

Hart Futures, II, LLC v French
2008 NY Slip Op 32507(U)
September 15, 2008
Supreme Court, New York County
Docket Number: 0100258/2008
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 100258/2008

HART FUTURES, II, LLC

vs.

FRENCH, WILLIAM

SEQUENCE NUMBER : # 001

STRIKE

INDEX NO. 100258-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

_____ were read on this motion to/for _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

SEP 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/15/08

WALTER B. TOLUB 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: IAS PART 15

-----x
HART FUTURES II, LLC

Plaintiff,

-against-

WILLIAM FRENCH and PHILLIPE DeJEAN,

Defendants.
-----x

Index No.100258/08
Mtn Seq.001

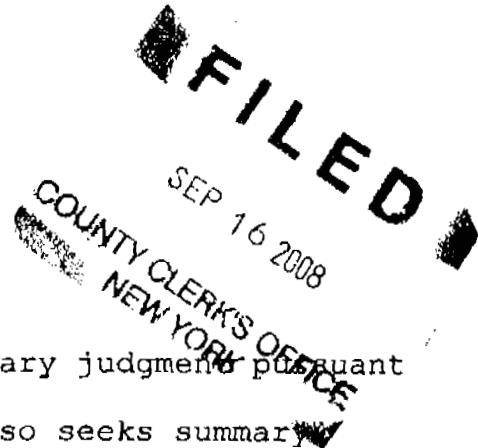
WALTER B. TOLUB, J.:

This is a motion by Plaintiff for summary judgment pursuant to CPLR §3212. Defendants' cross-motion also seeks summary judgment pursuant to CPLR §3212.

Facts

Plaintiff, Hart Futures II, LLC ("Hart") is the landlord and owner of 110 West 69th Street, New York, NY (the "Building"), which was erected prior to 1929. Defendants William French ("French") and Phillipe DeJean (DeJean) are residents of the Building and occupy Unit B, a room in the cellar ("Premises"). Defendant French has been residing at the Premises since 1989. Defendant DeJean moved into the Premises in 1989 and moved out in 1999, he returned to live at the premises in 2004.

Plaintiff commenced this action seeking an ejectment of Mr. French and Mr. DeJean arguing that the Premises is an illegal apartment that is not fit for residential occupancy pursuant to Multiple Dwelling Law ("MDL") §34. Plaintiff now seeks summary



judgment awarding possession of the Premises and an order of ejectment against the Defendants.

Defendants cross-move for summary judgment arguing that the Premises is legal and can be lived in pursuant to the Certificate of Occupancy.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

It is undisputed that in 1989, Defendant French began renting the Premises, a cellar apartment in an "old law" tenement¹. The Certificate of Occupancy for the building, issued

¹An old law tenement is a tenement existing before April 12, 1909, and recorded as such in the department, charged with enforcement of the law, before April 18, 1929 (MDL §4[11]).

[* 4]

in 1924, indicates that the Building and the cellar may be used as a residence. No new Certificate of Occupancy has been issued since that time and no Building violations have been recorded.

Defendants argue that since the standing Certificate of Occupancy permits the cellar to be used as a residence and since there are no recorded violations of such use, the apartment is legal and Defendants may continue to reside there. However, the issue in this matter is not whether the Certificate of Occupancy is valid, but rather whether a permit permitting the Premises to be occupied may be issued.

The MDL was amended to outlaw the occupancy of cellars and basements as living quarters (Measom v. Greenwich and Perry Street Housing Corp., 268 AD2d 156 [1st Dept 2000]). The Legislature's enactment of, inter alia, MDL §216 (dealing with cellar and basement apartments) and MDL §34 (dealing with rooms in basements and cellars), indicates the intent to ban the occupancy, in any multiple dwelling, of non-complying cellars and dwellings, including "old tenements" (Measom v. Greenwich and Perry Street Housing Corp., 268 AD2d 156 [1st Dept 2000] *emphasis added*).

Since there is no provision in the MDL grandfathering preexisting cellar apartments, affirmative steps must be taken to legalize such premises. The general rule, embodied in MDL §300[6], states that no room in a cellar or basement shall be

occupied for living purposes unless the department shall issue a written permit for such occupancy after all the applicable provisions of law have been complied with (MDL §300[6] *emphasis added*). Once the rules are complied with, even with an "old tenement" Certificate of Occupancy, a written permit must be issued as provided in MDL §300[5] (MDL §216).

Although there has not been a permit issued for the Premises, it is not clear whether the specific MDL requirements are met permitting the issuance of a permit upon application. The conflicting testimonies of Plaintiff's and Defendants' architects raise issues of fact as to whether the Premises may be legalized. Plaintiff's argument that it is impossible to make the apartment legal is unconvincing. Although it is true that Plaintiff's application to the Department of Buildings to legalize the apartment was denied, the denial was not based on the merits of the application, but rather the decision was based solely on Plaintiff's submission of an incorrect application form. It follows that there is a question of fact as to whether the apartment can be legalized.

Accordingly, it is


ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendants' cross-motion for summary judgment is denied.

Counsel for the parties are to appear for a hearing on whether the apartment can be legalized on October 6, 2008 at 9:30AM in Room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/15/08



HON. WALTER B. TOLUB, J.S.C.

FILED
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NEW YORK