

1319 St. John's Realty LLC v Conley

2008 NY Slip Op 30625(U)

March 6, 2008

Civil Court of the City of New York, Kings County

Docket Number: 0091337/2007

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART H

1319 ST. JOHN’S REALTY LLC, X

Petitioner-Landlord

-against-

DECISION & ORDER
Index No.: L&T 91337/07

HON. SABRINA B. KRAUS

REGINA CONLEY
1319 ST. JOHN’S PLACE
APARTMENT 1R
BROOKLYN, NY 11213

Respondent-Tenant

X

BACKGROUND

This summary nonpayment proceeding was commenced by **1319 ST. JOHN’S REALTY LLC** ("Petitioner") and seeks to recover possession of Apartment 1R at 1319 St. John’s Place, Brooklyn, New York, 11213 ("Subject Premises") based on allegations that **REGINA CONLEY** (“Respondent”) had failed to pay rent due under the rental agreement governing the parties.

PROCEDURAL HISTORY

This proceeding was commenced on or about September 12, 2007. The Respondent filed an answer on September 17, 2007, and the case was put on the court’s calendar for September 24, 2007. The proceeding was adjourned numerous times, for Respondent to subpoena Section 8 records and hire counsel,

and for the filing of Respondent's motion and Petitioner's opposition papers. On February 12, 2008 The Court heard oral argument and the motion was marked submitted.

FACTS

The subject premises is a rent stabilized apartment. Respondent has resided in the subject premises for approximately nine years, with her three minor children. From the inception of the tenancy, and through and including March 2005, a portion of Respondent's rent was paid by New York City Housing Authority ("NYCHA") in the form of a Section 8 Subsidy.

On or about March 2005, the Section 8 subsidy was suspended, due to the fact that the apartment failed inspection and was found to have conditions that were considered long-standing housing quality standards ("HQS") violations.

The last lease renewal agreement executed by the parties was in 2004 for a monthly rent of \$1050.00. Effective July 1, 2005, Respondent's portion of the rent was \$6.00 and the NYCHA share was \$1044.00.

On or about May 2006, Petitioner sued Respondent for nonpayment of rent under Index No. 72991/06. In said proceeding Petitioner sought the full amount of the rent from the Respondent. On or about June 7, 2006, NYCHA sent Petitioner a written statement indicating said proceeding was subject to dismissal based on the petitioner's failure to comply with the terms of the Second Partial Consent Judgment in **Williams v. New York City Housing Authority**, 81 Civ. 1901 (SDNY) ("Williams Consent Decree"). The proceeding was withdrawn

without prejudice pursuant to a stipulation between the parties on or about July 17, 2006.

In this proceeding, Petitioner once again sues Respondent for the entire portion of the rent due, and acknowledges that it has not complied in any manner with the Williams Consent Decree. Petitioner alleges that it was not required to comply with the Williams Consent Decree because the suspension of the subsidy had lasted over six months and Respondent's Section 8 Housing Subsidy Voucher was subsequently terminated.

MOTION TO DISMISS

Respondent moves for dismissal of the petition pursuant to CPLR § 3211 and for partial summary judgment pursuant to CPLR §3212; or in the alternative, for an order allowing Respondent leave to file an Amended Answer.

The Question presented by the motion asks where a rent stabilized tenant, has received a Section 8 subsidy, since the inception of her tenancy, which subsidy was suspended for over six months: a) Can the landlord sue said tenant for the full amount of the rent due; and b) Is the landlord required to comply with the Williams Consent Decree as a condition of bringing and maintaining such proceeding?

Petitioner relies primarily on the concurring opinion of Justice Golia in **W&L Associates LLC v Gurevich**, 16 Misc.3d 129(A) (App. Term, 2nd Dept., 2007) as the legal basis for its request "that this Court determine that where

NYCHA terminates a tenant's subsidy, and the tenant's lease expires... Petitioner can collect ... the full contract rent as set forth in the (expired) lease.”

In **Gurevich** the landlord attempted to opt out of the Section 8 program. The landlord notified NYCHA that it would no longer accept Section 8 payments on behalf of the rent-stabilized tenant, after the expiration of her lease. The landlord sent the tenant a renewal lease, that required the tenant to pay the full rent for the apartment. The tenant refused to execute the renewal lease, and the landlord “deemed” the lease renewed and brought a non-payment proceeding for the portion of the rent previously paid by Section 8.

The Appellate Term affirmed the lower court's dismissal of the petition, holding that the Landlord's acceptance of Section 8 housing assistance payments was a term and condition of the expired lease (citing **Rosario v. Diagnoal Realty, LLC**, 39 A.D.3d 739 (2006)), and that the landlord had no right to deem the lease renewed. Since there was no default by the tenant, who had paid her portion of the rent, the Court found that there was no basis for the proceeding and that the petition had properly been dismissed.

While Justice Golia concurred in the result, he expressed concern about the conflict between Section 8 Regulations and Rent Stabilization, and provided a theoretical example of how such conflicts could lead to unintended results. Justice Golia's concurrence also provided that to the extent his concurrence in **Licht v. Moses**, differed from the reasoning behind his concurrence in **Gurevich**, his disavowed said concurrence.

However, Justice Golia's example was predicated either on the landlord opting out of Section 8 or the Federal Government terminating the program altogether. Approximately one month after the **Gurevich** decision, The Court of Appeals issued its decision affirming the Appellate Division's holding in **Rosario v. Diagonal Realty LLC**, 8 N.Y.3d 755 (2007), and confirming that the landlord of a rent stabilized tenant could not opt out of Section 8, and that the acceptance of a Section 8 subsidy becomes a material term and condition of the lease governing the rent-stabilized tenant, which must be incorporated into all renewals. Thus Justice Golia's concurring opinion provides no support for Petitioner's position in this proceeding that Respondent is liable for the full amount of the rent, or that Petitioner was not obligated to comply with the requirements of the Williams Consent Decree.

Absent a showing that the parties have entered into a new agreement where the tenant agrees otherwise, a Section 8 tenant does not become liable for the Section 8 share of the rent, even after the termination of the subsidy. **Rainbow Assocs. v. Culkin**, 2003 N.Y. Slip Op 50771(U)(App. Term, 2nd Dept.); **Prospect Place HDFC v. Gaildon**, 6 Misc.3d 135(A)(App. Term, 1st Dept, 2005). There is no allegation that there has been any new or subsequent agreement between the parties. The last lease agreement between the parties was executed in 2004 for a rental of \$1050.00

As there is no agreement between the parties that Respondent is liable for the Section 8 portion of the rent, and given the Court of Appeals decision in

Rosario , a nonpayment proceeding against Respondent for said portion does not lie, and Respondent's motion for partial summary judgment as to any said portion, in this case \$1044.00 per month out of the legal rent of \$1050.00 is granted.

Moreover, contrary to Petitioner's allegations there is no authority for the position that where a HAP contract is terminated by virtue of six or more months having passed since the termination of the Section 8 subsidy, the Petitioner is not obligated to comply with the requirements of the second partial Williams Consent decree when bringing a non-payment proceeding. **Williams v. NYCHA**, No. 81 Civ. 1801 (SDNY RJW).

In **Cashmere Realty Corp. v. Hersi**, N.Y.L.J., Dec. 28, 2005, p.19, col. 3 (N.Y. Co. Civ. Ct., Lau, J.) The Court rejected this argument and held in pertinent part "Petitioner's contentions that the lack of payment of the HAP subsidy for six months terminates its contract and vitiates any obligation to comply with the Williams Consent Decree similarly lacks merit. ... NYCHA Policy memorandum LHD #04-43 states clearly that 'If the landlord seeks to evict the tenant, (even after the effective date of the tenant's removal from our program data base as an active voucher holder), the landlord shall still be required to contact NYCHA for concurrence per the Williams Consent Decree.'" The Court further held that the failure to demonstrate and plead such compliance constituted a fatal defect in Petitioner's *prima facie* case, and required dismissal of the proceeding.

Policy memorandum LHD #04-43 is applicable to this proceeding and provides Petitioner with a remedy in seeking to collect the full rent, Petitioner need only correct the outstanding violations to have the subsidy restored. The Memorandum provides in pertinent part:

If the landlord notifies our borough office that HQS violations have been repaired (even if after the effective date of the tenant's removal from our program data base as an active voucher holder), staff shall follow standard procedure to verify the repairs and, if so, to reinstate subsidy payments for the apartment as of the appropriate effective date. Staff shall restore the tenant to the program as an active voucher holder in order to complete the reinstatement.

Petitioner's position, if given credence, would effectively evade the holding in **Rosario**, as a landlord of a rent-stabilized tenant could opt out of Section 8, by allowing an apartment to fall into disrepair so that it fails inspection, and then refusing to correct the violations for six months. Such a result would be absurd .

In the case at bar, Petitioner acknowledges that it has not complied with any of the requirements of the Williams Consent Decree in instituting this proceeding. Moreover, NYCHA, who was otherwise notified of this proceeding, issued a letter to Petitioner's counsel dated November 27, 2007 advising that this proceeding was commenced in violation of the Williams Consent Decree and subject to dismissal because: Landlord failed to certify to NYCHA that the grounds for the proceeding were lawful; and Petitioner failed to serve NYCHA with a copy of the pleadings; and Petitioner failed to plead Respondent's Section 8 status or join NYCHA as a party to this proceeding; and the proceeding seeks rent from Respondent beyond the tenant's share; and that the subsidy was

suspended through no fault of the tenant because the apartment failed inspection and the landlord never certified that conditions were corrected.

While Petitioner's counsel alleges in his affirmation in opposition that Petitioner disputes the assertion that it willfully refused to make the repairs and instead alleges that Respondent has "engaged in a pattern of conduct deliberately designed to frustrate and delay Petitioner's efforts to correct the conditions" this is not a valid basis for opposition to the motion to dismiss.

The factual allegations contained in the affirmation of Petitioner's counsel are of no probative value, and are not asserted through an affidavit of any party or agent with first hand knowledge. Moreover, even if such assertions were properly before the Court, it would not constitute a basis for this proceeding.

"Where a tenant breaches an obligation under ... Section 8 regulations, such as by failing to provide access to the premises for correction of HQS violations as alleged here, a landlord's remedy is to commence a holdover proceeding for material noncompliance with those provisions A nonpayment proceeding to recover the Section 8 portion of the rent from the tenant does not lie." **Vincenzi v. Strong**, 16 Misc.3d 1121(A) (2007)(Citations omitted).

CONCLUSION

Based on the foregoing the Court finds that this proceeding must be dismissed, based on the failure of Petitioner to comply with the Williams Consent Decree or establish a legal basis precluding Petitioner from being required to do so.

This constitutes the decision and order of this court.

Dated: March 6, 2008
Brooklyn, New York

Hon. Sabrina B. Kraus, J.H.C.

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