24 Henry St. Group, Inc. v Ah Kheon Soo

2008 NY Slip Op 32830(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 107634/06

Judge: Jane S. Solomon

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[*1]

SCANNED ON 10/16/2008

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

PRESENT: Jane S. Solomon Justice

PART 55

24 HENRY STREET GROUP, INC.

-v-

SOO, AH KHEON

INDEX NO. 107634/06

MOTION DATE 7/21/08

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for partial sj.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6-8
Replying Affidavits	9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

Date 11-3-08 Preliminary Conf set for Noon at The end of decision.

FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/08

JANE S. SOLOMON J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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24 HENRY STREET GROUP, INC.,

Plaintiff,

Index No.: 107634/06

DECISION/ORDER

- against-

AH KHEON SOO,
"JOHN DOE # 1" and "JANE DOE # 1,"
SHU K. IP, AH GEI,
"JOHN DOE # 2" and "JANE DOE # 2,"
LIAN QING JIAN,
"JOHN DOE # 3" and "JANE DOE # 3,"
YIM MING WONG,
"JOHN DOE # 4" and "JANE DOE # 4,"
SIEW ENG GAN,
"JOHN DOE # 5" and "JANE DOE # 5,"

Defendants.

FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON, J:

Plaintiff 24 Henry Street Group, Inc. ("Plaintiff") commenced this action, inter alia, to eject the occupants of five housing units in its building and moves for partial summary judgment on its complaint (motion sequence number 001). Defendant Lian Qing Jian defaulted and the Court issued an Interim Order permitting entry of a default judgment on Plaintiff's ejectment cause of action. Plaintiff has discontinued its causes of action against defendant Siew Eng Gan. The remaining named defendants collectively ("Defendants"), have answered and oppose Plaintiff's motion. The motion is decided as follows.

BACKGROUND

Plaintiff is the owner of a four-story building located at 24 Henry Street in Manhattan (the "Building"). The Building is located in an R7-2 zoning district. The original Certificate of Occupancy permitted the basement, first, second, and third floors to be used as a one-family dwelling. Plaintiff purchased the Building in 1984 and converted the upper three floors into nine housing units (two on the first floor; four on the second floor; three on the third floor) in violation of the Certificate of Occupancy.

In 1991, plaintiff obtained a new Certificate of Occupancy which permitted the basement to be used as a medical office since such "community facilities" are permitted in an R7-2 residential zoning district. Although the Building actually contained nine housing units, the Building was still to be used as a one-family residence. The Building now contains the same nine housing units and the basement has apparently been vacant since 2006. Defendants occupy only three of the nine housing units in the Building.

On March 24, 2006, Plaintiff served 30-day notices of termination on all of the Defendants. On June 1, 2006, Plaintiff filed its summons and complaint. The complaint asserts causes of action for ejectment, use and occupancy arrears, and unjust enrichment against each of the Defendants.

Defendants asserted affirmative defenses that: 1) the Building's units are subject to the Rent Stabilization Law; 2) personal jurisdiction is lacking due to improper service; 3) Plaintiff failed to serve predicate notices pursuant to the Rent Stabilization Law; 4) Plaintiff is barred from collecting any rent by the equitable doctrine of estoppel; 5) Plaintiff's claims are barred by the statute of limitations and/or the equitable doctrine of laches; 6) Plaintiff has failed to state causes of action for ejectment; 7) Plaintiff is barred from collecting any rent by Real Property Law sections 301 and 302; 8) Plaintiff lacks capacity to commence this action; and 9) Plaintiff has breached each of the Defendants' warranty of habitability.

In addition, Defendants counterclaimed for: 1) $25,000 in money damages due to breach of the warranty of habitability; 2) an injunction requiring plaintiff to "legalize" Defendants' apartment units; and 3) attorney's fees. Plaintiff replied.

Plaintiff thereafter served this motion for: 1) default judgment on the seventh cause of action for ejectment against defendant Jian; 2) partial summary judgment dismissing Defendants' affirmative defenses; 3) partial summary judgment severing and/or dismissing Defendants' counterclaims; and 4) partial summary judgment on its ejectment claims. On November 26, 2007, the Court issued an Interim Order permitting entry of a default judgment against defendant Jian on plaintiff's seventh

cause of action for ejectment and reserved its decision on the balance of the motion. Plaintiff has also discontinued its causes of action against Gan with whom it settled.

DISCUSSION

I. Plaintiff's Request for Partial Summary Judgment Dismissing Defendants' Affirmative Defenses

A. Defendants' First Affirmative Defense

Defendants' first affirmative defense asserts that their apartment units are subject to the Rent Stabilization Law and Code. Plaintiff correctly points out that buildings that contain fewer than six housing accommodations are exempted from the coverage by the Rent Stabilization Code. 9 NYCRR § 2520.11(d). Even though there are nine units in the Building, Plaintiff argues that the Rent Stabilization Code is not applicable because there is not enough space in the Building for six *legal* units under the Zoning Resolution. Since the Building cannot be legalized for six housing accommodations, Defendants' units cannot be subject to rent stabilization. Horowitz Affirmation in Support, at ¶¶ 48-53; Plaintiff's Memorandum of Law in Support, at pp. 4-6.

Plaintiff has presented the affidavit and report of licensed architect Shiming Tam ("Tam"), as well as a copy of Zoning Resolution §§ 23-22 and 23-221, which govern the maximum number

of dwellings in buildings zoned as R7-2. Tam asserts that the residential space in the Building can only be legally divided into five residential rooming units. Accordingly, Tam concludes that the Rent Stabilization Law and Code is inapplicable under the exemption found in 9 NYCRR § 2520.11(d).

Defendants respond that, pursuant to 9 NYCRR § 2520.6 (a), a "housing accommodation" is defined as "[t]hat part of any building or structure, occupied or intended to be occupied by one or more individuals as a residence, home, dwelling unit or apartment," and cite Matter of Shubert v New York State Div. of Hous. and Community Renewal, 162 AD2d 261 (1st Dept 1990) for the proposition that "a reduction in the number of units so that it is below six has no impact on the issue of RSL coverage once it is established that the tenants occupied the property while at least six units were occupied." Gorman Affirmation in Opposition, at ¶ 12. Defendants also cite Rashid v. Cancel, 9 Misc.3d 130(A), 2005 WL 2441996 (App. Term, 2005) for the proposition that, "if a building contains six units, legal or not, a reduction to less than six would not strip the remaining tenants of RSL and RSC coverage." See Gorman Letter to the Court dated July 9, 2008.

It is well settled that a landlord cannot deprive tenants of rent stabilization protection by reducing the number of units in its building to fewer than six units. Matter of Ki Wai Leung v.

Div of Hous. & Community Renewal of State of N.Y., 266 A.D.2d 545 (2nd Dept. 1999); Matter of Zandieh v. Div. of Hous. & Comm. Renewal of State of N.Y., 249 A.D.2d 553 (2nd Dept. 1998); Matter of Shubert v. N.Y. State Div. Of Housing & Community Renewal, 162 A.D.2d 261 (1st Dept. 1990).

In Rashid v. Cancel, the landlord's building once contained six units (five legal units and one illegal basement apartment). The basement apartment was vacated after the landlord was cited by the Department of Housing Preservation and Development for the apartment. The landlord argued that the reduction from six to five units in the building rendered the building exempt from rent stabilization coverage. However, the Court held that "the use of the basement as a sixth housing accommodation over a multi-year period brought the entire building under rent stabilization." Rashid, 2005 WL 2441996 at *1 (citations omitted).

The Court further held that "the alleged subsequent reduction in the number of housing accommodations to fewer than six, even if done, as landlord claims, after the placement by the Department of Housing Preservation and Development of a violation, did not exempt the remaining units from rent stabilization." Id (citations omitted).

Plaintiff has not established, as a matter of law, that the Building cannot be regularized into lawful units with rent stabilization protection. Plaintiff's argument that no more than

five residential units would be permissible in the Building is belied by the fact that Plaintiff's expert, in arriving at his conclusion, does not factor in the vacant basement space in the Building. While this space may be used as a medical office, it can also be used for one or more residential units under the applicable zoning regulations because the Building is in an R7-2 residential district.

Since, as Plaintiff's expert points out, five units are permitted on the first, second, and third floors, and one or more units are permitted in the basement, there appears to be enough space in the Building for the minimum of six lawful units covered under the Rent Stabilization Code. Accordingly, notwithstanding Plaintiff's argument to the contrary, it appears that the Building can indeed be regularized into lawful units with rent stabilization protection.

Even if the Building cannot be regularized into at least six lawful residential units, Defendants' three units should still be afforded rent stabilization protection. It is undisputed that there are, in actuality, *nine* residential units in the Building. Plaintiff argues, as the landlord did in Rashid v. Cancel, that only five units are legally permissible. Since only five units are legally permitted, according to Plaintiff, the Building is exempt from rent stabilization protection.

However, as the Court held in Rashid v. Cancel, a landlord cannot deprive existing tenants of rent stabilization protection by reducing the number of units in the building below the six unit threshold by claiming that certain units are not permitted.

Plaintiff's reliance on Wolinsky v. Kee Yip Realty, 2 N.Y.3d 487 (2004) is misplaced. In Wolinsky, a group of tenants converted their commercially leased loft spaces to residential units and occupied the units as residences in violation of the Zoning Resolution. Plaintiffs asked the Court to extend the protections of the Emergency Tenant Protection Act of 1974 to their illegal conversions. The Court held that the tenants' illegal conversions did not fall under the ambit of the ETPA, it being clear that "the Legislature did not view the ETPA as safeguarding the interests of the 'loft pioneers.'" 2 N.Y.3d at 493. It should be noted that, since Wolinsky, the First Department has held that, if lofts are capable of being legalized as residences, they would be subject to rent stabilization. See Duane Thomas LLC v. Wallin, 35 A.D.3d 232, 233 (1st Dept. 2006).

Wolinsky is inapplicable to the present case because it deals with a factual scenario that is not before the Court - a tenant's conversion and use of commercial loft space as a residence. Further, Wolinsky does not address the issue of whether a reduction in the number of units below the six unit threshold can deprive tenants in a building of rent stabilization

protection. Moreover, the Court's holding in Duane Thomas LLC, supra, makes clear that rent stabilization protection is denied only to tenants of lofts being used as residences when the lofts are not capable of being legalized as residential units. Here, as noted above, Plaintiff cannot show, as a matter of law, that the units cannot be legalized into lawful units with rent stabilization protection.

It should be noted that Plaintiff's argument is predicated upon a reliance on the very zoning restrictions that it has flouted for years. In contravention of the Zoning Resolution and the Certificate of Occupancy that *it obtained*, Plaintiff improperly subdivided the first, second, and third floors into nine residential units to obtain additional rental income. Plaintiff owned and operated the Building and its nine units for years in contravention of zoning regulations. Now, in an ejectment action, Plaintiff urges this Court to, upon a strict interpretation of the zoning regulations *that it ignored*, find that the Building cannot contain more than five units and thus is not subject to rent stabilization protection. Plaintiff's motion to dismiss Defendants' first affirmative defense is denied.

B. Defendants' Second & Third Affirmative Defenses

Defendants' second affirmative defense asserts that Plaintiff failed to obtain personal jurisdiction over Defendants by virtue of improper service of process. However, Plaintiff has presented copies of the affidavits of service and has demonstrated that Defendants' second affirmative defense should be dismissed. The same analysis applies to Defendants' third affirmative defense regarding service of predicate notices. While such notices may not be required in advance of an ejectment action commenced pursuant to RPAPL Article 6, see e.g. East 82 LLC v O'Gormley, 295 A.D.2d 173 (1st Dept. 2002); Southside Development Co. v Mitchell, 156 A.D.2d 268 (1st Dept. 1989); O'Connor v Gallier, 7 Misc 3d 1016 (A), 2005 NY Slip Op 50632 (U), (Sup. Ct., Kings County 2005), Plaintiff served 30-day termination notices and has provided credible affidavits of service thereof. Accordingly, Defendants' third affirmative defense is dismissed.

C. Defendants' Fourth Affirmative Defense

Defendants' fourth affirmative defense asserts that Plaintiff is barred from collecting any rent from Defendants by the equitable doctrine of estoppel. Plaintiff argues that "a claim of estoppel from collecting rent is no defense to Plaintiff's cause of action for ejectment." See Plaintiff's

Memorandum of Law, at 8. RPAPL 601 specifically permits a landlord to seek money damages in connection with an ejectment claim, and also affords a tenant a right of setoff under certain circumstances (which may or may not be applicable here).

Defendants have not adequately pled an affirmative defense based on equitable estoppel. Neither the elements of estoppel, nor any facts which, if proven, could give rise to an equitable estoppel are pled or set forth in Defendants' affidavits in opposition. Defendants' fourth affirmative defense is dismissed.

D. Defendants' Fifth Affirmative Defense

The fifth affirmative defense alleges that Plaintiff's claim is barred by the statute of limitations and laches. Plaintiff correctly contends that its ejectment claims are timely. N.Y. C.P.L.R. §212; Ley v. Innis, 149 A.D.2d 366 (1st Dept 1989). Plaintiff's 30-day notices all fixed April 30, 2006 as the termination date. Plaintiff timely commenced suit by filing on June 1, 2006. Defendants also cannot maintain a defense of laches since Defendants do not plead or set forth in their opposition papers any conceivable delay on Plaintiff's part that could have caused them injury. See Soo, Ip and Wong Affidavits in Opposition. Defendants' fifth affirmative defense is dismissed.

E. Defendants' Sixth Affirmative Defense

Defendants' sixth affirmative defense asserts that Plaintiff has failed to state a cause of action for ejectment. To prevail on a cause of action for ejectment, "the plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or dismissed by the defendant or his predecessors, and of which the defendant is in present possession." Jannace v Nelson, L.P., 256 A.D.2d 385, 385-386 (2nd Dept 1998). Since, as discussed above, Defendants have raised a triable issue regarding the coverage of their tenancies by rent stabilization, Plaintiff cannot establish the second and third prongs of this claim. Thus, Defendants' sixth affirmative defense is not dismissed.

F. Defendants' Seventh & Eighth Affirmative Defenses

Defendants' seventh affirmative defense asserts that Plaintiff is barred from collecting any rent from defendants by Real Property Law sections 301 and 302 is not addressed in Defendants' opposition papers and is dismissed. Similarly, Defendants' eighth affirmative defense that plaintiff lacks capacity to commence this action is not seriously pressed by Defendants on this motion and is dismissed.

G. Defendants' Ninth Affirmative Defense

Defendants' ninth affirmative defense that plaintiff has breached defendants' warranty of habitability is not a valid defense to an ejectment claim, see, e.g., Aponte v Santiago, 165 Misc 2d 968 (Civ. Ct., Bronx County 1995), but remains against Plaintiff's second, fifth, and eleventh causes of action for money damages.

II. Plaintiff's Request for a Partial Summary Judgment Severing and/or Dismissing Defendants' Counterclaims

Plaintiff asks the Court to either sever or dismiss Defendants' counterclaims. This portion of the motion is denied because the counterclaims are entwined with the remaining triable issues.

III. Plaintiff's Request for a Partial Summary Judgment on its Ejectment Causes of Action

The final portion of Plaintiff's motion is for summary judgment on its first, fourth, and tenth causes of action for ejectment against defendants Soo, Ip/Gei, and Wong. In light of the above discussion about Defendants' first affirmative defense, this portion of Plaintiff's motion is denied.

Based on the foregoing, it is **ORDERED** that:

1. Plaintiff's motion to dismiss Defendants' affirmative defenses is granted to the extent that Defendants' second, third, fourth, fifth, seventh, and eighth affirmative defenses are dismissed while Defendants' first, sixth, and ninth affirmative defenses are not dismissed;

2. Plaintiff's motion to dismiss and/or sever Defendants' counterclaims is denied;

3. Plaintiff's motion for partial summary judgment on its ejectment causes of action is denied;

4. Counsel shall appear for a preliminary conference in Part 55, 60 Centre St, Room 432, New York, NY on November 3, 2008 at 12 noon, of which their courtesy copies hereof are notice.

Dated: October 14, 2008

ENTER:

J.S.C.

JANE S. SOLOMON

FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK