SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

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EAST 82 LLC,

Plaintiff,

Index No. 111645/00

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- against -

DECISION AND ORDER

FRANCESCA FRIEDMAN, et al.,

Defendants.

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MARTIN SCHOENFELD, J.:

In this action plaintiff-landlord East 82, LLC seeks (1), pursuant to Article 6 of the Real Property Actions and Proceedings Law, to eject defendant-tenant Francesca Friedman ("defendant") and "John and Jane Doe" from Apartment A ("the premises" or "the apartment") in the basement of the building ("the building") plaintiff owns at 548 East 82nd Street, New York, NY, and (2) payment of use and occupancy. Defendant has counterclaimed for (1) damages for breach of the warranty of habitability and (2) attorney's fees pursuant to Real Property Law § 234.

Plaintiff now moves for partial summary judgment consisting of a Final Judgment of possession and a warrant of eviction. Defendant now cross-moves for summary judgment dismissing the complaint and for legal fees. For the reasons set forth herein, plaintiff's motion is granted and defendant's motion is granted

to the extent that it seeks to dismiss plaintiff's claim for use and occupancy and is otherwise denied.

Background

The New York City Department of Buildings Certificate of Occupancy for the building, dated February 4, 1981 (Moving Exhibit 2), lists a "Cellar" and various upper floors. The "Cellar" contains a "Boiler room, meter rooms, laundry room, [and] Doctor's Offices."[1]

Plaintiff's predecessor in interest leased the premises to defendant pursuant to a lease (Cross-Moving Exhibit A) commencing February 11, 1998 and ending February 28, 1999. The allowed use was "for living purposes only" (Lease ¶ 1). The lease has a standard attorney's fees provision (Lease ¶ 20(a)(5)). A renewal lease extended the term through March 1, 2001.

Plaintiff purchased the building on or about April 14, 1999 (Moving Exhibit 1). Defendant stopped paying rent in or about March of 1999 after finding out that "the certificate of occupancy did not reflect my apartment" and upon "advice from

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[1] Whether the premises are in what would technically be a "cellar" or a "basement," see Multiple Dwelling Law § 4(37), 4(38), need not be decided herein. The premises are clearly in what the Certificate of Occupancy refers to as the "Cellar."

counsel" (Cross-Moving Affidavit ¶ 10). Defendant notes (*id.* ¶ 12) that "the basement would flood during heavy rainstorms."

In or about May of 1999 plaintiff commenced a non-payment summary proceeding in Civil Court (L&T Index No. 075780/99) (see Cross-Moving Exhibit B). Plaintiff alleged that the apartment was "Subject to [the] Rent Stabilization Law," a statement supported by other evidence in the record (Cross-Moving Exhibit C).[2] Defendant's third affirmative defense (Moving Exhibit 5 ¶¶ 7-8) was that pursuant to Multiple Dwelling Law "(MDL") § 302(1)(b), the action could not be maintained because the Department of Buildings had not issued a Certificate of Occupancy for the premises. The action was discontinued and plaintiff commenced the instant ejectment action in or about April of 2000.

Meanwhile, in or about January of 2000 the building's boiler caught fire, apparently due to a gas leak, necessitating a trip by the Fire Department (Cross-Moving Affidavit ¶ 18).

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[2] Surprisingly or not, even an apartment that cannot legally be occupied can be subject to Rent Stabilization. E.g., 840 West End Associates v Zurkoski, NYLJ, Feb. 28, 1991, p 24, col 4 (App Term, 1st Dept) (Cross-Moving Memorandum, Exhibit A). However, as discussed below, this Court does not believe that being subject to rent regulation insulates an apartment from the application of basic common law principles.

Discussion and Disposition

The instant action is almost "on all fours" with Hornfeld v Gaare, 130 AD2d 398 (1st Dept 1987). In Hornfeld the plaintiff owned a multiple dwelling with a certificate of occupancy permitting residential use of the first through fifth floors. The basement was reserved for the "boiler room, storage and office of building." Defendant rented certain basement space ostensibly for storage. Thereafter, plaintiff commenced a non-payment summary proceeding. The court found that plaintiff had permitted defendant to occupy the premises for residential purposes and dismissed the proceeding on the ground that MDL § 302(1)(b) prohibits the recovery of rent from the occupant of an illegal apartment. Plaintiff then hired a licensed professional engineer to see if the basement space could be transformed into a legal residence. However, "the requirement that the ceilings of a basement apartment be at least 4 feet six inches above the curb level [could not] possibly be resolved." This left plaintiff in the same basic quandary as the instant plaintiff.

> Thus, defendant has continued to occupy the basement area for residential purposes in violation of his lease[3] and pertinent provisions of the Multiple

[3] In the instant case, the residential use does not violate the lease per se. However, in Hornfeld the Civil Court determined

> Dwelling Law, without paying rent or use and occupancy . . . , and is leaving the plaintiff landlord exposed to civil and criminal sanctions for failure to cure the violation so long as the defendant continues his illegal residential use of the basement space.

Plaintiff then commenced a declaratory judgment action in Supreme Court seeking use and occupancy and surrender of the premises. Defendant sought a renewable, rent-stabilized lease and denial of any use and occupancy payments. The Appellate Division concluded that because defendant could not "be permitted to occupy the premises as his residence, judgment should be entered requiring that defendant surrender the premises to the landlord," but that as plaintiff had permitted the residential use, plaintiff could not recover use and occupancy.

Similar to Hornfeld is Corbin v Harris, 92 Misc 2d 480 (Supreme Court, Kings County 1977), in which the court used its equitable powers to evict the occupant of an illegal basement residence, but denied the landlords' request for a money judgment. Thus, a landlord is entitled to recover possession of residential real property that is being illegally occupied even if the landlord contributed to the illegal situation, but the

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that the landlord had in fact allowed residential use. Furthermore, in the instant case, the current owner did not allow an illegal use; the owner inherited an illegal use and is trying to end it.

landlord will be precluded from recovering "rent" and use and occupancy.

Defendant's resolute counsel has interposed several defenses, but upon examination of the law and the uncontested facts, none of them are availing. First, defendant states (Cross-Moving Affidavit ¶ 36) that plaintiff never served her with "a proper termination notice as required under the rent stabilization law and code" (see Rent Stabilization Code §§ 2524.2(a), (b); 2524.3(c). This Court's initial reaction was that a landlord bringing a common law ejectment action does not have to jump through the various hoops placed in front of a landlord bringing a statutory summary proceeding. Interestingly, two recent cases have addressed the issue head on and reached divergent conclusions.

In Aponte v Santiago, 165 Misc 2d 968 (Civil Court, Bronx County 1995), then Civil Court Judge Lucindo Suarez stated as follows:

> A further question which should be addressed is whether plaintiffs were required to serve a notice terminating defendant's tenancy prior to the commencement of this action. At common law, a previous demand or notice to quit was unnecessary to commence an action to recover real property. Since RPAPL article 6 did not modify this principle of the common law, service of a notice of termination is not required as a condition precedent to this action. Consequently, a crucial distinction

> between the statutory summary proceeding previously commenced by plaintiffs and this action is the fact that a termination notice was not a jurisdictional predicate herein.

Id. at 972 (citations omitted). On the other hand, in Gerolemou v Soliz, 184 Misc 2d 581 (App Term, 2d Dept 2000), three judges of the Appellate Term, Second Department, stated as follows:

> Even apart from Real Property Law § 232-a, the common law requires the giving of a notice of termination to terminate a month-to-month tenancy, and neither a summary holdover proceeding nor an ejectment action will lie in the absence of the giving of such notice. The ruling to the contrary in *Aponte v Santiago* . . . should not be followed.

Id. at 580 (citations omitted). In Gerolemou the landlord and tenant had an oral month-to-month tenancy. The opinion makes no mention of any type of pre-commencement notice, official or unofficial, to the tenant. Thus, for all that appears, the tenant had absolutely no notice that the landlord was declaring an end to the month-to-month tenancy (and therefore it had not actually ended) and no notice that the landlord was commencing litigation prior to the litigation itself. In the instant case the tenant stopped paying rent, and the landlord (presumably) served a predicate notice for the civil court action. Furthermore, here, the tenant is in physical danger; the landlord is subject to fines and penalties; and the law is being

flagrantly violated, facts completely absent from Gerolemou.

Finally, none of the presumed purposes of giving a notice of termination, such as providing a chance to cure (impossible here (*infra*)), providing notice of the consequences of a failure to cure (obvious here); or extending the time the tenant would have to continue the tenancy without a cure (unnecessary[4] and undesirable and/or against public policy here), would have been furthered by a notice of termination from this landlord to this tenant. Thus, in the absence of controlling authority,[5] this court finds the better rule to be that New York's statutory rent regulation has not abrogated the common law rule that notice of termination is not a condition precedent to bringing an ejectment action (the more so if the tenant has stopped paying rent, the tenant has had a surfeit of notice, and the tenancy is illegal and dangerous without any possibility of cure (*infra*)).

Defendant's counsel states (Cross-Moving Affidavit ¶¶ 8-9)

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[4] As the name implies, a statutory "summary proceeding" should be concluded with dispatch. A common law plenary action like ejectment proceeds more slowly and carefully.

[5] But see Alleyne v Townsley, 110 AD2d 674, 675 (1st Dept 1985) ("No statue abrogates the common-law rule that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after the expiration of a fixed and definite term."); accord, Southside Development Co. v Mitchell, 156 AD2d 268, 269 (1st Dept 1989).

that where a tenant's occupancy is illegal, the remedy under Rent Stabilization Code § 2524.3(c) is for the landlord to cure the condition if this can be done "without incurring undo expense or hardship." See Freehold Investments v Abrue, NYLJ, June 7, 1989, p 26, col 4 (Civil Court, Kings County) (Cross-Moving Memorandum Exhibit A):

> While section 2524.3(c) of the Rent Stabilization Code provides that a landlord may commence an action to recover possession of an apartment where a tenant's occupancy is illegal because of requirements of law, the Courts have consistently held that this remedy may be used only as a 'last resort,' particularly in instances where the landlord created the illegality without the tenant's knowledge."

Even assuming the applicability of this provision, which need not be and is not decided, it, too, would be unavailing. Plaintiff has submitted the reply affidavit of Harry Alex Meltzer, a Registered Architect, who states that plaintiff asked him to determine whether the premises "could be legally converted into Class 'A' residential apartments"; that "it is absolutely clear that the subject premises, located in the cellar, **CANNOT** be legally converted into Class "A" residential apartments"; that one reason is that if the basement/cellar were considered to be a residential floor, the building would then consist of seven residential floors and would have to be made fireproof, which

would require a "gut rehabilitation" of the entire building[6] (¶¶ 7-13); that another reason is that conversion to residential use would violate the City's Zoning Regulations as to "floor area ratio"[7] (¶¶ 14-19); that another reason is that conversion would violate Multiple Dwelling Law § 34(6)(a), which requires that a cellar or basement apartment have "at least one half of its height and all of its window surfaces above every part of an 'adequate adjacent space," which "shall be open to the sky . . . and shall be a continuous surface area outside the dwelling not less than thirty feet in its least dimension . . . " and that the "least dimension" is actually approximately six and a half feet, to the end of the courtyard (¶¶ 20-23; Reply Exhibit 3); and that another reason is that the Department of Buildings has already determined, in effect, that the basement/cellar is unsuitable for residential use (¶¶ 24-27).

In response to Meltzer's affidavit, defendant has submitted the affidavit of John Mahler, also a Registered Architect, who states that he has not had time, as of late November 2000, to

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[6] This would clearly entail undue expense and hardship for all concerned.

[7] Meltzer states that the building already violates the current Regulations, but that the building was in compliance when built and that therefore the violation has been "grandparented."

determine whether the apartment can be "legalized." The instant decision is being issued in early April, 2001. Thus, defendant has had plenty of time to have submitted a substantive response to Mr. Meltzer, several of whose reasons are clear and appear to be incontrovertible, particularly the fireproofing and "adequate adjacent space" reasons.

Finally, defendant's argument that plaintiff has submitted in reply papers matters that should have been in its moving papers (E.g., Wosyluk v L.T.L. Developers, 147 AD2d 475 (2d Dept 1989)) is unavailing for two reasons. First, plaintiff's reply submissions essentially respond to the points in defendant's answering papers, which is the valid purpose of a reply.[8] A movant is not required to foresee every possible opposition to a motion. In any event, defendant had the "last word" word here in her reply in further support of her cross-motion, and failed to raise an issue of fact.

This Court is well aware that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a

[8] Arguably, plaintiff's submissions are not even in reply, but, rather, in opposition to defendant's cross-motion.

party of [her] day in court." Gibson v American Export Isbrandtsen Lines, 125 AD2d 65, 74 (1st Dept 1987). However, "[A] party opposing [a summary judgment] motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose." Gilbert Frank Corp v Federal Insurance Co., 70 NY2d 966, 967 (1988) (citations omitted). The "evidentiary proof" demonstrates that defendant's occupancy is illegal and dangerous. She may not continue her occupancy, even if, as defendant states (Cross-Moving Affidavit ¶¶ 8-9), and appears quite likely, she had no idea at the start of her tenancy that her occupancy was illegal and even if she is willing to abide the daily dangers.

Conclusion

In addition to following the law, decisions should follow common sense. Here, a greedy (or very uninformed) landlord rented out as residential space a basement area designed as office space. A new landlord, presumably not in any collusion with the old, bought the building at around the time the tenant

stopped paying rent because the space was illegally inhabited. The landlord brought a non-payment summary proceeding but was foiled because the tenant had no obligation to pay rent because the apartment was "illegal." This illegality was not a mere technical defect but was inherent in the design and nature of the building, subjected the new landlord to fines and penalties, and subjected the tenant to the risk of disease, injury, or death due to unsanitary conditions and fire hazards (witness the aforesaid boiler incident, which could easily have turned tragic). The landlord then brought a common law ejectment action. Common sense dictates that the landlord be given the space back but not be allowed to collect the moneys that would be due if the space had been occupied legally.[9]

Thus, for the reasons set forth herein, plaintiff's motion for summary judgment is granted; plaintiff shall settle a final judgment of possession (and may submit a warrant of eviction); defendant's motion for summary judgment is granted to the extent that plaintiff's claim for use and occupancy is dismissed; and

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[9] Like the authority upon which it relies, today's decision will discourage illegal tenancies, because it bars the collection of rent and "use and occupancy." Furthermore, a tenant may be entitled to damages from a landlord who offers a residential lease for space for which there is no Certificate of Occupancy, which would further discourage such dangerous chicanery.

the remaining claims for attorneys fees and breach of the warranty of habitability are hereby severed and, if deemed advisable, may proceed if they cannot be resolved now that the big issue has been.

This opinion constitutes the decision and order of the Court.

Settle judgment.

Dated: April 5, 2001

J.S.C.