

Yucekus v 42-25 43rd Owners Corp.

2008 NY Slip Op 32899(U)

October 23, 2008

Supreme Court, Queens County

Docket Number: 9752/06

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

VOLKAN YUCEKUS

Plaintiff

-against-

42-25 43RD OWNERS CORPORATION,
DAEJAN (N.Y.) LIMITED and RESIDENTIAL
MANAGEMENT, INC.,

Defendants.

Index No: 9752/06

Motion Date: 3/5/08

Motion Cal. No.: 28

Motion Seq. No.: 3

Motion Date: 8/20/08

Motion Cal. No.: 18

Motion Seq. No.: 4

The defendants' motion submitted on March 5, 2008 and the plaintiff's motion submitted on August 20, 2008 are combined for disposition.

The following papers numbered 1 to 25 read on these motion by (1)defendant for an Order dismissing this action pursuant to CPLR 3215(c) or, in the alternative vacating its default and compelling plaintiff to accept its answer; and (2)the plaintiff's motion for leave to enter a default judgment and proceed to inquest for an assessment of damages.

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Defendants'	
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Upon the foregoing papers the above motions are determined as follows.

The plaintiff, who resides at 43-25 43rd Street, Sunnyside, N.Y. Apt. 4F, commenced this action against the owner of the premises, 43-25 43rd Owners Corporation (hereinafter Owner's Corp.), Daejan (N.Y.) Limited (hereinafter Daejan) the sponsor of the co-operative conversion, and Residential Management, Inc., the managing agent, for declaratory and injunctive relief and to recover monetary damages based upon, inter alia, the defendants' alleged fraud, deceptive business practices and violations of the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC).

Sometime in 1971, Ethem Bicer and his wife Cahide Bicer, the plaintiff's maternal grandparents, became tenants of apartment 4F at 43-25 43rd Street, Sunnyside, N.Y. Plaintiff was born in 1979 and has continually resided in the apartment with his grandparents. Ethem Bicer, the sole tenant of record died in 1987. At the time of his death, the apartment was rent stabilized and governed by the Rent Stabilization Law (RSL) (Administrative Code of City of N.Y. § 26-501, et seq.) and the Rent Stabilization Code (RSC) (9 NYCRR 2520.1, et seq.). The plaintiff and his grandmother, Cahide Bicer, continued to reside at the apartment as the remaining tenants without a lease. The defendant Owner's Corp. purchased the premises in 1987 and in 1992 the premises were converted to a cooperative pursuant to a non-eviction plan filed by the defendant, Daejan, as sponsor. The defendant, Residential manages the premises through its resident managing agent, Joshua Frankel. Neither plaintiff nor his grandmother purchased the shares allocated to the apartment leaving Daejan the owner of the "unsold shares".

In 2001 plaintiff's grandmother died leaving plaintiff as the remaining tenant in the apartment. The plaintiff notified Joshua Frankel of his grandmother's death, and requested a rent stabilized lease. Plaintiff maintains that the defendants, through Frankel, refused to recognize or even discuss his status as a rent stabilized tenant and refused to offer a renewal lease. Plaintiff further maintains that the defendants, through Frankel told him that the apartment was not governed by the RSL or RSC, that plaintiff was not entitled to a renewal lease and unless he signed the "sub-lease" he would lose his apartment.

The plaintiff claims that the defendants should have given him a rent stabilized lease for a one or a two year term at \$517.03 per month. Instead the defendants offered the first sub-lease for a term of one year from May 1, 2002 until April 30, 2003 at a rent of \$550.00 per month; the second sub-lease for a term of one year from May 1, 2003 until April 30, 2004 at a rent of \$600.00 per month; and the third sub-lease for a term of two years commencing on May 1, 2004 until April 30, 2006 at a rent of

\$900.00 per month. Plaintiff further maintains that the defendants' made material misrepresentations regarding his status and the applicability of the rent stabilization law, which the defendants knew were false when made, and which were made with the intent to induce and coerce him into signing the sub-leases in which plaintiff purportedly waived his rent regulated rights and agreed to an illegal rent.

The plaintiff also claims that he paid the rent for the terms of the "sub-leases", however, in August, 2005, Daejan commenced a summary non-payment proceeding against the plaintiff in the Housing Court. The proceeding was dismissed by the Court, after a hearing, in a decision dated January 13, 2006. The court held that the petitioner improperly plead the status of the apartment as not being subject to rent stabilization, inasmuch as rent regulatory rights cannot be waived except under certain circumstances not present here. Therefore, the waiver in the "sub-leases" is void as against public policy. Since the dismissal, defendants have commenced several other summary proceedings in the Housing Court which defendants were forced to discontinue because they had failed to register the subject apartment with DHCR and to state the proper rent. These proceedings, plaintiff claims, were frivolous and commenced to harass him.

The plaintiff commenced this action on April 28, 2006, served the defendants on May 16, 2006 pursuant to BCL § 306, and filed copies of the affidavits of service on May 23, 2006. On June 20, 2006, plaintiff's counsel extended the defendants' time to answer to July 6, 2006. On July 6, 2006, defendants' last day for answering the complaint, the defendants served the plaintiff with a motion to dismiss the complaint pursuant to CPLR 3211(a)(3)(5) & (7). However, due to several procedural mistakes of the defendants, the motion was never filed in court. Six months later on December 20, 2006 the defendants again served the same motion to dismiss the complaint pursuant to CPLR 3211(a)(3)(5) & (7). The motion was denied by Order dated June 14, 2007.

More than 7 months after the court's Order denying defendants' previous motion, the defendants made the instant motion seeking the dismissal of this action pursuant to CPLR 3215(c) or, in the alternative, for an Order directing the plaintiff to accept their answer. After the defendants' motion was submitted, the court by Order dated March 6, 2008, scheduled a conference for March 14, 2008 to attempt to settle the action and held the motion in abeyance.

On April 29, 2008, while settlement negotiations were ongoing, the plaintiff moved for an Order granting leave to enter a default judgment. The plaintiff's motion was adjourned several times and finally submitted on August 20, 2008 when a settlement had still not been reached.

The defendants' motion to dismiss the complaint pursuant to CPLR 3215 (c), or for an order compelling the plaintiff to accept the defendants' answer, in reality a motion to vacate their default, is denied. The plaintiff's motion for a default judgment is granted.

CPLR 3215(c) provides that, "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." The plaintiff, seeking to obtain a default judgment after the expiration of one year and avoid the dismissal of the complaint as abandoned, must offer a reasonable excuse for the delay and demonstrate the merits of the action (see Durr v. New York Community Hosp., 43 AD3d 388, 389 [2007]; Geraghty v. Elmhurst Hosp. Center of New York City Health and Hospitals Corp. 305 AD2d 634 [2003]; Akler v. Booth Mem. Med. Ctr., 257 AD2d 640 [1999]).

Defendants seeking to vacate their default must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see CPLR 5015[a][1]; Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986]; Gray v. B.R. Trucking Co., 59 NY2d 649 [1983]). This, the defendants failed to do.

Although significant settlement negotiations may constitute a reasonable excuse for the defendants' default (see e.g. Palmieri v. Romat Realty Corp., 45 AD2d 948 [1974]), it appears that the settlement negotiations in this case did not take place until after their default.

The defendants have also failed to establish a meritorious defense. In support of their motion, the defendants submitted only their attorney's affirmation arguing that the defendants are not in default and that they are willing to settle the action. There is nothing in the attorney's affirmation regarding a meritorious defense which would, in any event, be insufficient as he is without personal knowledge of the facts (see, Olan v. Farrell Lines, 105 AD2d 653 [1984], aff'd. 64 NY2d 1092 [1985]). The proposed answer annexed as an exhibit is also insufficient to

demonstrate a meritorious defense as it is unverified and consists of general denials. In addition, the affirmative defenses contained in the proposed answer which merely plead conclusions of law without any supporting facts are insufficient as a matter of law (see Petracca v. Petracca, 305 AD2d 566, 567 [2003]; Bentivegna v. Meenan Oil Co., 126 AD2d 506, 508 [1987]; Glenesk v. Guidance Realty Corp., 36 AD2d 852, 853 [1971]). Although the defendants did not submit an affidavit from a person with personal knowledge of the facts in support of their motion to vacate their default, they did submit Frankel's, the resident building manager's, affidavit in opposition to the plaintiff's motion. Frankel's affidavit claiming that his attorney advised that defendants have several meritorious defenses is insufficient to demonstrate even an arguably meritorious defense.

The ongoing settlement negotiations, however, are a reasonable basis for plaintiff's failure to move for entry of a default judgment within one year (see Iorizzo v. Mattikow, 25 AD3d 762 [2006]) and the plaintiff, by his affidavit demonstrated a meritorious cause of action.

The meritorious nature of the plaintiff's action is further demonstrated by Frankel's affidavit submitted in opposition. Frankel does not dispute that the plaintiff was not offered a rent stabilized lease, or that the defendants refused to recognize the plaintiff's status as a rent stabilized tenant by succession rights. Frankel merely asserts that the corporate defendants "believed" that the apartment ceased to be governed by the rent stabilization laws upon the building's conversion to a cooperative. He does not state the basis of the defendants' belief or any efforts they made to ascertain whether such belief's was correct or had a sufficient legal bases. Nor is Frankel's assertion that plaintiff executed three sub-leases waiving his rights under the rent stabilization law constitute a meritorious defense. The tenant cannot waive a benefit of the rent stabilization law (9 NYCRR 2520.13) and an agreement by the tenant which purports to waive the benefit of any provision of RSL or RSC is void (see Georgia Properties, Inc. v. Dalsimer, 39 AD3d 332, 334 [2007]; Riverside Syndicate, Inc. v. Munroe, 39 AD3d 256, 257 [2007], aff'd 10 NY3d 18 [2008]).

The defendants' claimed defense of the statute of limitations is without merit. The statute of limitations (CPLR 213-a) is an affirmative defense which can be waived. As a result of the defendants' default, they have waived all affirmative defenses which could have been raised (see e.g. FBB Asset Managers Inc. v. Friends, 2 AD3d 573 [2003]). However, the limitations contained in RSL § 26-516[a][2], is not only a

statute of limitations, but a substantive limit on the overcharges which may be recovered (see Myers v. Frankel, 184 Misc.2d 608 [App. Term 2000]). However, as plaintiff points out, the four year statute of limitations is not applicable in the determination of the plaintiff's rent stabilized status. Nor is the statute of limitations implicated, inasmuch as the plaintiff seeks to recover only for the overcharges which occurred during the four-year period prior to commencing this action (see e.g. Myers v. Frankel, supra; 78/79 York Associates v. Rand, 180 Misc. 2d 316 [App. Term 1999]).

The defendants no longer dispute the plaintiff's rent stabilized status and have, during negotiations, offered a rent stabilized lease. The only issue remaining, and which prevented final settlement of this action, is the amount of the legal regulated rent for the apartment and the amount of plaintiff's damages caused by the defendants' conduct.

In view of all of the above, an inquest and trial to determine the legal rent chargeable, and the amount of plaintiff's damages, if any, shall be held on December 3, 2008 at 11:00 a.m. in Part 2, courtroom 46 of the Courthouse located at 88-11 Sutphin Blvd., Jamaica, N.Y. Plaintiff shall file a Note of Issue no later than 20 days prior to the date set herein for the inquest.

A copy of the Note of Issue shall be served on the defendants by regular mail at least twenty (20) days prior to the scheduled inquest date.

Dated: October 23, 2008
D# 36

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J.S.C.