

191 Chrystie LLC v Ledoux

2008 NY Slip Op 30734(U)

March 11, 2008

Supreme Court, New York County

Docket Number: 0104904/2007

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

191 Chrystie LLC

INDEX NO.

104904/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

Barry Ledoux

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

A-C

PAPERS NUMBERED

1
2
3,4

Answering Affidavits — Exhibits A-K

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers it is hereby ordered that the within motion is decided in accordance with the attached decision and order.

FILED

MAR 17 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 11, 2008

Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
191 CHRYSTIE LLC,

Index No: 104904/07

Plaintiff,

Decision & Order

-against-

BARRY LEDOUX a/k/a BARRY SONNIER,

Defendant.
-----X

Hon. Martin Shulman, J.S.C.:

Defendant Barry Ledoux a/k/a Barry Sonnier ("defendant") moves *inter alia* to dismiss this declaratory judgment action for lack of subject matter jurisdiction (CPLR 3211[a][2]); failure to state a cause of action (CPLR 3211[a][7]); and based upon documentary evidence (CPLR 3211[a][1]).¹ Plaintiff 191 Chrystie LLC ("plaintiff") opposes the motion.

Plaintiff is the owner of premises located at 191-193 Chrystie Street, New York, New York (the "building"). Defendant occupies the front unit on the building's sixth floor, which was previously subdivided into two units designated as 6A and 6B.² By order number 246 dated June 12, 1985 (the "Loft Board order") rendered in a coverage proceeding entitled *In the Matter of the Application of Wyn Loving*, Loft Board Docket No. TR-0079 (the "coverage proceeding"), the New York City Loft Board determined that Unit 6A was a residential unit covered by Article 7-C of the Multiple Dwelling Law

¹ By interim decision and order dated September 4, 2007 (the "interim order"), this court denied that portion of defendant's motion to disqualify plaintiff's counsel.

² This court's interim order implies, apparently incorrectly, that the premises are currently subdivided. In subsequent submissions, defendant avers that the premises are no longer subdivided. See *Ledoux Aff.* sworn to October 16, 2007, at ¶ 5.

(the "Loft Law"), and that defendant is the residential occupant of said unit entitled to protection thereunder. With respect to Unit 6B, which defendant sublet to various individuals from approximately 1978 to 1985, the Loft Board order similarly found that Unit 6B was a covered residential unit but declined to determine defendant's right to possession thereof, stating that defendant's claim "should be determined with reference to the principles governing landlord and tenant relations, in a court of competent jurisdiction." In this action, plaintiff seeks a declaration that defendant is not a protected tenant of Unit 6B and thus has no right to continue in occupancy.

At the outset, the court rejects defendant's unsupported assertion that the court lacks subject matter jurisdiction. Contrary to defendant's claims, the Loft Board does not have exclusive jurisdiction over this matter. *County Dollar Corp. v. Douglas*, 161 A.D.2d 370, 556 N.Y.S.2d 533 (1st Dep't., 1990)("Unless the Legislature has expressed an explicit intention to vest exclusive original jurisdiction in the administrative agency, the court will be held to have concurrent jurisdiction [2 NY Jur.2d, Administrative Law, §178-80]"). Here, as previously stated, the Loft Board order expressly declined to determine defendant's right to possession of Unit 6B, stating that the matter should be raised via court proceedings. Further, defendant offers no support for his claim that a declaratory judgment action is unavailable to plaintiff and the court finds no authority restricting plaintiff to commencing a summary proceeding or ejection action.

Turning to defendant's claim that the complaint fails to state a cause of action, it is well settled that on a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211[a][7]), a court must take all allegations of the complaint as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Caron v.*

* 4]

Hargro Fabrics, 91 N.Y.2d 362 (1998); *Marini v. D'Atolio*, 162 A.D.2d 391 (1st Dept., 1990). The court must assume that the complaint's allegations are true and must deem the complaint to allege whatever can be reasonably inferred therefrom however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 A.D.2d 105 (1st Dept., 1985); *see also, McGill v. Parker*, 179 A.D.2d 98 (1st Dept., 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co.*, 91 A.D.2d 173 (1st Dept., 1983). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.C.*, 125 Misc.2d 530 (Sup. Ct., Rich. Co., 1984).

The legal issue to be determined is whether defendant became a statutory tenant of Unit 6B entitled to protection under the Loft Law when the second subtenants vacated and defendant reclaimed the space for residential use. Relevant to this inquiry are the following facts stipulated to in the coverage proceeding and cited in the Loft Board order:

- Defendant took possession of the entire sixth floor front space by lease dated May 8, 1978 which expired June 1, 1983 (the "lease term");
- Prior to August 1, 1978, the space defendant leased was subdivided into two residential units, with defendant occupying Unit 6A and subletting Unit 6B;
- Defendant's first subtenants entered into possession of Unit 6B on or about August 1, 1978 and vacated on March 1, 1983;
- Defendant's second subtenants took possession of Unit 6B on or about April 1, 1983 and were in possession as of the date of the Loft Board order, without permission of plaintiff's predecessor in interest.

* 5]

The applicable Loft Board regulations are codified in the Rules of the City of New York ("RCNY"), Title 29, Chapter 2. With respect to subdivided premises such as that at issue here, RCNY §2-09(b)(5) provides in pertinent part:

. . . where a prime lessee is in possession of a portion of the space which he or she leased from the landlord, such prime lessee shall be entitled to remain in possession, and be qualified for the protections of Article 7-C, **only with respect to the portion of such space which he or she occupied as a residential unit . . . and shall not be entitled to claim any of the remaining space as a primary residence against the occupant of any other residential unit within such space, except to the extent provided for in §2-09(c)(5)** of these regulations . . . (emphasis added)

Because defendant admittedly never occupied Unit 6B during his lease term, residentially or otherwise, he must satisfy the criteria of one of the three subdivisions of RCNY §2-09(c)(5) to be entitled to coverage as a protected tenant of Unit 6B.

Defendant's reliance upon RCNY §2-09(c)(5)(i) is misplaced because his lease expired on June 1, 1983 and was never renewed. Similarly, RCNY §2-09(c)(5)(ii) is inapplicable due to the lease expiration. Defendant must therefore satisfy the requirements of RCNY §2-09(c)(5)(iii) to be deemed a protected tenant of Unit 6B.

RCNY §2-09(c)(5)(iii) provides in relevant part:

(iii) Where the prime lessee is the residential occupant of a portion of subdivided space as his/her primary residence, which he/she rented from the landlord, the prime lessee shall be entitled to recover as part of his/her primary residence a residential unit, located within the space, occupied by another person or persons, if such prime lessee can establish that:

(A) there was an express written agreement between the prime lessee and the occupant of such space, other than the mere expiration of the lease, entitling the prime lessee to recover such space, and that the prime lessee has not taken actions inconsistent with exercising the option entitling him/her to recover such space;

- (B) the prime lessee has occupied the entire demised premises as his/her own primary residence for at least one year prior to the subdivision and subletting of the unit;
- (C) the prime lessee has a compelling need to recover such space; and
- (D) the prime lessee has not been guilty of harassment of residential occupants.

As plaintiff correctly notes, defendant fails to offer any proof of compliance with the requirements set forth in (A) through (D) above. Defendant's motion papers do not address the applicability of RCNY §2-09(c)(5)(iii).

Defendant's remaining arguments in support of his motion to dismiss also lack merit. First, defendant points to non-binding dicta³ in the Loft Board Order. Defendant also asserts a conclusory claim of laches and relies upon documentary evidence to establish judicial estoppel. Specifically, defendant claims plaintiff's petition in the holdover summary proceeding entitled *191 Chrystie LLC v. Barry Sonnier*, L&T Index No. 68106/07, concedes that defendant "is a covered loft tenant." The court's review of the petition does not reveal such sweeping admissions. Rather, the petition, which describes the premises occupied by defendant as the "6th Floor Loft", alleges merely that the premises are protected under the Loft Law, a fact established by the Loft Board order, with defendant occupying same "on a statutory basis as a month to month tenancy." Exh. B to Motion at ¶¶ 3, 12. Nowhere does the petition allege that defendant is a protected tenant.

³ The Loft Board order's penultimate paragraph reiterates that Unit 6B is a covered unit and goes on to state "in that connection, should [defendant] obtain possession of the space, he would be deemed the residential occupant as of April 1, 1983, with the rights and obligations thereof."

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For the above reasons, plaintiff's complaint is sufficient to withstand a motion to dismiss. In light of the foregoing, the portion of defendant's motion requesting attorneys' fees and sanctions is denied as academic. Accordingly, it is hereby

ORDERED that defendant's motion is denied in its entirety; and it is further

ORDERED that pursuant to CPLR 3211(f), defendant shall serve his answer to the complaint within ten (10) days of service of notice of entry of this decision and order.

The parties are directed to appear for a preliminary conference on April 15, 2008 at 9:30 p.m. at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

This constitutes this Court's decision and order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
March 11, 2008



HON. MARTIN SHULMAN, J.S.C.

FILED

MAR 17 2008

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