

Wynne v 425 Third Ave. Realty Co.

2009 NY Slip Op 30905(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 116527/08

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

WYNNE, PATRICIA

INDEX NO. 116527/08

MOTION DATE _____

- v -
425 THIRD AVENUE REALTY CO.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided pro
attalo

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/15/09

EMILY JANE GOODMAN
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 : I.A.S. PART 17

-----X
PATRICIA WYNNE

Plaintiff,

Index No. 116527/08

-against-

425 THIRD AVE REALTY CO,

Defendant.

-----X
EMILY JANE GOODMAN, J.S.C.:

In this action, Plaintiff seeks restoration to a rent stabilized apartment (the apartment) and damages for an alleged unlawful eviction and breach of lease. It is uncontested that the New York City Buildings Department and the New York City Fire Department issued vacate orders for the apartment at issue, due to dangerous conditions in the apartment (to wit, the accumulation of combustible debris¹, and the presence of a gas leak, which Plaintiff maintains was the result of Defendant's failure to fix a pipe leak).

Plaintiff moves for an order restoring her to possession of the apartment, or alternatively, if the apartment has been rented, an order restoring her to the next available apartment at the building. Defendants objects to the motion, alleging a lack of personal and subject matter jurisdiction, and the failure to name and serve necessary parties.

Defendant also maintains that an injunction should not be granted based on Plaintiff's

¹Based on review of photographs submitted in connection with Defendant's opposition, it appears that the combustible debris was comprised of large amounts of clothing, blankets, shoes, and plastic bags.

failure to establish a likelihood of success, a lack of irreparable harm, and that the equities tip in Plaintiff's favor.

Defendant's arguments concerning jurisdiction and the failure to name necessary parties are not persuasive. Defendant's attorney's affirmation is insufficient to contest service. Moreover, Defendant alleges that only the initial attempt at service was not made as alleged by the process server. By order, dated 1/26/09, the Court permitted alternative service. As to that order, Defendant only states "Third Avenue Realty Co., has a Business Certificate filed in the Clerk's Office of Westchester County stating an address of 14 Harwood Court, Suite 209, Scarsdale, New York." This is non-responsive and has nothing to do with whether service was made in accordance with the order, dated 1/26/09, and that order is law of the case.

Further, this Court does not lack subject matter jurisdiction. Defendant argues that only the New York City Buildings Department and the New York City Fire Department can authorize restoration to the apartment because both New York City Administrative Code §26-127 (relating to buildings) and §15-227 (relating to fire prevention) provide that a vacate order shall not be rescinded unless "the owner, lessor, lessee or mortgagee seeking such rescission provides assurance...that the conditions which caused the issuance of the order have been corrected and will not reoccur." Defendant also cites East 13th St. Homesteaders' Coalition v Wright for the proposition that the Court does not have subject matter jurisdiction. However, that case does not stand for that proposition, but rather,

merely, that the Court must apply an arbitrary and capricious standard when determining whether to uphold a vacate order (see East 13th St. Homesteaders' Coalition v Wright 217 AD2d 31 [1st Dept 1995] [agency decision to seal a building which was perilous to life and safety under a vacate order was not arbitrary and capricious]). Here, assuming that Plaintiff's request for restoration is implicitly a request for an order rescinding the vacate orders, there is no evidence that the vacate orders are still in effect. This is especially true if the Court presumes that Defendant has complied with the very law it cites. Defendant states that another tenant now resides in the apartment, but has not disclosed whether it applied for rescission of the vacate orders so that the tenant could move in to the sealed apartment. Even if the vacate orders have not been rendered moot, they would not bar this action to the extent Plaintiff seeks damages.

Further, because there is no evidence that the vacate orders are still in effect, Defendant has not demonstrated that the City is a necessary party. There is also no need to add the current occupant of the apartment as a party to this action because Plaintiff seeks restoration to her former apartment only if it has not already been rented.

However, injunctive relief is denied because the relief sought is the ultimate relief in this case. The court cannot grant the ultimate relief that she seeks under the guise of a preliminary injunction (see SportsChannel Am. Assocs. v Natl. Hockey League, 186 AD2d 417, 418 [1st Dept 1992]). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff

would receive the ultimate relief sought, pendente lite” (St. Paul Fire and Marine Ins. Co. v York Claims Serv., 308 AD2d 347, 349 [1st Dept 2003]). Nor, as a general rule, will the court issue a mandatory preliminary injunction requiring one person to surrender the possession of real estate or other property in dispute to another (see Knower v Atkins, 273 AD 356 [1st Dept] affd 298 NY 750 [1948]). Plaintiff has also not established that the balance of equities tip in her favor given that there is an issue as to whether, if Plaintiff is restored, she would create a dangerous condition by accumulating an ordinate amount of items which could be combustible. As to the likelihood of success, it does not appear that Plaintiff will prevail to the extent she seeks damages based upon her initial eviction which was caused by issuance of the vacate orders. No evidence has been proffered that Defendant unlawfully evicted Plaintiff or caused someone else to do so. Rather, the evidence indicates that Defendant acted properly in contacting the Fire Department after gas was smelled in the apartment. However, the Court agrees with Plaintiff that Defendant cannot rely on the vacate orders to circumvent compliance with the Rent Stabilization Law, which dictates procedures which landlords must follow when terminating rent stabilized leases. As Plaintiff correctly argues, Defendant cannot merely inform Plaintiff by letter that Defendant “has decided to not renew your lease.” Defendant should have, but did not, bring the appropriate proceeding to terminate Plaintiff’s lease. Defendant cites absolutely no authority for its ability to merely notify Plaintiff that her lease would not be renewed, and circumvent statutory procedures.

Notably, Real Property Actions and Proceedings Law §853 not only allows for damages where a tenant is forcibly ousted, but allows for damages where the tenant is “kept out” by unlawful means.

It is hereby

ORDERED that the motion is denied

This constitutes the Decision and Order of the Court.

Dated: April 15, 2009

ENTER:

EJG

J.S.C.

EMILY JANE GOODMAN

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK