366 Audobon Holding, LLC v Morel
2008 NY Slip Op 33504(U)
December 29, 2008
Supreme Court, New York County
Docket Number: 101875/08
Judge: Martin Shulman
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SCANNED ON 1/8/2009

[* 1]

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

MARTIN SHULMAN
J.S.C.

PART 1

Index Number : 101875/2008
366 AUDUBON HOLDING LLC
VS.
MOREL, JUANA
SEQUENCE NUMBER : 001
SUMMARY JUDGEMENT

INDEX NO. 101875/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-E	1, 2, 3
Answering Affidavits — Exhibits A-E	4, 5
Replying Affidavits + Exh. A-B	6, 7

Cross-Motion: ☐ Yes ☒ No

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

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

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 29 2008

MARTIN SHULMAN J.S.C.

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 1

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366 AUDUBON HOLDING, LCC,

Plaintiff,

-against-

JUANA MOREL,

Defendant.

Index No: 101875/08

Decision and Order

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Plaintiff, 366 Audubon Holding, LLC ("plaintiff" or "Audubon"), moves pursuant to CPLR 3212 for an order granting summary judgment for ejectment of defendant, Juana Morel ("defendant" or "Morel"), from a rear cellar apartment (the "cellar apt.") in a building located at 552 West 184th Street, New York, New York 10033 (the "Premises") and dismissal of defendant's defenses and counterclaims.

Audubon's basis for Morel's ejectment is seemingly quite simple. Plaintiff alleges that a former, renegade superintendent illegally constructed the cellar apt. (Barbanel Aff. in Support of Motion at ¶ 4) and "rented" the illegal cellar apt. to Morel without authorization or permission from Audubon's predecessor in interest. Audubon retained a licensed architect, Laurence Dalfino, R.A. ("Dalfino"), *inter alia* to examine the records of the New York City Department of Buildings ("DOB") and New York City Department of Housing, Preservation and Development ("HPD"). In his supporting affidavit, Dalfino avers that: no permits, plans and/or certificate(s) of occupancy ("C/O") can be found verifying the lawful construction of the cellar apt. (Dalfino Aff. in Support of Motion at

¶ 5); as a new law tenement built in 1904, the Premises neither had nor is required to have a C/O (Dalfino Aff. in Support of Motion at ¶ 3); a copy of the I-Card[1] for the Premises (attached to Dalfino Aff. in Support of Motion) similarly reveals no references to the cellar apt. or the existence of "any habitable dwelling units in the cellar." (Dalfino Aff. in Support of Motion at ¶ 3); in accordance with MDL § 216,[2] one cannot residentially occupy any room(s) in a cellar without a permit, and without a permit, defendant's occupancy of the cellar apt. is in violation of law (Dalfino Aff. in Support of Motion at ¶¶ 7-8); a conversion of the cellar apt. into a lawful habitable space, if possible, would not only be cost-prohibitive but would in any event require plans/permits subject to DOB approval (Dalfino Aff. in Support of Motion at ¶ 9).

Against a backdrop of no DOB paper trail verifying the legality of the construction of the cellar apt., Audubon's president avers that there is no record of Morel ever paying rent directly to the prior owner or to plaintiff,[3] no record of the prior owner having registered the cellar apt. with the New York State Division of Housing and Community Renewal ("DHCR"), no record of the cellar apt. ever being listed on HPD's I-Card and no record of defendant every executing a lease with the prior owner for the cellar apt.

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[1] HPD's website explains the import of an I-Card: "Before 1938, . . . [HPD] used "I" cards ("I" stands for initial inspection) to record the occupancy and arrangement of the buildings HPD inspected. Certificates of Occupancy were not required until 1938. Today, absent a Certificate of Occupancy, the Department uses I-cards to determine the legal use and occupancy of a building." (http://www.nyc.gov/html/hpd/html/owners/faqs-for-res-owners/shtml).

[2] MDL §216 titled *Rooms in basements and cellars* states, in relevant part: "No room in the basement or cellar of any tenement shall be occupied for living purposes unless there is a written permit therefor as provided in subdivision five of section three hundred . . ."

[3] Unchallenged on this record is the fact that the few money orders for rent tendered to plaintiff were duly rejected and returned to defendant.

from 1994 until the Premises was sold to plaintiff in 2004 (*see* copy of Deed as Exhibit E to Motion) (Barbanel Aff. in Support of Motion at ¶¶ 5-6 and 8-9). Audubon's president further summarized circumstances of the prior licensee holdover proceeding between the parties which was discontinued without prejudice in favor of plaintiff pursuing this ejectment action (Barbanel Aff. in Support of Motion at ¶¶ 11-13).

In a seriatim fashion, Audubon discounts each of defendant's ten procedural and/or subject matter jurisdictional defenses (as pleaded in her unverified answer [see Exhibit B to Motion]) as baseless and/or conclusory (i.e., the court lacks jurisdiction to grant ejectment [the court clearly does]; failure to serve a proper predicate termination notice [none legally required although notice to quit was served out of caution]; there exists a landlord-tenant relationship with the prior owner's consent and defendant is rent stabilized [no lease, no rent collected and Morel's illegal occupancy negates any claimed privity of estate or rent regulatory status]; plaintiff cannot collect rent or use and occupancy from an occupant of an illegal apartment [no rent or use and occupancy being sought in this ejectment action]; plaintiff failed to state a cause of action or facts with particularity [pleads sufficient facts comporting with statutory requisites and proves entitlement to ejectment]; failure to plead regulatory status of the Premises [pled the rent regulatory status of the Premises at ¶10 to Verified Complaint as Exhibit A to Motion]; the cellar apt. is eligible for certification under MDL §§ 216 and 300[6] [not so as Dalfino attested to, *supra*]; and plaintiff is liable for civil and criminal penalties as the cellar apt. is legal [defendant cannot alternatively demand certification if she claims the cellar apt. is otherwise legal]). Plaintiff also seeks dismissal of Morel's purportedly baseless counterclaims: one to deem defendant a rent stabilized tenant (cannot obtain

this status on an illegal occupancy); and the second to obtain an award for attorneys' fees (absent a lease with an attorneys' fees provision, plaintiff cannot benefit from fee-shifting pursuant to RPL §234). *See* Sidrane Affirmation in Support of Motion at ¶¶ 20-59.

In opposition to plaintiff's summary judgment motion, Morel claims she moved into the cellar apt. with certain family members in or about 1994 pursuant to an arrangement with the then superintendent, Raphael Rivera ("Rivera")(Morel Opp. Aff. at ¶¶ 2, 5-7) and paid her monthly rent to Rivera, whom she believed was acting as an agent for the prior owner (*see* copies of money orders for January-November 2005[4] as Exhibit B to Morel Opp. Aff.). To further corroborate her status as a rent stabilized tenant, defendant produced a 2000 letter purportedly from the prior owner verifying her occupancy of the cellar apt. (Exhibit A to Morel Opp. Aff.), a copy of a 2006 New York State Division of Housing and Community Renewal ("DHCR") Rent Administrator's order directing plaintiff to offer Morel a vacancy lease (Exhibit C to Morel Opp. Aff.), a copy of a 2008 HPD Open Violations Report for the Premises *inter alia* citing garden variety violations of the New York City Housing Maintenance Code for the cellar apt. (e.g., peeling paint and plaster, etc.), but no cited violation for an illegal cellar apartment (Exhibit D to Morel Opp. Aff.) and a copy of a 2005 DOB/ECB[5] violation report for

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[4] Morel produced copies of rent receipts Rivera apparently prepared for the months of January-June 2005, a copy of a money order made payable to 184 Street Realty, L.L.C. for the months of August-September 2005 and copies of money orders made payable to plaintiff c/o Howal Management for the months of October and November 2005.

[5] The ECB or New York City Environmental Control Board is an administrative tribunal that hears disputes like a court to resolve health and safety concerns such as outstanding DOB violations.

apartment construction work on the first floor of the Premises without a permit, but similarly no cited violation for an illegal cellar apartment (Exhibit E to Morel Opp. Aff.).

Defendant's counsel points out that plaintiff through the prior owner established a rent stabilized tenancy even if plaintiff never actually accepted any rent payments from Morel after taking title to the Premises (Sanchez-Camus Opp. Aff. at ¶ 20). Morel's attorney further noted that without the DOB having ever issued an illegal occupancy violation for the cellar apt. and/or rejecting plaintiff's filed plans of Audubon's attempt to legalize same, Audubon's characterization of the cellar apt. as illegal is premature (Sanchez-Camus Opp. Aff. at ¶ 14). Counsel finally contends that plaintiff has not met its burden of establishing sufficient facts demonstrating that legalization of the cellar apt. as reflected in a potential C/O would be unduly burdensome or economically unfeasible (*Id.* at ¶ 15), *viz.*, plaintiff's supporting affidavits contain unsubstantiated and conclusory allegations about the unfeasibility of legalizing the cellar apt. which foreclose its entitlement to summary judgment.

Audubon's reply essentially reiterates all plaintiff's factual and legal arguments raised in its motion and distinguishes the case law defendant relies upon to defeat Audubon's summary judgment motion. In addition, Dalfino's Reply Affidavit at ¶¶ 6-11, expands on the potential scope and breadth of the work needed to legalize the cellar apt., including, but not limited to, the necessity of: demolishing the entire apartment interior for DOB site inspections (having assumed that Rivera, an unlicensed handyman, did all the plumbing, electrical and structural work contrary to the New York City Building Code and without obtaining DOB approvals); requiring "substantial architectural work" to determine the reconfiguration/enlargement of the cellar apt.

including the windows to ensure adequate height, space, light and ventilation; and upgrading the plumbing and electrical systems as well as replacing all the walls and doors.

DISCUSSION

Motion to Strike

A review of defendant's unverified answer (Exhibit B to Motion) seemingly reveals a number of boilerplate, conclusory affirmative defenses which lack factual and legal support. For the following reasons, the branch of Audubon's motion to strike the third, fourth, fifth, seventh and eighth affirmative defenses is granted.

The third defense pleads the court's lack of subject matter jurisdiction. Yet, the State Constitution confers the Supreme Court with unqualified general jurisdiction (N.Y. Const. Art. VI, §7 [a]) to resolve cases of every description in law and equity including RPAPL Art. 6 ejectment actions.[6] *Maresca v. Cuomo*, 64 N.Y.2d 242, 252, 485 N.Y.S.2d 724, 728 (1984).

As for the fourth defense, MDL § 302 is not implicated as the Premises is a new law tenement and does not require an existing C/O to rent apartments therein. Even if the cellar apt. is arguably found to be illegal, plaintiff has no claim for rent or use and occupancy in this action.

The fifth and eighth affirmative defenses allege a failure to serve a proper predicate notice of termination. Unquestionably, Audubon has accepted no rent

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[6] Unlike the New York City Civil Court where an ejectment action may only lie if the assessed value of the real property involved does not exceed $25,000.00 (Civil Court Act § 203[j]), the Supreme Court has authority to maintain an ejectment action regardless of the property's assessed value.

creating any holdover tenancy. Because of the possibility that the court could question the pleaded status of defendant as a squatter, plaintiff cautiously served a predicate 7-day Notice to Quit (Exhibit D to Motion), receipt of which is unchallenged. In any event, a termination notice is not required to maintain an ejectment action. *See Alleyne v. Townsley*, 110 A.D.2d 674, 487 N.Y.S.2d 600 (2nd Dept., 1985).

Finally, the regulatory status of the Premises was properly pleaded vitiating defendant's eighth affirmative defense.

Summary Judgment

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd.*, 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

As a preliminary matter, plaintiff's motion for summary judgment is partially granted dismissing defendant's second counterclaim for legal fees pursuant to RPL §234 as a matter of law. "In the absence of a lease agreement providing for landlord's

recovery of [attorney's] fees, the reciprocity provisions of Real Property Law §234 are not triggered . . ." *Partnership 92 West, L.P. v. Woods*, 186 Misc.2d 445, 717 N.Y.S.2d 827 (A.T., 1st Dept., 2000), *app. den.*, 2001 N.Y. App. Div. LEXIS 3486 (1st Dept., 2001),

citing with approval to *Rivertower Associates v. Chalfen*, 167 A.D.2d 309, 562 N.Y.S.2d 54, 55 (1st Dept., 1990)("Attorney's fees are available to a tenant under the statute only pursuant to a valid clause in a valid lease . . .").

As a general observation, certain paragraphs of the verified complaint (Exhibit A to Motion) as pleaded are either inconsistent with, or unproven from, the alleged evidentiary facts Audubon proffers in support of its summary judgment motion. Illustratively, ¶ 3 of the verified complaint alleges defendant to be a "squatter." However, the parties' respective documentary evidence raises questions rather than answers, thus precluding a summary determination of defendant's status as a squatter at this juncture.

First, in ¶ 6 of the complaint, Audubon alleges upon information and belief that Rivera rented the cellar apt. to Morel without the knowledge of the prior owner. While Audubon's president attests to the fact "that there was no record of any money received from this "tenant" on the prior Owner's books" (Barbanel Aff. in Support of Motion at ¶6), still, there is no evidentiary proof substantiating this claim (e.g., closing statement, assignment of leases, etc.).

On the other hand, plaintiff's shortcomings of proof on this record do not give Morel a "win" as to her purported status as a tenant entitled to rent stabilization

protection. True, Morel's opposition affidavit attests to her having commenced occupancy in 1994 and continuously making monthly rent payments to Rivera for a ten year period with the prior owner's consent. To that end, Morel does present a copy of the customer receipt of the money order made payable to the prior owner, 184th Street Realty, LLC (Exhibit B to Morel Opp. Aff.) for August-September 2005 rent. Nonetheless, the prior owner's receipt of same would be irrelevant as the prior owner transferred title to the Premises to plaintiff on December 14, 2004 (see deed as Exhibit E to Motion), six months before this money order was tendered.

Nor does defendant's copy of what she believes to be a tenancy acknowledgment letter dated February 17, 2000 from Rooz Real Estate Corp. ("Rooz") (Exhibit A to Morel Opp. Aff.) with a mailing address at P.O. Box 610302, Bayside, New York 11361, even colorably prove her tenancy status. Notably, Rooz is not listed on the deed as one of the three limited liability companies which had respective ownership interests in the Premises prior to transferring title to Audubon. Nor is Rooz listed as a managing agent for the prior owner in any documentation presented in opposition to plaintiff's summary judgment motion. Absent her sworn statements, Morel has not conclusively demonstrated whether a single payment of monthly rent has been knowingly accepted/collected by the prior owner directly or by Rivera, as its purported agent, since allegedly commencing occupancy of the cellar apt. in 1994 and while continuously residing therein from 1994 to 2004.[7]

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[7] Defendant's copies of seven receipts Rivera ostensibly prepared and signed upon his receipt of cash rent payments for the period January-July 2005 (defendant apparently would have been able to retain the customer receipt or stub of any money order tendered to the superintendent without a need for a receipt) is also not proof of

Morel's tenancy claim also rests on a non-appealed DHCR Rent Administrator's default order issued in 2005 which directed plaintiff to offer her a vacancy lease. True, this piece of evidence is exceedingly slim, but this court must view same in the light most favorable to the opponent of a summary judgment motion. *Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 353, 746 N.Y.S.2d 865 (2002). And after searching the record, this court is really left with the parties' dueling affidavits which raise a material question about defendant's tenancy status (a necessary element of this ejectment action) that must be resolved at trial.

The gravamen of this ejectment action rests on the alleged illegality of the cellar apt. and Morel's illegal occupancy thereof. Paragraphs 8 and 11 of the Verified Complaint, when read together, allege, upon information and belief, a violation of an unidentified New York City Administrative Code provision(s)[8] warranting plaintiff's removal from the cellar apt. Paragraph 15 of the complaint alleges Morel's occupancy of an illegal apartment exposing plaintiff to civil and criminal penalties. On this record thus far, Audubon has not proffered any evidence of the former or the latter.

More to the point, to successfully prevail on its claim that the cellar apt. is illegal and in violation of MDL §§ 216 and 300(6) and obtain summary judgment on this

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her tenancy based on plaintiff's unchallenged assertion that Audubon has not knowingly accepted any rent from defendant since taking title to the Premises in December 2004.

[8] Making an educated guess, N.Y.C. Admin. Code (Housing Maintenance Code) §§ 27-2082 and 2086[a] may be implicated. But without an inspection and competent expert evaluation of the cellar apt., it is impossible on this record to discern any alleged inadequacy of the height, space and ventilation therein which would otherwise foreclose a residential occupancy. See generally, *Measom v. Greenwich and Perry Street Housing Corp.*, 268 A.D.2d 156, 712 N.Y.S.2d 1 (1st Dept., 2000).

centrally disputed issue, plaintiff must have produced an illegal occupancy violation issued by the DOB/ECB. The undisputed fact that no DOB documentation exists to give the cellar apt. any "patina" of legality (e.g., no C/O, I-Card reference, permits, plans, etc.) is not wholly determinative of the cellar apt.'s status. That a licensed architect opines that the cellar apt. is illegal without any authority to make this binding determination does not make it so. Moreover, plaintiff's expert's legal conclusion in support of plaintiff's summary judgment motion is impermissible. *Measom v. Greenwich and Perry Street Housing Corp., supra*, 268 A.D.2d at 159, 712 N.Y.S.2d at 6-7. In a different vein, without Dalfino having personally conducted a forensic evaluation of the cellar apt., this architect's reply affidavit as to the cost-prohibitive and burdensome nature of any potential legalization is wholly speculative.

Alternatively, plaintiff could seek a "determination [if an illegal occupancy violation exists by virtue of] . . . the applicability of . . . [these statutory provisions which] would be in the nature of declaratory relief which was never sought and not pleaded (CPLR 3017[b])." (bracketed matter added). *Town of Oyster Bay v. Commander Oil Corp.*, 177 Misc.2d 1025, 1032, 677 N.Y.S.2d 746, 750 (Sup. Ct., Nassau Co., 1998). Not only is summary judgment on this central question premature without any proof of an illegal occupancy violation on this record, but in addition, without a cause of action for declaratory relief, this complaint would have to be dismissed with leave to re-plead.

Notwithstanding the foregoing, the Appellate Division in *Kaminsky v. Kahn*, 23 A.D.2d 231, 236, 259 N.Y.S.2d 716, 721-722 (1st Dept., 1965), succinctly observed:

> The Supreme Court in this State is a court of general original jurisdiction in law and equity . . . and, in conformity with its all inclusive powers, the court is authorized in any action to render such judgment as is appropriate

> to the proofs received in conformity with the allegations of the pleadings, irrespective of the nature of the relief demanded, subject, of course . . . to the imposition of such terms as may be necessary to protect the rights of any party . . . The court, within the framework of the pleadings in any case, may draw upon its broad reservoir of powers . . . formulated under the principles of equity, and utilize any of them to afford complete relief to a party . . .
>
> * * * * * *
>
> The present day trend, under CPLR, is to give total effect to the statutory abolishment of 'the distinctions between actions at law and suits in equity . . .', and it would be a reproach to the efficiency of our courts if, under such circumstances, the court were to dismiss a complaint and remit the plaintiff to the necessity of bringing a new action at law [or suit in equity] . . . (bracketed matter added).

See also, *Ansonia Associates v. Ansonia Residents' Association*, 78 A.D.2d 211, 216, 434 N.Y.S.2d 370, 376 (1st Dept., 1980)("the court may *sua sponte* make the appropriate determination . . ." to achieve an equitable result).

Accordingly, for the above reasons, it is

ORDERED that plaintiff's motion is granted to the extent that defendant's third, fourth, fifth, seventh and eighth affirmative defenses and defendant's counterclaim for attorneys' fees are dismissed, and the motion is otherwise denied.

Counsel for the parties are directed to appear for a preliminary conference on January 27, 2009 at 9:30 a.m. at I.A.S. Part 1, Room 1127B, 111 Centre Street, 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
December 29, 2008

HON. MARTIN SHULMAN, J.S.C.

FILED
JAN 08 2009
COUNTY CLERK'S OFFICE
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