010)

Justice Jane S. Solomon

Decided: November 19, 2010

ATTORNEYS

Plaintiff was represented by Eric D. Sherman, Esq. and Luisa K. Hagemeyer, Esq., of Pryor Cashman LLP, New York, NY

Defendant was represented by Jeffrey M. Steintz, Esq., of Rappaport Hertz Cherson & Rosenthal, PC, Forest Hills, NY

DECISION and ORDER

*1

In this residential landlord-tenant dispute, the former tenant, plaintiff Matthew Pritzker, moves, pursuant to CPLR 3212 (a), for summary judgment on the complaint, and defendant Park South Lofts LLC (Lofts), the landlord, cross-moves for summary judgment dismissing the complaint, and on its first and second counterclaims. Pritzker and Lofts entered into a lease, beginning October 1, 2008, and ending September 30, 2009, providing for the rental of apartment PHB, a three-story condominium unit, in the building located at 45 East 30th Street in Manhattan. The complaint, which is based upon Lofts's failure to return Pritzker's \$84,000 security deposit once Pritzker vacated the apartment, alleges the following five causes of action: (1) conversion; (2) and (3) breach of the lease; (4) violation of General Obligations Law (GOL) §7-103; and (5) a claim for attorney's fees. Lofts's first two counterclaims allege that plaintiff damaged the apartment; the third counterclaim is for attorney's fees.

*2

The treatment of money given as a security deposit in connection with the use or rental of real property is governed by GOL §7-103. GOL §7-103 (a) provides, in relevant part:

Whenever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement or to be applied to

payments upon such contract or agreement when due, such money...shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same....

GOL §7-103 (2) provides, in relevant part,

Whenever the person receiving money so deposited or advanced shall deposit such money in a banking organization, such person shall thereupon notify in writing each of the persons making such security deposit or advance, giving the name and address of the banking organization in which the deposit of security money is made, and the amount of such deposit.

Where a landlord has deposited a security deposit in a bank and fails to comply with the notice provision of GOL §7-103 (2), a court may draw the rebuttable inference that the

*3

landlord has mingled that security deposit with the landlord's own money, in violation of GOL §7-103 (1). *Paterno v. Carroll*, 75 AD3d 625 (2d Dept 2010); *Dan Klores Assoc. v. Abramoff*, 288 AD2d 121 (1st Dept 2001). Such commingling constitutes a conversion, as well as a breach of fiduciary duty (*LeRoy v. Sayers*, 217 AD2d 63 [1st Dept 1995]), and regardless of any noncompliance by the tenant with the terms of the lease, it entitles the tenant to an immediate return of the deposit. *Id.*; accord *Tappan Golf Dr. Range, Inc. v. Tappan Prop., Inc.*, 68 AD3d 440 (1st Dept 2009). In the event of such commingling, the landlord may not use any portion of the deposit even for otherwise legitimate purposes. *Id.*; *Dan Klores Assoc*, *supra*. The reason for this is that GOL §703-1 and its predecessor statute transformed the landlord-tenant relationship with regard to security deposits from a creditor-debtor relationship to one in which the landlord is the trustee of the deposit. A tenant seeking the return of a deposit may not "be subject to setoffs or counterclaims asserted against him in a different capacity." *Matter of Perfection Tech. Servs. Press [Cherno-Dalecar Realty Corp.]*, 22 AD2d 352, 356 (2d Dept 1965), *affd* 18 NY2d 644 (1966).

Here, it is undisputed that, on October 6, 2008, Lofts deposited plaintiff's security deposit, or caused it to be deposited, in an agency account of Langsam Property Service Corp. (Langsam), which Lofts identifies as its managing agent, at Hudson Valley Bank in Yonkers (the Bank), and that neither Lofts nor Langsam gave plaintiff contemporaneous written notice

*4

of that deposit. Accordingly, Lofts bears the burden of rebutting a presumption that it commingled plaintiff's security deposit with money of its own, in Langsam's agency account.

An extract from the Bank's listing of transactions in Langsam's agency checking account, covering transactions from October 3, 2008, through October 8, 2008, shows 47 credit entries, including one for defendant's deposit. Among the other credits, are items in the respective amounts of \$10,000, \$20,000, \$30,000, \$40,000, \$251,748.27, \$383,029.54, and, immediately following the entry for plaintiff's security deposit, a credit for \$88,644.05. *Sherman Affirm.*, Exh. 6, at numbered 202. Lofts has offered no explanation of the sources of any of those credits, other than that representing the deposit of plaintiff's security deposit. Nor has it given so much as an inkling of who, other than itself, may own the bulk of the money in Langsam's agency account. Lofts's argument to the contrary notwithstanding, the mere fact that plaintiff's security deposit was deposited in an agency account does not show that the deposit was not commingled with any of Lofts's own money. Clearly, an agency account may include, or indeed

consist of, money belonging to the agent's principal. See e.g. *Industrial Mfrs., Inc. v. Bangor Mills, Inc.*, 283 App Div 113 (1st Dept 1953), *affd* 307 NY 746 (1954). Nor does a bookkeeping entry on a Langsam spreadsheet, which identifies an \$84,000 item as the security deposit for plaintiff's apartment (Sherman Affirm., Exh. 6, at numbered 205), show that that deposit was properly segregated.

*5

Matthew Engel, a member of Lofts, states in his affidavit that Lofts owns no real property in New York State other than the condominium apartment that it rented to plaintiff, that Lofts does not own six residential units anywhere, and that the Langsam agency account "is wholly segregated from [Lofts's] monies." Engel Aff., at 2. In the absence of any explanation of the sources of the many credits to Langsam's account, other than that of plaintiff's security deposit, in the absence of a copy of such contract as Lofts and Langsam may have entered into, and in the absence of unambiguous evidence that the Langsam account does not include money belonging to Lofts, Mr. Engel's bare statement, that the Langsam account is "segregated" from Lofts's monies, does not suffice to rebut the presumption that the security deposit was "mingled with the personal moneys" of Lofts, within the meaning of GOL 703-1.

I note in addition that, as discussed below, Lofts decided, after plaintiff vacated the apartment, that a portion of the deposit would be used to repair damage allegedly caused during plaintiff's tenancy. However, Lofts retained the entire deposit, an amount greatly exceeding Lofts's estimate of the costs of repair, and continues to retain it to guarantee the attorney's fees to which it believes that it may become entitled in this action. Whether Lofts kept that portion of the deposit which exceeds Lofts's estimated repair costs in the Langsam account, or whether it withdrew it and placed it in another account, it is clear that Lofts exerted dominance over that sum

*6

and did not view it as segregated from its own money, other than, perhaps, in an accounting sense.

Accordingly, plaintiff is entitled to summary judgment on his claims of conversion and violation of GOL §703-1.

Plaintiff's second and third causes of action allege, respectively, that Lofts's failure to return any portion of plaintiff's deposit violates paragraph 9 of the lease, and that Lofts's failure to pay interest on the deposit also violates paragraph 9.

Paragraph 9 of the lease provides, in relevant part:

[O]wner may use or apply all or any part of the deposit as may be required to pay for damage to the apartment during the term of this lease. If Renter carries out all of Renter's obligations under this lease, and if the apartment is returned to Owner in the same condition as when rented by Renter, ordinary wear and tear excepted, Renter's security will be returned in full to Renter...within 30 days of Renter vacating.

After plaintiff vacated his apartment, and prior to the commencement of this lawsuit, Lofts notified plaintiff that the apartment had suffered damage during his tenancy, and accordingly, that a portion of his deposit would be used for repairs. The parties engaged in negotiations as to how much plaintiff might pay for repairs, but they came to no agreement. It is undisputed, however, that the most that Lofts claimed to

*7

be due to it was \$36,404.06, and the evidence that Lofts has submitted here, shows that, in the event, it spent somewhat less than that, to wit, \$32,204.84 on repairs to the apartment. Lofts had no colorable claim to retain any portion of plaintiff's deposit beyond the sum that it had estimated to be needed for repairs.

Lofts argues that it was justified in retaining the entire deposit, because it was incurring legal fees in connection with remedying the damage to the apartment, but the record shows that such fees were incurred solely as a result of Lofts's attempt to have plaintiff enter into a settlement, pursuant to which he would agree to pay for the needed repairs. Lofts contends that paragraph 9 of the lease states that "Owner may use or apply the security deposit in full or in part if necessary to pay for unpaid rent, damage, loss, fees... arising out of the lease." Levine Reply Affirm., at 3 (so in the Affirmation). The phrase in section 9 of the lease, that Mr. Levine chose to replace with an ellipsis, states "or expenses due to re-renting." The legal fees that Lofts incurred prior to the commencement of this action had nothing to do with a re-renting of the apartment.

Lofts also argues that, at present, it is entitled to retain the entire deposit, because, now that plaintiff has commenced this action, Lofts will be entitled to the fees that it incurs here, if it prevails. Nothing in the lease, or the law, allows a landlord to retain a portion of a tenant's security deposit as a form of "bond," as plaintiff aptly names

*8

it, to guarantee the attorney's fees to which the landlord may become entitled. Accordingly, Lofts's retention of a sum in excess of both its estimated and its actual repair costs violated paragraph 9 of the lease, and plaintiff is entitled to partial summary judgment as to liability on his second cause of action. Because plaintiff contests his responsibility for the damage for which Lofts seeks to hold him responsible, the sum to which plaintiff will be entitled on his second cause of action is unknown at present; however, other than justifying an award of attorney's fees pursuant to paragraph 19 of the lease, any such sum will be nominal, because plaintiff alleges no damages, other than the retention of his deposit, and he is entitled to the return of his whole deposit by virtue of prevailing on his claims of conversion and violation of GOL §7-103.

With regard to the payment of interest, paragraph 9 provides, in relevant part, that "[i]f required by law, the account will bear interest at the banking institution's prevailing rate." GOL §7-103 (2-a) requires that a rental deposit be placed in an interest-bearing account when the deposit is made "for the rental of property containing six or more family dwelling units." While the meaning of the quoted phrase is not entirely clear, one interpretation is that the requirement applies to the rental of a portion of such property as contains six or more family dwelling units. See 1970 N.Y. Op. Atty. Gen. No. 17 (deposit in interest-bearing account required when rental is "of premises in an apartment house of six or more family dwelling units").

*9

Here, the apartment that plaintiff rented is owned by Lofts in fee simple, and it is undisputed that Lofts owns no other portion of the Building, in which all dwelling units — and there are more than six — are condominium units. Lofts argues that it was not required to deposit plaintiff's rental deposit in an interest-bearing account, because GOL §7-103 (2-a) was intended to apply solely to owners of buildings containing six or more rental units. This interpretation is reasonable, albeit inconsistent with

that in the opinion circulated by the Attorney General in 1970. At that time, fee ownership of individual apartments was not common in New York. The exclusion of properties with five or fewer family dwellings from application of GOL §7-103 (2-a) is consistent with the notion that it does not impose the burden of requiring the landlord to keep the security deposit in a separate interest-bearing account upon the fee owner of only a single unit, just as it clearly does not apply to the fee owner of a single-family home.

Inasmuch as plaintiff's security deposit is not within the ambit of GOL §7-103 (2-a), Lofts was not obligated to place plaintiff's deposit in an interest-bearing account. Accordingly, plaintiff's third cause of action is dismissed as a matter of law.

Because plaintiff is prevailing on some of his causes of action, he may become entitled to attorney's fees, pursuant to paragraph 19 of the lease, in an amount currently unknown. However, to the extent that Lofts prevails on its counterclaims, it, too, will be entitled to attorney's fees. Accordingly,

*10

summary judgment on the claims for attorney's fees is not appropriate at this time, and will be addressed at the end of the lawsuit.

Defendant's first counterclaim alleges that plaintiff violated paragraph 13 of the lease, which requires the tenant, "at its sole cost and expense, [to] repair or replace anything in the apartment requiring repair or replacement as a result of Renter's actions or neglect." Defendant's second counterclaim is based upon paragraph 9 of the lease, which, as quoted above, provides that defendant "may use or apply all or any part of the deposit that may be required to pay for damages to the apartment during the term of the lease." The third counterclaim consists of a demand for attorney's fees, pursuant to paragraph 19 of the lease.

The two main items of damage for the repair of which Lofts seeks to hold plaintiff liable are a tear in the lining of the swimming pool and perforations in the Efis [sic] stucco. Matthew Iacopetta, one of the three people who shared the apartment with plaintiff, states in his affidavit that, when he and the other three tenants moved in, there were already perforations in the stucco, resulting from various electrical equipment having been screwed into it. However, Mr. Engel avers, and Mr. Iacopetta does not deny, that plaintiff caused additional perforations in the stucco by installing an outdoor sound system. With regard to the swimming pool, Mr. Iacopetta states that it was maintained by the building's security guard, rather than by a pool professional, and that it was allowed to

*11

freeze and to thaw at least twice during the winter that he and plaintiff lived in the apartment.

In sum, Mr. Engel's averments as to plaintiff's having caused perforations in the stucco entitle Lofts to partial summary judgment as to liability for some damages on its first counterclaim. The second counterclaim has become moot as a result of the ruling on plaintiff's motion.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on his complaint is granted to the extent that he is entitled to judgment against defendant in the amount of \$84,000, together with interest at the statutory rate from the date of October 30, 2009, as calculated by the Clerk of the Court; and the second counterclaim is dismissed; and it further is

ORDERED that the defendant's cross motion for summary judgment is granted to the extent that plaintiff's third and fourth causes of action are dismissed; and plaintiff is found partially liable to defendant on the counterclaims for damage to property; and it further is

ORDERED that except as provided herein the motions are denied and the plaintiff's fifth cause of action and defendant's first and third counterclaims are to be severed and continued; and it further is

ORDERED that the Clerk of the Court is to enter partial judgment accordingly.