

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

871

CA 20-00842

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

MOHAMMAD M. MASHEH, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JHF MANAGEMENT, LLC, JODA PROPERTIES, LLC,
STEVE FERRARO AND JOHN H. FERRARO,
DEFENDANTS-RESPONDENTS.

LEGAL SERVICES OF CENTRAL NEW YORK, INC., BINGHAMTON (GEORGE B. HADDAD
OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (LAUREN M. MILLER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County
(Gerard J. Neri, J.), entered June 23, 2020. The order denied the
motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiff, a month-to-month tenant at an apartment
in a building owned and operated by defendants, commenced this action
to recover damages arising from defendants' actions in taking
possession of the apartment and removing plaintiff's belongings from
the premises and disposing of them. Plaintiff now appeals from an
order denying his motion for summary judgment on his cause of action
for wrongful eviction. We affirm.

Plaintiff contends that he was entitled to summary judgment on
his wrongful eviction cause of action because he was a month-to-month
tenant and defendants wrongfully evicted him by failing to commence a
special proceeding (see RPAPL 711). Plaintiff further contends that
the evidence established that he never intended to abandon the
premises. We reject those contentions and conclude that plaintiff's
own moving papers raise triable issues of fact whether he abandoned
the subject premises (see generally *Smith v Hamasaki*, 173 AD3d 1816,
1817 [4th Dept 2019]; *Gawron v Town of Cheektowaga*, 125 AD3d 1467,
1468 [4th Dept 2015]).

On his motion, plaintiff bore the initial burden of establishing
his prima facie entitlement to judgment as a matter of law and to
"show that there is no defense to [his] cause of action" for wrongful
eviction (CPLR 3212 [b]; see generally *Winegrad v New York Univ. Med.*

Ctr., 64 NY2d 851, 853 [1985]). "Abandonment in law depends upon the concurrence of two and only two factors; one, an intention to abandon or relinquish; and two, some overt act, or some failure to act, which carries the implication that owner neither claims nor retains any interest in the subject matter of the abandonment" (*City of Binghamton v Gartell*, 275 App Div 457, 460 [3d Dept 1949]). Here, we conclude plaintiff's own motion papers raise questions of material fact whether he notified defendants of an intention to terminate his tenancy and, if so, whether he retracted that notification. There also are triable questions of fact whether plaintiff evidenced his abandonment of the premises by, inter alia, failing to respond to the calls and a notice from defendants regarding his status and by the condition in which he allegedly left the apartment. "Viewing the evidence in the light most favorable to defendant[s], the nonmoving part[ies]" (*Jackson v Rumpf*, 177 AD3d 1354, 1355 [4th Dept 2019]), we conclude that plaintiff failed to meet his initial burden on the motion regardless of the sufficiency of defendants' opposition papers (see generally *Winegrad*, 64 NY2d at 853).

Entered: December 23, 2021

Ann Dillon Flynn
Clerk of the Court