

Tonge v 98 Morningside
2008 NY Slip Op 31397(U)
May 13, 2008
Supreme Court, New York County
Docket Number: 0107326/2006
Judge: Milton A. Tingling
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PRESENT: HON. MILTON A. TINGLING

PART 44

[Redacted]

107326/06.

Tonge, Deryck

98 Morningside 002

INDEX NO. _____
MOTION DATE 3/12/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
Motion to/for _____

[Redacted]

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 19 2008
COUNTY CLERKS OFFICE
NEW YORK

Plaintiffs Deryck Tonge and Sonya McNair Tonge move for a default judgment, or, in the alternative, for partial summary judgment against defendant 98 Morningside, Inc. (Morningside), and for summary judgment against defendant David Lieberman, sued herein as John Doe. Lieberman cross-moves for partial summary judgment on his rent overcharge claim against Morningside and 98 Morningside LLC, (LLC), and dismissing the consolidated and removed non-payment proceeding that LLC brought against him. Morningside cross-moves

Dated: 5/13/08 _____ MAA
1 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

REFERRED TO JUSTICE

for an order precluding plaintiffs from offering certain evidence, compelling plaintiffs to comply with certain discovery demands, and imposing sanctions on plaintiffs' counsel. Plaintiffs have now withdrawn their claim against Lieberman. Accordingly, their motion for summary judgment against him is moot, and their third cause of action, which seeks Lieberman's ejection, will be dismissed.

That branch of plaintiff's motion which seeks a default judgment will be denied because an order by this court, dated July 25, 2007, granted Morningside leave to serve a late answer. Such answer was then served. However, for the reasons that follow, that branch of plaintiffs' motion which seeks summary judgment will be granted. The court notes that, by letter dated October 2, 2007, Morningside withdrew its defense that it had not been properly served.

The following facts are undisputed. Plaintiffs were the tenants of rent-stabilized apartment no. 75 (Apartment) in the building (Building) located at 98 Morningside Avenue in Manhattan. As a result of a fire in the Building, on November 19, 2002, the Apartment became uninhabitable, and plaintiffs found shelter elsewhere. At the time of the fire, Morningside was the landlord of the Building. At an unspecified time, LLC became the successor in interest of Morningside. By order issued on March 7, 2003, the New York State Division of Housing and Community Renewal (DHCR) set the rent for the Apartment at \$1.00 per month as of the date of the fire "which caused the tenant to vacate involuntarily," and provided that, upon payment of such rent, plaintiffs were entitled

to be restored to occupancy. Notwithstanding that order, on or about August 30, 2004, Morningside commenced a non-payment proceeding against "J. Tonge" in the New York City Civil Court, alleging a failure to pay the base rent of \$436.04 per month from December 1, 2002, on. That proceeding was marked off calendar by a stipulation between the parties. Subsequently, by order issued on January 10, 2005, DHCR denied Morningside's application to restore the rent, having found that the conditions that had led it to set the rent at \$1.00 per month had not been corrected. By lease dated January 18, 2006, Lieberman rented the Apartment from LLC for a two-year term, at a rent of \$2,100 per month. By petition dated January 19, 2007, LLC commenced a non-payment proceeding in the New York City Civil Court, alleging that Lieberman had failed to pay the rent for September through December 2006. Paragraph 7 of the petition alleges that the Apartment "became exempt [from the Rent Control and Rent Stabilization Laws] pursuant to the Rent Stabilization Law Section 26-504.2 as a 'High Rent Accommodation' which became vacant after April 1, 1994." That section provides, generally, that when an apartment with a legal regulated rent of \$2,000 or more per month is vacated the apartment becomes exempt from rent regulation.

As against Morningside, plaintiffs' complaint alleges constructive eviction and conversion of the property that plaintiffs left in the apartment at the time that they sought alternative shelter. In his verified answer to Morningside's petition in the non-payment proceeding that it brought against him,

Deryck Tonge states that Morningside had failed to provide access to the Apartment, although he had made numerous and continuing requests for such access. Sonya McNair Tonge avers in her December 10, 2007 affidavit that, after the fire, she and her husband made numerous inquiries as to when they would be able to return to the Apartment, and that although they were always told by Morningside that they would hear from it, they never received notification that the Apartment had been repaired. She also states that, in October 2004, Morningside's attorney in the non-payment proceeding promised to look into the question, but that they never heard from him; that they periodically went to the Building to check on their mail, and thus discovered that Lieberman was living in the Apartment; and that they had never returned their keys, or given Morningside any other reason to believe that they did not intend to return to the Apartment. Morningside's sole response is a one sentence statement in the affidavit of Pam Paragon, who identifies herself as the manager of Morningside, and who states that plaintiffs "refused to return to the [A]partment even after it was renovated." Ms. Paragon fails to specify when the Apartment was made habitable, and she adduces not a single fact to support her conclusory statement that, after such time, plaintiffs refused to return to it. Notably, she does not state that Morningside ever informed plaintiffs that the Apartment had been repaired, and she states no fact to show that plaintiffs surrendered the Apartment. See Mitchell v City of New York, 154 Misc 2d 222 (Civ Ct, Bronx County 1992).

It is undisputed that, from November 19, 2002, the date of the fire, through at least January 10, 2005, the date of the DHCR order denying Morningside's application to restore the rent, Morningside failed to make the Apartment habitable. At some time between January 10, 2005 and January 18, 2006, when Lieberman rented the Apartment, Morningside repaired the Apartment. However, it is undisputed that Morningside failed to notify plaintiffs that the Apartment had been repaired, and that they could move back in.

It is "well established that a landlord may not oust an occupant of an apartment from those premises without resorting to proper legal process and providing legal notice." Romanello v Hirschfeld, 98 AD2d 657, 658 (1st Dept 1983) (Milonas, J. dissenting), affd as modified "for the reasons stated in the dissenting memorandum by Justice E. Leo Milonas." 63 NY2d 613, 615 (1984); see also Hess v First Ave. Owners, Inc., 2001 WL 1682745 (App Term, 1st Dept 2001). As noted above, Morningside commenced a non-payment proceeding against plaintiffs. However, it never received a judgment awarding it possession of the Apartment. While Morningside contends that plaintiffs abandoned the Apartment, the evidence is that they did not do so. Accordingly, it is inescapable that plaintiffs were still the legal tenants of the Apartment at the time that LLC leased it to Lieberman, and that they had been constructively evicted from the time that Morningside's reasonable time to repair the Apartment after it was damaged in the fire had passed. See Bay Plaza Estates v New York Univ., 257 AD2d 472 (1st Dept 1999) (constructive eviction occurs

when a landlord fails to repair a condition causing a dwelling to be uninhabitable); Johnson v Cabrera, 246 AD2d 578 (2d Dept 1998) (same). Accordingly, plaintiffs are entitled to summary judgment as to liability on their cause of action alleging constructive eviction.

As to their cause of action alleging conversion, Sonya McNair Tonge states in her affidavit that she and her husband had personal property in the Apartment which apparently was taken or disposed of by Morningside. Defendants offer no evidence to the contrary.

Lieberman, too, is entitled to partial summary judgment on his overcharge claim, and to a dismissal of the consolidated non-payment proceeding that Morningside brought against him. As noted above, DHCR set the rent for the Apartment at \$1.00 per month, as of the date of the fire, and it rejected Morningside's subsequent application to restore the rent. It is undisputed that, but for the fire and Morningside's years-long failure to remedy the damage caused by it, the legal regulated rent on the Apartment would have been \$436.04 per month. Inasmuch as the Apartment was not vacant at the time that Morningside leased it to Lieberman, Morningside was not entitled to a vacancy-related rent increase, let alone a decontrol of the rent. Consequently, Morningside was not entitled to the \$2,100 monthly rent that it was charging Lieberman and that it claimed in the non-payment proceeding.

Although Morningside contends that summary judgment would be premature inasmuch as there has been no discovery, it fails even to suggest what relevant information it might hope to get from

plaintiffs, or from Lieberman. The court notes that Morningside's demand for a verified bill of particulars from plaintiffs could not elicit any information relevant to this action. It appears to be a boiler plate document used in negligence cases.

Accordingly, it is hereby

ORDERED that the third cause of action in plaintiffs' complaint is hereby dismissed; and it is further

ORDERED that defendant 98 Morningside, Inc. is found liable to plaintiffs on the first and second causes of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that defendant 98 Morningside, Inc. and petitioner 98 Morningside LLC in the proceeding styled 98 Morningside LLC v Lieberman, Index No. L&T 053199/07 are found liable to co-defendant David Lieberman on his cross claim and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the petition in the proceeding styled 98 Morningside LLC v Lieberman, Index No. L&T 053199/07 is hereby dismissed; and it is further

ORDERED that petitioner 98 Morningside LLC is found liable to respondent David Lieberman on his counterclaim for attorney's fees and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein.

DATED:

May 13, 2008
COUNTY CLERK'S OFFICE
NEW YORK

FILED

MMA
HON. MILTON A. TINGLING
J.S.C.