

Allen v Waidmann Realty Corp.

2010 NY Slip Op 33349(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 115354/2009

Judge: Richard F. Braun

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

PRESENT: HON. RICHARD F. BRAUN
J.S.C. Justice

PART 23

Index Number : 115354/2009

ALLEN, MARGARET

VS.

Waidmann Realty Corp., et al

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE 8/19/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for dismiss/stay/over
motion to remove old consolidated summary
proceeding

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____

Amended

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

Answering Affidavits — Exhibits _____

Repeating Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is* granted to the extent
of staying this action pending a final determination in
Ogden Corp. v Allen, Civil Ct, NY County, index no.
08663/07, and the cross motion is denied.

This constitutes the decision and order of
the Court. See separate opinion.

FILED
DEC 03 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: New York New York November 24, 2010 FNSR: [Signature]
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 23**

----- X
MARGARET ALLEN,

Index No. 115354/2009

Plaintiff,

OPINION

-against-

WAIDMANN REALTY CORP.; OGISU CORP.;
JACQUES CHRÉTIEN; SOLANGE REALTY
CORP. and YASUMASA OGISU,

Defendants.

-----X

FILED
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NEW YORK

RICHARD F. BRAUN, J.:

This is an action for a declaratory judgment with respect to the plaintiff's status as a rent stabilized tenant and for damages, including punitive damages, for breach of the warranty of habitability. Plaintiff seeks declarations that the zoning law permits only residential occupancy of the subject building, and grandparenting* does not apply (first cause of action); that the subject building and another building constitute a single horizontal multiple dwelling for rent stabilization purposes (second cause of action); that plaintiffs' residential occupancy contravenes the certificate of occupancy precluding the recovery of rent, plus directing the defendants to promptly file and obtain a proper certificate of occupancy (third cause of action); that plaintiff's rent is to be set based upon the lowest regulated rent at the time of her initial occupancy, plus awarding a money judgment of rent overcharge and attorney's fees (fourth cause of action); and that the individual defendants are personally liable (fifth cause of action); and for damages, including punitive damages, for breach of the warranty of habitability (sixth cause of action). Defendants Waidmann Realty Corp. (Waidmann),

* Plaintiff's attorneys use gender biased language in the complaint.

Jacques Chretien (Chretien), and Solange Realty Corp. (Solange) move to dismiss the complaint, pursuant to CPLR 3211(a)(4), because plaintiff has counterclaimed for the same relief in a pending holdover proceeding. Alternatively, defendants seek to dismiss the first through fifth causes of action for a declaratory judgment as non-justiciable and by virtue of the pending holdover proceeding where plaintiff can be afforded complete relief, or alternatively to stay this action, pursuant to CPLR 2201 and 3211(a)(4), pending a final determination in the holdover proceeding. Plaintiff cross-moves to deny the motion, which is unnecessary (*see Sullivan v 40 West 53rd Partnership*, NYLJ, Oct. 16, 2000, at 27, col 2 [Sup Ct, NY County]), and to remove and consolidate the holdover proceeding and another one with this action.

Plaintiff is the subtenant in a unit on the first floor of 1626 York Avenue, Manhattan, known as #3. Defendant Ogisu Corp. (Ogisu) is a month-to-month tenant of the basement and first floor space at 1626 York Avenue, including plaintiffs' apartment. Ogisu operates a restaurant at the premises and, as the prime tenant of #3, sublet the space to plaintiff for a one year term ending September 30, 1997. Plaintiff stayed on thereafter as a month-to-month tenant. The certificate of occupancy for 1626 York Avenue shows for the 1st through 3rd floors five residential units and a doctor's office. Plaintiff alleges that at the time defendant Waidmann took title to the building, defendant Waidmann also took title to 1628 York Avenue and later transferred "a portion of the entire parcel covered under the deed" to defendant Solange.

In July 2007, Ogisu terminated plaintiff's month-to-month tenancy to regain the space for Ogisu's business. Ogisu commenced a summary holdover proceeding against plaintiff as respondent-undertenant in September 2007, in which plaintiff answered and counterclaimed that 1626 York Avenue contains six residential units and that Ogisu is an illusory tenant because Ogisu in collusion

* 4]

with Waidmann and Chretien had subleased the premises to plaintiff to evade the Rent Stabilization Law. She seeks therein to recover among other things rent overcharges, attorneys' fees, and damages for breach of warranty of habitability, and claims that Ogisu and Waidmann cannot collect rents in the absence of a proper certificate of occupancy. After summary judgment was granted to plaintiff, the Appellate Term reversed and reinstated the petition. The court noted the uncertain regulatory status of the subject apartment and found that, assuming that the illusory tenancy doctrine is applicable, triable issues of fact exist as to whether "the rent laws have been violated in a way that has permitted the prime tenant to rent the apartment for the purpose of subleasing for profit or otherwise depriv[ed] the subtenant of rights under the Rent Stabilization Law", citing *Primrose Mgt. Co. v Donahoe*, 253 AD2d 404, 405 (1st Dept 1998) (see *Ogisu v Allen*, 25 Misc 3d 135(A), 2009 NY Slip Op 52252(u) [App Term, 1st Dept 2009]).

Clearly, there is substantial overlap between the defenses/counterclaims in the holdover proceeding and the declaratory relief sought here. However, in this action additional parties are involved and further relief is sought so that dismissal under CPLR 3211(a)(4) would not seem to be warranted (see *Hinman, Straub, Pigors & Manning, P.C. v Broder*, 89 AD2d 278, 280 [3rd Dept 1982]; see generally *Whitney v Whitney*, 57 NY2d 731, 732 [1982] ["CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action."]; cf. *Brecker v 295 Cent. Park West, Inc.*, 71 AD3d 564, 565 [1st Dept 2010] ["Absent a showing of special circumstances or novel issues requiring Supreme Court involvement, the court should not have conditioned dismissal on full discovery in Civil Court, and should simply have dismissed the equitable action under CPLR 3211(a)(4) (citations omitted)."]; *Spain v 325 West 83rd Owners Corp.*, 302 AD2d 587, 597-588 [2nd

Dept 2003] ["Since the plaintiffs may obtain full redress of their rights under the proprietary lease by raising the claims asserted in this action as affirmative defenses and counterclaims in the summary proceeding, the Supreme Court properly denied their motion for removal and consolidation, and granted that branch of the cross motion which was to dismiss the action pursuant to CPLR 3211(a)(4) (citations omitted)."])

Similarly, while relief may be obtained in the Civil Court proceeding making the declaratory judgment claims potentially superfluous, it is submitted that they are nevertheless justiciable and seek ancillary relief beyond that available in Housing Court (*see Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *New York Public Interest Research Group, Inc. v Carey*, 42 NY2d 527, 530-531 [1977]; *Krieger v Krieger*, 25 NY2d 364, 366 [1969]). Thus, dismissal of the first through fifth causes of action is not warranted.

Nevertheless, the Housing Court is the preferred forum for this type of dispute, and it can more expeditiously afford full relief on the claims raised by way of the affirmative defenses/counterclaims there (*see Post v 120 East End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *Brecker*, 71 AD3d at 565; *Blutreich v Amalgamated Dwellings, Inc.*, 46 AD3d 352, 353 [1st Dept 2007]; *44-46 West 65th Apartment Corp. v Stvan*, 3 AD3d 440, 442 [1st Dept 2004]). Plaintiff should not be able to circumvent the policy favoring adjudication of such claims in Housing Court by tacking on requests for ancillary relief in this action. Housing Court is certainly capable of adjudicating the claim that the premises are part of a horizontal multiple dwelling (*see e.g., 207 E. 117th Street, LLC v Vera*, 20 Misc 3d 128(A), 2008 NY Slip Op 51379(U) [App Term, 1st Dept 2008]). To the extent it is deemed necessary, the Housing Court has the discretion to provide for discovery in connection with the issue of whether the premises are a horizontal multiple dwelling (CPLR 408; *see 480-486*

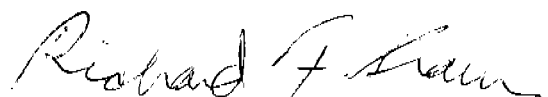
Broadway, LLC v. No Mystery Sound, Inc., 11 Misc.3d 1056(A), 2006 N.Y. Slip Op. 50236(U). *3, *5 [Civil Court, New York County 2006], *aff'd* 16 Misc3d 137(A) [App Term, 1st Dept 2007]; *see generally Smilow v Ulrich*, 11 Misc 3d 179, 182 [Civ Ct, NY County 2005]; *New York University v Farkas*, 121 Misc 2d 643, 647 [Civ Ct, NY County 1983]). The fact that discovery is not generally available in special proceedings would not support plaintiff's position in any event (*see Brecker v 295 Cent. Park West, Inc.*, 71 AD3d 564, 565 [1st Dept 2010], *supra*; *cf. All 4 Sports & Fitness, Inc. v. Hamilton, Kane, Martin Enterprises*, 22 AD3d 512, 514 [2nd Dept 2005], *supra* ["the differing rules regarding the availability of discovery in the District Court, is [not a] sufficient reason to prefer the Supreme Court to the District Court as a forum for litigation of this landlord-tenant dispute."].) Likewise, plaintiff is free to seek joinder of additional parties in the holdover proceeding (CPLR 1003; *see 45th & Broadway Associates v Skyline Enterprises*, 144 Misc 2d 714, 715-716 [Civ. Ct., NY County 1989]).

To the extent plaintiff seeks to pierce the corporate veil or compel defendants to obtain a proper certificate of occupancy, that relief is subordinate to the question of whether she is a rent stabilized tenant, which should be determined in the summary proceeding. Plaintiff, if she is so advised, can seek such further relief in this action if she succeeds in the holdover proceeding (*see Blutreich v Amalgamated Dwellings, Inc.*, 46 AD3d at 353).

Accordingly, by separate decision and order, dated November 24, 2010, the motion was granted to the extent of staying this action pending the determination of *Ogisu Corp. v Allen*, Civil Ct, NY County, index No. 08663/07, and the cross motion denied. The court has declined to exercise its discretion, pursuant to CPLR 8106 and 8202, to award motion costs to defendants due to defendants' attorney's not complying with 22 NYCRR 202.8(c) (*cf. Armendariz v Tiramisu Rest.*, 170 AD2d 334, 334-335 [1st Dept 1991] [counsel's improper inclusion of legal discussion in

supporting affirmations, improper under the similar rule for Civil Court, could support the rejection of affirmations, and/or the commencement of contempt or Departmental Disciplinary Committee proceedings]) and because of defendant's attorney's failure to put in all cites the pages to which specific reference was made.

Dated: New York, New York
November 30, 2010



RICHARD F. BRAUN, J.S.C.

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