

239 Troy Ave. LLC v Thomas
2025 NY Slip Op 35268(U)
October 1, 2025
Civil Court of the City of New York, Kings County
Docket Number: L&T Index No. 326721-24
Judge: Karen May Bacdayan
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART R

239 TROY AVENUE LLC

L&T Index No.: 326721-24

Petitioner

Motion Seq Nos. 1-2

-against-

DECISION/ORDER

ELAINE THOMAS; JOHN DOE; JANE DOE

Respondent.



HON. KAREN MAY BACDAYAN

Kucker Marino Winiarsky & Bittens, LLP, for petitioner
The Legal Aid Society (Lura Chamberlain, Esq.), for respondent Elaine Thomas

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc Nos: 16-48.

BACKGROUND AND PROCEDURAL POSTURE

This is a summary nonpayment proceeding commenced in September 2024 against respondent Elaine Thomas as the tenant of record of the rent-stabilized subject premises, alleging respondent owes \$16,764.11 in rental arrears: \$605.24 for July 2022, \$626.31 monthly from August 2022 to April 2023, and \$657.63 monthly from May 2023 to August 2024. (NYSCEF Doc No. 1, petition ¶¶ 2, 7, 10.) Respondent filed a *pro se* answer on October 16, 2024, asserting a general denial and alleging there are or were conditions in the apartment and/or building/house which petitioner did not repair and/or services which petitioner did not provide. (NYSCEF Doc No. 4.) Respondent’s counsel filed a notice of appearance on May 20, 2025. (NYSCEF Doc No. 5.) Respondent’s counsel filed a demand for a verified bill of particulars on May 23, 2025. (NYSCEF Doc No. 6.) On May 27, 2025, the court issued a decision and order adjourning the proceeding to June 17, 2025, amending the petition to date, and requiring petitioner to upload to NYSCEF a copy of the lease in effect at the time petitioner commenced the proceeding, and a DHCR printout and HPD registration, neither of which needed to be certified, all by June 10, 2025, and directed respondent to serve an amended answer on the return date. (NYSCEF Doc No. 7.)

On June 16, 2025, respondent filed an amended answer with an objection in point of law (failure to state a cause of action); seven affirmative defenses (failure to state a cause of action; occupied without valid certificate of occupancy; not validly registered with HPD at time proceeding was commenced; improper tender of lease renewal; failure to make good faith approximation of arrears; defective petition; breach of warranty of habitability) and three counterclaims (order to correct and make repairs; rent abatement; harassment). (NYSCEF Doc No. 8.) For purposes of the instant motion, respondent's second affirmative defense alleges petitioner has allowed for residential occupancy in the basement and/or cellar of the subject building, and "in more than ten separately-leased spaces within the [s]ubject [b]uilding," in violation of the building's certificate of occupancy that only permits residential units on the first floor (two units) and four residential units each on the second and third floors. (*Id.* ¶¶ 14-21.) The proceeding was transferred to the trial part on June 17, 2025, and was adjourned to July 22, 2025 for a pre-trial conference. On that date, the court issued an adjournment and briefing schedule order on respondent's anticipated motion for summary judgment based on its affirmative defense of lack of a valid certificate of occupancy, with the proceeding adjourned to October 1, 2025 for oral argument. (NYSCEF Doc No. 15.)

On August 21, 2025, respondent's counsel timely filed a motion seeking summary judgment on respondent's second affirmative defense and dismissing the petition. (NYSCEF Doc No. 16, notice of motion [sequence 1].) On September 17, 2025, petitioner's counsel e-mailed the court and included respondent's counsel, asking the court how it would like to proceed on petitioner's request to make an application to the court to discontinue the matter, stating that "[a]fter review of the documents in preparation for trial, I recognize the need for discontinuance," but that respondent's counsel would not consent to discontinue "absent the payment of legal fees[.]" The court replied the following day, stating petitioner could either make an oral application on October 1, 2025, or move by order to show cause for an order discontinuing the proceeding. Respondent's counsel replied the same day, stating "due to the nature of the defense raised in our motion, we are seeking a disposition (whether through order or stipulation) on the merits and will oppose any motion or application to the contrary." No opposition papers were filed by September 22, 2025. On September 30, 2025 -- one day prior to the October 1, 2025 oral argument date -- respondent's counsel filed an order to show cause seeking either an order permitting petitioner to discontinue the proceeding, or alternatively to

permit counsel to withdraw as attorneys of record for petitioner. (NYSCEF Doc No. 46, proposed order to show cause.)

The order to show cause was signed on October 1, 2025 and made returnable for October 1, 2025, the same day as oral argument was scheduled on respondent's motion for summary judgment. NYSCEF Doc No. 48, signed order to show cause [motion sequence 2].¹ Both parties appeared in the courtroom at 9:30 a.m. Respondent did not indicate a desire to oppose petitioner's order to show cause, and indicated that their request for attorneys' fees was intended to provide leverage for settlement. Accordingly, no cross-motion for attorneys' fees would be forthcoming. Petitioner's motion did not settle.² The court deems the service of the order to show cause waived as respondent did not oppose arguing the motion on October 1, 2025.

At oral argument, petitioner stated, and respondent did not dispute, that petitioner had reached out to respondent's counsel on September 7, 2025 via email with an offer to discontinue the proceeding. Respondent's counsel stated that she had countered that a discontinuance would only be acceptable if same was with prejudice and addressed the merits of the motion. As for that branch of petitioner's attorney's motion to withdraw as counsel for their client, it is undisputed that petitioner's counsel never stated -- until they filed their order to show cause to withdraw -- that they intended to withdraw as counsel. At argument, petitioner did not disagree with the court that, even if petitioner should have discovered that respondent's motion was meritorious prior to September 7, 2025, that at that time, they would also have certainly known that their opinion regarding the merits of respondent's motion irreconcilably diverged from that of their client.

DISCUSSION – Petitioner's Order to Show Cause

Petitioner's Motion to Withdraw as Counsel

At this late juncture, the court will not relieve petitioner's counsel and for a stay to enable their client to obtain new counsel. To do so would only result in further delay of this proceeding. The court sees no prejudice to petitioner's counsel if the court issues a determination adverse to

¹ The motion did not initially appear on the court's calendar on October 1, 2025 as the court's calendar had been administratively blocked for the Jewish Holidays. Regardless, as both parties were in the courtroom, the court, without objection, held argument on the substance of petitioner's signed order to show cause. The court was subsequently able to open the threshold.

² The court notes that respondent did not advance that the original lease comprised a reciprocal attorneys' fees provision, that petitioner did not pray attorneys' fees in the petition, and respondent did not counterclaim for attorneys' fees in their answer. These are not necessarily insurmountable facts, but the issue is not before the court, no intention to move for attorneys' fees has been articulated, and same will not be heard.

their client. Granting the delinquent motion would only cause further delay. On the other hand, respondent is entitled to a determination on the merits. Moreover, the court has a duty to control its calendar. “[A] judge is . . . obliged to keep a close watch on the age of the inventory. Some delay is inevitable, but it must be kept to a minimum. If it is not, the judge is held accountable to the public, to the bar and to court administrators.” (Crane & Meade, *Adjournments in State Civil Practice: Courts Seek Careful Balance Between Fairness and Genuine Needs*, 72 NY St BJ 36 [May 2020].)

CPLR 3217 – Petitioner’s Motion to Discontinue

“The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR 3217(b) rests within the sound discretion of the court[.] In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted.” (*Turco v Turco*, 117 AD3d 719, 720 [2d Dept 2014] [internal citations and quotation marks omitted].) However, “[a] plaintiff should not be permitted to discontinue an action without prejudice for the purpose of avoiding an adverse order of the court.” (*Casey v Custom Crushing & Materials, Inc.*, 309 AD2d 726, 727 [2d Dept 2003] [internal citation omitted]; *Angerame v Nissenbaum*, 208 AD2d 579, 579 [2d Dept 1994] [“generally leave to discontinue an action without prejudice should not be granted to enable a plaintiff to circumvent the effect of a court order in the defendant’s favor, since prejudice would inure to the defendant[.]”]; *NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d 319, 319 [1st Dept 1997] [finding lower court “properly discontinued the action with prejudice where plaintiff’s request for a discontinuance without prejudice was an apparent attempt to evade the consequences of an adverse order on defendant’s pending motion for summary judgment and preserve its ability to commence a Federal action.”] [internal citation omitted].)

In *Fulton View Realty, LLC v Reddy*, 74 Misc 3d 54 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022], the Appellate Term reversed the lower court’s decision granting the landlord’s oral application to discontinue the nonpayment proceeding but without deciding the tenant’s pending motion for summary judgment seeking, *inter alia*, dismissal of the proceeding. The Appellate Term remitted the case to the lower court for further proceedings, finding it improper to grant the landlord’s oral application to discontinue the proceeding “based upon an improper certificate of occupancy,” without first deciding the tenant’s pending motion for

summary judgment. (See also *W & HM Realty Partners Co., LLC v Houtenbos*, 54 Misc 3d 134[A], 2017 NY Slip Op 50083[U] [App Term, 1st Dept 2017] [modifying lower court's order by conditioning grant of landlord's motion to discontinue holdover proceeding upon payment of tenant's attorney's fees and remanding for hearing on reasonable attorneys' fees, finding such conditional discontinuance appropriate "[i]n the particular circumstances of this case, where landlord sought to discontinue its possessory claim after 20 months of litigation and completion of discovery, and while tenant's motion for summary judgment of dismissal was pending . . ."]; 884 *W. End LLC v Rosman*, 53 Misc 3d 152[A], 2016 NY Slip Op 51721[U] [App Term, 1st Dept 2016] [affirming conditional discontinuance of holdover proceeding upon payment of respondent's reasonable attorneys' fees, "where petitioner-landlord sought to discontinue its possessory claim nearly three years after service of the holdover petition and after substantial discovery was completed."] [internal citations omitted]; *PSA 190 Ave. B Assocs., LP v Ejoh*, 19 Misc 3d 141[A], 2008 NY Slip Op 50970[U], *1 [App Term, 1st Dept 2008] [same, where "landlord sought to discontinue its (dubious) possessory claim nearly a full year after service of the holdover petition[.]";³ but compare 526 *W. 158th St., HDFC v Ramon*, 70 Misc 3d 136[A], 2021 NY Slip Op 50047[U], *1 [App Term, 1st Dept 2021] [affirming grant of landlord's motion to discontinue holdover proceeding without prejudice and denying tenant's cross-motion for summary judgment to dismiss or alternatively for attorneys' fees, finding "[l]andlord's possessory claim did not appear frivolous . . . landlord asserted good faith reasons for its decision to withdraw the claim after discovery raised questions about the nature of tenant's occupancy," and "landlord expeditiously moved to discontinue the proceeding upon learning the information that raised such questions."])

³ "Examples of conditions that may be attached to discontinuances include a requirement that the plaintiff reimburse the defendant for costs, disbursements and attorneys' fees expended in the defense of the action, or the requirement that the discontinuance be deemed on the merits as to be with prejudice. If the discontinuance is permitted on condition that it be with prejudice, it will typically be accorded *res judicata* effect if a later action is commenced between the same parties for the same subject matter, or subject matter that could have been litigated in the earlier proceeding. Judges may use different nomenclature to convey the finality of the discontinuance, such as 'with prejudice' or 'on the merits,' though the court may just as equally grant the discontinuance 'without prejudice' if it chooses instead." (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3217:19.)

DISCUSSION - Respondent's Motion for Summary Judgment

Respondent's motion for summary judgment is unopposed. The court's briefing order was marked "FINAL." (NYSCEF Doc No. 15.) Accordingly, petitioner is in default and respondent's motion is decided on petitioner's default. Petitioner has indicated no cogent reason for their default, nor have they advance that their nonpayment petition has merits. Rather, petitioner's counsel seeks to either discontinue the proceeding, or, in the alternative, absolve themselves of the controversy.

Respondent's Arguments

Respondent attaches the "I-Card" for the subject building, stamped February 25, 1941, which reflects that the five-story building can be used for a total of 10 units, with two units on the first floor, and four units on the second and third floors. (NYSCEF Doc No. 21, respondent's exhibit C.) Respondent's counsel cites to Exhibit B as the certificate of occupancy for the building, but no such document is attached as Exhibit B; rather, Exhibit B consists solely of respondent's counsel's certification pursuant to CPLR 2105. (NYSCEF Doc No. 20.) Counsel affirms that the certificate of occupancy maintained by the New York City Department of Buildings ("DOB") is dated February 25, 1941, and reflects the authorized occupancy as two stores and two families on the first story, four families on the second story, and four families on the third story, for a total of 10 residential units. (NYSCEF Doc No. 17, respondent's attorney's affirmation ¶ 11.) Respondent's counsel argues that petitioner's counsel "freely admitted" on the record in both the resolution part and the trial part on June 17, 2025, that 12 residential units currently exist in the subject building, without providing evidence that DOB has permitted such occupancy or that a new certificate of occupancy is not necessary. (*Id.* ¶ 20.) Respondent affirms that their review of DOB publicly available records indicate that one "Alteration Type 1" permit application was filed on or about May 1, 2018, which reflects plans to alter the occupancy of the building. (*Id.* ¶ 44; NYSCEF Doc No. 22, respondent's Exhibit D, DOB application details for Job No. 321795955 for the subject building.) Section 7 of the application ("Additional Considerations, Limitations or Restrictions") states the work would change the number of dwelling units and "occupancy/use," and that the "[c]hange is inconsistent with current certificate of occupancy[.]" (NYSCEF Doc No. 22 at 2.) Section 9 of the application ("Job Description") states: "LEGALIZED EXISTING FIRST FLOOR FRONT TWO DWELLING UNIT CONVERTED FROM TWO RETAIL STORE. ALSO FILE TO REMOVE ECB

VIOLATION RELATED TO STORE CONVERTED TO DWELLING UNIT.” (*Id.*) The application details states the plan was disapproved on August 22, 2018. (*Id.* at 1.) Respondent’s counsel affirms that no subsequent applications were filed with DOB to change the occupancy of the building. (NYSCEF Doc No. 17, respondent’s attorney’s affirmation ¶ 47.)

Respondent cites to seven (7) open ECB violations related to violations of the certificate of occupancy, issued between May 2017 and September 2020. (NYSCEF Doc Nos. 26-39, respondent’s exhibits H-U; NYSCEF Doc No. 17, respondent’s attorney’s affirmation ¶ 51.) ECB violation number 35356085N, issued on November 5, 2018, states that the certificate of occupancy “issued on 02/25/1941 indicates 1st floor – 2 stores and 2 family dwelling – no stores observed on the 1st floor at time of inspection . . . now sub-divided/created a duplex in conjunction w/apt #2 fully converted w/2 pc bathroom- toilet & sink.” (NYSCEF Doc No. 32, respondent’s exhibit N, ECB violation # 35356085N.) There are also three (3) open ECB violations regarding work conducted without a work permit in units that violate the certificate of occupancy. (NYSCEF Doc Nos. 40-45, respondent’s exhibits V-AA; NYSCEF Doc No. 17, respondent’s attorney’s affirmation ¶ 52.) Respondent also cites two stop work orders (“SWO”) issued by DOB. One partial SWO was issued around September 26, 2018; the comments from the DOB website overview for complaint number 3668925 state that the partial SWO was issued due to installation of new gas piping for a gas furnace in the building’s cellar without any permits or inspections. (NYSCEF Doc No. 23, respondent’s exhibit E.) A full SWO was issued on November 5, 2018; the comments from the DOB website overview for complaint number 3674112 state that the full SWO was issued because of, *inter alia*, a duplex created and completed in “APT #2,” and that occupancy was contrary to the certificate of occupancy. (NYSCEF Doc No. 24, respondent’s exhibit F.) Counsel further cites to Environmental Control Board (“ECB”) violations.

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“No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law,” and “[e]xcept as above provided, no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy.” (Multiple Dwelling Law § 301 [1]-[2].)

“If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one . . . [n]o rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.” (*Id.* § 302 [1] [a] – [b].) In 2012, the Court of Appeals made clear in *Chazon, LLC v Maugenest*, 19 NY3d 410 (2012), that “[i]n the absence of compliance, the law’s command is quite clear: ‘No rent shall be recovered by the owner of such premises . . . and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.’” (*Chazon, LLC*, 19 NY3d at 415.) Subsequent appellate case law makes it just as clear that the prohibition on collecting rent applies to *all* units in the subject building that lacks a proper certificate of occupancy, not simply those units that themselves violate the certificate of occupancy. (See *Ormonde Equities LLC v Jacoby*, 81 Misc 3d 137[A], 2023 NY Slip Op 501416[U] [App Term, 1st Dept 2023] [affirming dismissal of nonpayment proceeding due to alteration leading to occupancy without a valid certificate of occupancy, “even though tenant’s apartment may not have been affected by the alteration/change underlying the violation.”] [internal citation omitted]; *W. 48th Holdings LLC v Eliyahu*, 64 Misc 3d 133[A], 2019 NY Slip Op 51066[U] [App Term, 1st Dept 2019] [finding landlord barred from collecting rent “even if tenant’s apartment was not one of the newly created apartments.”]; *GVS Props. LLC v Vargas*, 59 Misc 3d 128[A], 2018 NY Slip Op 50396[U], *1 [App Term, 1st Dept 2018] [“Inasmuch as the building as presently configured varies substantially from what the certificate of occupancy permits and that the health and safety of all building residents is affected, landlord is barred from collecting rent for the entire building.”]; *E. Harlem MEC Parcel C, L.P. v Smalls*, 82 Misc 3d 127[A], 2024 NY Slip Op 50317[U] [App Term, 1st Dept 2024] [affirming dismissal of nonpayment proceeding, where no valid certificate of occupancy was issued to allow for addition of commercial space on first floor, thus landlord precluded from recovering rent from residential tenant].)

CONCLUSION

Accordingly, it is

ORDERED that petitioner’s order to show cause is DENIED in all respects; and it is further

ORDERED that respondent’s motion for summary judgment is GRANTED; and it is further


ORDERED that the petition is *dismissed with prejudice and on the merits*; and it is further

ORDERED that a judgment of dismissal shall enter *in favor of respondent*.

Respondent shall serve and file *notice of entry* upon petitioner's counsel no later than 10 days from the date of this order.

This constitutes the decision and order of the court.

Dated: October 1, 2025
Brooklyn, NY



HON. KAREN MAY BACDAYAN
Judge, Housing Part

So Ordered
Hon. Karen May Bacdayan