Gloveman Realty Corp. v Jeffreys
2003 NY Slip Op 30084(U)
November 5, 2003
Supreme Court, Kings County
Docket Number: 3003589/1999
Judge: Nicholas A. Clemente
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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at the Courthouse, Monticello, New York, on the 5" day of November, 2003

P R E S E N T :

HON. NICHOLAS A. CLEMENTE,
Justice.

. . . . . -X

GLOVEMAN REALTY CORP.,

Plaintiff,

- against - Index No. 35896/99

JOHN JEI-FERYS, et al.,

Defendants.

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The following papers numbered 1 to 12 read on this motion: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 8-12
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this action alleging the breach of lease agreements and seeking ejectment, monetary damages, specific performance, use and occupancy, and attorney'sfees, plaintiffGloveman Realty Corp. (plaintiff) moves

for partial summary judgment in its favor with respect to its second and third causes of action in its amended complaint, and dismissing the first, third, fourth, fifth, sixth, and seventh affirmative defenses, and the first and fourth counterclaims set forth in defendants' answer. Defendants cross-move for partial summary judgment dismissing plaintiffs first cause of action.

Plaintiff is the owner of commercial loft buildings, which are located at 175 Powers Street, 294 Graham Avenue, and 300 Graham Avenue, in Brooklyn, New York, and are interconnected *so* as to form one building. On July 17, 1996, September 1, 1996, and February 8,1998, respectively, defendants John Jefferys, Leslye Leaness, and Stephen Arnold entered into loft leases with plaintifffor the third floor loft at 175 Powers Street, the second floor loft at 175 Powers Street, and the second Floor loft at 294 and 300 Graham Avenue. These leases are still in effect. Although the building is not registered as a multiple dwelling, it contains 13 units that are residentially occupied by persons living independently of each other.

The building has a certificate of occupancy for manufacturing only; it does not have a residential certificate of occupancy. The language of the subject leases provide that the tenants shall use and occupy the demised premises for art work studios. However, the riders to the leases gave defendants John Jefferys, Leslye Leaness, and Stephen Arnold permission to subdivide the leased spaces into separate units; to install plumbing, including showers and toilets, for each separate unit; to install stove and water heater hookups for each separate unit; and to create

separate entrances for each of these units. The leases also gave these defendants the right to sublet these separate units and to sell the fixtures at the end of their leases. Such leases additionally expressly provided that the construction work could be done by the tenants. After taking possession of the leased space, defendants John Jefferys, Leslye Leaness, and Stephen Arnold invested substantial amounts of time and money in renovating their lofts for residential use. They subdivided the lofts into residential units, and sublet the living space to the other defendants herein. The building is presently occupied by residential tenants on the first, second, and third floors of 175 Powers Street, the second floor of 294 Graham Avenue, and the second floor of 300 Graham Avenue.

In 1998, the New York City Department of Buildings and the Environmental Control Board of the City of New York served plaintiff with a series of notices of violations for creating residential apartments in the building in violation of its certificate of occupancy; for performing the work in constructing the apartments, including the electrical and plumbing work, without the necessary permits; and for failing to provide mechanical ventilation from three interior bathrooms and to provide proper venting of gas fired equipment on all floors. Following plaintiffs June 22, 1999 service of a notice to cure upon defendants John Jefferys, Leslye Leaness, and Stephen Arnold, requiring them to, inter alia, cease and desist from using the premises for residential purposes, and services of 30-day notices to vacate, plaintiff brought this action, seeking to evict defendants and to regain possession of the

premises.

Plaintiffs original complaint contained solely its first cause of action, which seeks the ejectment of defendants. Following joinder of issue with respect to plaintiffs original complaint, plaintiff had moved for, inter alia, summary judgment against defendants John Jefferys, Leslye Leaness, and Stephen Arnold. In support of its motion, plaintiff argued that since the subject building was not residentially occupied during the Loft Law window period of April 1, 1980 to December 1,1981, it did not qualify for interim multiple dwelling status, and that it, therefore, was entitled to summary judgment in its favor on its ejectment complaint.

The court, in its May 16,2000 decision and order, rejected plaintiffs argument, and held that the building was a de facto horizontal multiple dwelling because it contained at least 12 units that are residentially occupied by persons living independently of each other (see Multiple Dwelling Law § 4 [7]; *Ropla Rlty. Corp. v Ulmer*, 110 Misc 2d 619,620-621, *affd* 113 Misc 2d 175; *Mandel v Pitkowsky*, 102 Misc 2d 478,479, *affd* 76 AD2d 807; *Lipkis v Pikus*, 96 Misc2d 581, 588, *affd* 99 Misc 2d 518, *affd* 72 AD2d 697). The court, in its May 16,2000 decision and order, further held that, as such, the defendant-tenants would qualify for protection under the Rent Stabilization Law of 1969 (Administrative Code of City of **NY,** tit 26, ch 4) (RSL) and the Emergency Tenant Protection Act of 1974 (L 1974, ch 576) (ETPA), which apply to residential, not commercial units, if it could be established that plaintiff had "rent[ed] the premises under a nominally commercial lease with knowledge that

the tenants intend[ed] to convert the property to residential use, [and had] [acquiesce[d] in the conversion . . . and [thereafter]s[ought] to avoid [the] protections afforded these tenants under the RSL and ETPA ***(Tan Holding Corp. v Wallace,*** 178 Misc 2d 900,903 ***revd on other grounds*** 187 Misc 2d 687; ***see also Metzendorf v 130 W. 57*** Co., 132 AD2d 262,265; *771 on 77* ***Realty Corp. v*** Norton, 189 Misc 2d 389, 395-396; ***Mandel,*** 102 Misc2d at 480).

The court noted that plaintiff contended that it lacked knowledge that the defendants intended to convert the property to residential use and did not acquiesce in such use, and, in support of that contention, plaintiff had submitted the affidavit of its president, Chester Gerber, wherein he asserted that he believed defendants would be using the lofts as their workshops and as sites for art shows, and that he never intended that any of the lofts would be converted illegally to residential space. Chester Gerber stated that he never had keys to the lofts and never entered them. Defendants, in opposition to plaintiffs motion, submitted, inter alia, detailed affidavits, asserting that Chester Gerber had knowledge and acquiesced in the residential use of the premises. The court, in its May 16, 2000 decision and order, found that material and triable issues of fact existed as to plaintiff's principal's knowledge of, and acquiescence in defendant's residential use of the premises, and, consequently, whether defendants are rent-stabilized tenants entitled to the protection afforded to such tenants under the RSL and ETPA, and it denied plaintiffs motion (see CPLR 3212 [b]; *Metzendorf*, 132 AD2d at 266; ***Wilson v*** *One* ***Ten*** *Duane*

St. Rlty. Co., 123AD2d 198,201; *Tan Holding Corp. v Wallace,* 187 Misc 2d at 687, 688-689).

In May 2002, plaintiff amended its complaint to assert four additional causes of action. Plaintiffs second cause of action is for damages caused by defendants as a result of their alterations to the property and their alleged breaches of the leases by performing such construction work. Plaintiffs third cause of action seeks specific performance requiring defendants to correct all of the alterations and cure all of the violations placed on the building as a result of the alterations. Plaintiffs fourth cause of action demands payment of use and occupancy by defendants, and its fifth cause of action seeks recovery of legal fees. Defendants have interposed six affirmative defenses and four counterclaims.

In support of their cross motion, defendants have submitted the deposition testimony of Chester Gerber, in which he admitted that in the early part of 1997, he knew that defendants had created residential space in their lofts and that the tenants and subtenants were living there, and that he had approved of defendants' plan to convert the commercial space to residential space and had agreed to lease them the property on that basis. In view of this admission, a triable issue of fact no longer exists as to plaintiffs knowledge of, and acquiescence in the conversion of the property to residential use. Thus, defendants are entitled to the protections afforded under the RSL and the ETPA *Etlin v Pepper,* NYLJ, April 26,2000, at 30, col 5 [Civ Ct, Kings County]; *717 on 71 Realty Corp.,* 189 Misc 2d at 395-396).

Plaintiffs' argument that since its building does not qualify for interim multiple dwelling status under the Loft Law, it cannot qualify as a de facto horizontal multiple dwelling for protection under the RSL and the ETPA, is without merit, and has been rejected by recent case law (see *Tracto* €quip. Corp. v White, NYLJ, Mar. 21, 1997, at 36, col 4 [App Term 2d and 11th Judicial Dists]; ***375** Berry **Street** Corp. **v Huang,*** NYLJ, Fab. 5,2003, at 21, col 5 [Civ Ct, Kings County]; ***Etlin***, NYLJ, April 26,2000, at 30, col 5; 777 *on 17* Realty Corp., 189 Misc 2d at 399).

Plaintiffs reliance upon ***302-304** Met Assoc.,* Inc. *v Butler* (NYLJ, Jan. 3,2001, at 24, col 2 [Sup Ct, Kings County]), in support of its argument that loft tenants who are not covered by the Loft Law are not protected by the RSL and the ETPA, is misplaced. ***302-304*** Met Assoc., *Inc.* merely held that such rent protection only applied where the tenant paid for the renovations, and, in that case, unlike in the case at bar, the landlord paid for the conversion to residential use. Furthermore, ***302-304*** Met Assoc., Inc. held that the unit of the defendants therein could not be deemed eligible for de facto multiple dwelling status because the use was prohibited by the current zoning law. In the case at bar, residential use is not prohibited by the zoning law.

Plaintiffs contention that defendants are not entitled to RSL protection because the rent is greater than $2,000 per month, is also devoid of merit. Administrative Code of the City of New York § 26-504.2 only excludes housing accommodations which become vacant on or after April 1, 1997 and "where at the

time the tenant vacated such housing accommodation the legal regulated rent was [$2,000] or more per month." Here, there was no legally regulated rent set by the Division of Housing and Community Renewal, and, thus, this provision is wholly inapplicable to this case ***(see*** *111* on *11* ***Realty*** *Corp.,* 189 Misc 2d at 398). Therefore, in view of the foregoing defendants are entitled to summary judgment dismissing plaintiffs first cause of action for eviction ***(see*** CPLR 3212 [b]).

Plaintiff, in its motion insofar as it seeks summary judgment in its favor on its second and third causes of action, claims that it is entitled to damages and specific performance requiring defendants to correct the alterations and cure the violations. In support of such claim, plaintiffs president, Chester Gerber, now admits that he knew that the leases contemplated that defendants would perform alterations to convert the spaces involved to residential use, but contends that defendants were required to do so legally. Specifically, plaintiff argues that defendants breached the leases as a matter of law because John Jefferys testified at his deposition that none of the alteration work performed by them for plumbing and electrical work to build the 13 residential units that they created was performed by licensed contractors.

Plaintiffs argument is unavailing. Plaintiff, in support of its argument, relies upon paragraph 68 of the subject leases. Such paragraph, however, provides that "[a]ll work is to be performed by licensed contractors or by ***tenant***" (emphasis added). Thus, the leases expressly permitted the defendant-tenants to perform the work themselves. Moreover, Chester Gerber admitted at his deposition that it was

contemplated by the leases that the work would be performed by the defendant-tenants, that he was aware that such work was being performed by the defendant-tenants, and that he acquiesced in the performance of this work by the defendant-tenants.

Plaintiff, further argues that defendants breached the leases as a matter of law because defendants did not file any plans nor obtain any permits from the New York City Department of Buildings in connection with any of the residential conversion work which they performed, as was required by paragraphs 3, 50, and 80(e) of the leases. While these paragraphs **do** impose these requirements upon the tenants, it is noted that paragraph 3 requires the tenants to "promptly deliver duplicates of all such permits, approvals and certificates to [plaintiff]." Plaintiff never received any such duplicates of the required permits, approvals, and certificates, and plaintiff must have been aware that such approvals had not been obtained and that its certificate of occupancy for the building had never been changed or amended to permit residential use. Thus, while plaintiffs president, Chester Gerber, argues that he relied upon defendants' continuous representations to him that all of their alterations were being made in compliance with the laws of the City and State of New York and that he was duped by them into believing that the work was performed in compliance with such laws, the question of whether such reliance was reasonable and whether, by his own acquiescence, actions, and conduct, he participated in, condoned, and/or supported defendants' lack of compliance with legal requirements, presents a triable

question of fact.

In this regard, it is noted that paragraph 53 of the leases provides that "[i]n the event of any violation . . . in the terms and conditions of this lease by the tenant, the landlord agrees to notify the tenant in writing by certified mail and providing therein to the tenant ten (10) days notice to cure said violation." Although plaintiff, as noted above, was admittedly aware of the alterations performed by defendants in the early part of 1997, it did not serve a notice to cure upon them until June 22, 1999. Consequently, plaintiff is not entitled to summary judgment in its favor on its second and third causes of action (see CPLR 3212 [b]).

Plaintiff, by its motion, also seeks to dismiss defendants' first affirmative defense, which alleges that all of the alterations were made with the full knowledge, consent, and assistance of plaintiff and its agents. Plaintiff contends that it is entitled to such dismissal because Chester Gerber denies that the alterations were made with his consent, and that, even if they were, his knowledge of, or acquiescence in illegal alterations, does not constitute a defense. Such argument is rejected. A lease is not automatically voided for illegality where a tenant's contemplated use of the premises does not conform with the existing certificate of occupancy (see *Progressive Image Gruppe v 762 Charles Street Owners,* 272 AD2d *66,* **66).** Furthermore, Chester Gerber has admitted that the alterations for residential occupancy were made with his knowledge and consent. "[A] party may waive the defense of the illegality of a contract in which he [or she] himself [or herself]

participated and affirm the same insofar as the parties are concerned" (22 NY Jur 2d, Contracts § 205; *see also 777 on 71 Realty Corp.,* 189 Misc 2d at 399-4000). Thus, this defense constitutes a viable one and its dismissal must be denied.

Defendants' third affirmative defense asserts that plaintiff accepted their rent checks for the premises for 36 months after it expressly consented to, encouraged, assisted in, and personally observed defendants' alterations and conversion of the space, thereby waiving any right to object to these conditions. It has been specifically held that a clear waiver occurs and a landlord is precluded from complaining about the neglect of his tenants in procuring a building permit for making alterations where the landlord was unquestionably aware of the extensive renovations being performed on the premises, and he accepted rent throughout the period and failed to take any action *(Restoration Realty* ***Corp. v*** *Robero,* 87 AD2d 301, 305, *affd* 58 NY2d 1089). Therefore, defendants' third affirmative defense is meritorious and should not be dismissed.

Defendants' fourth affirmative defense alleges that plaintiff must be estopped from alleging that defendants' alterations and conversion work was in violation of the leases since plaintiff and its agents made express and implicit representations to them that they were permitted to convert the premises to residential use, and personally observed the conversion work, and that they reasonably relied upon such representations and promises to their detriment by making enormous financial and labor investments in converting the premises to residential use. Plaintiffs argument,

in seeking dismissal of this defense, that it never made any oral representations that defendants could use their spaces illegally for residential use is belied by Chester Gerber's admissions that he was aware that defendants were converting the premises for residential use despite the fact that such premises did not have a certificate of occupancy for such use. Thus, dismissal of this affirmative defense must be denied.

Defendants' fifth affirmative defense must be dismissed because it merely alleges that the allegations of the newly-added five cause of action of the amended complaint fails to state a cause of action. "An affirmative defense of failure to state a cause of action cannot be interposed in an answer" ***(Iannarone v Gramer, 256*** AD2d **443,445; *see*** also ***Guglielmeo v Roosevelt Hosp. Staff Housing*** Co., 222 AD2d **403,404).** Additionally, defendants' sixth affirmative defense that plaintiff, by its actions, has condoned all behavior of which it complains, is duplicative of the first affirmative defense, and should, therefore, be dismissed.

Defendants' seventh affirmative defense seeks reformation of the leases to reflect the fact that plaintiff and defendants entered into a residential lease. In view of Chester Gerber's admission that he was aware that defendants would be living at the premises, such defense cannot be dismissed. While plaintiff argues that defendants cannot set forth a request for reformation by way of an affirmative defense, it has been held that reformation may be set forth as an affirmative defense in an answer ***(see Surlak v Surlak,*** 95 AD2d **371,381; *Tracy Dev. Co. v Empire Gas***

& Elec. Co., 190 NYS 172, 173).

Defendants' first counterclaim seeks recovery of over $200,000 based upon the money, labor, and time which defendants invested in the premises. Such counterclaim must be dismissed. The lease agreements do not provide that the landlord is responsible for the costs of the alterations. Paragraph 81 of the leases only provides for a concession in rent for a period of two months for the purpose of renovation and new construction. Defendants also do not assert that plaintiff ever agreed to pay for the cost of the alterations. Therefore, dismissal of this counterclaim is warranted.

Plaintiffs motion also seeks dismissal of defendants' fourth counterclaim, which seeks the recovery of attorney's fees pursuant to paragraph 19 of the leases and the reciprocal entitlement to attorney's fees pursuant to Real Property Law § 234. Plaintiff contends that defendants cannot obtain attorney's fees if they prevail in this action because of the commercial form of the lease. Plaintiffs contention is without merit. "While Real Property Law § 234 applies only to the lease of residential premises, where, as here, the intention of the parties was to enter into a lease for residential premises, Real Property Law § 234. applies to th[e] lease[s]" (*117 on 77 Realty* Corp. v *Norton,* 191 Misc 2d 483,486; *see also* 640 *Broadway Renaissance Co. v Rossiter,* 256 AD2d 568, 568-569; *Feierstein v Meser*, 124 Misc2d 369, 372). Thus, summary judgment dismissing defendants' fourth counterclaim must be denied.

Accordingly, plaintiffs motion, insofar as it seeks partial summary judgment in its favor with respect to its second and third causes of action in its amended complaint, and dismissing the first, third, fourth, and seventh affirmative defenses, and the fourth counterclaim set forth in defendants' answer, is denied. Plaintiffs motion, insofar as it seeks partial summary judgment dismissing defendants' fifth and sixth affirmative defenses, and first counterclaim, is granted. Defendants' cross motion for partial summary judgment dismissing plaintiffs first cause of action, is granted.

This constitutes the decision and order of the court.

E N T E R ,

J. S. C.