

Weisenthal v Gotham Realty Holdings, LLC
2010 NY Slip Op 34077(U)
August 27, 2010
Supreme Court, New York County
Docket Number: 105613/2009
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

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ANNE WEISENTHAL,

**DECISION AND
ORDER**

Plaintiff,

-against-

Index No. 105613/2009

GOTHAM REALTY HOLDINGS, LLC,

Defendant.

-----X
O. PETER SHERWOOD, J.:

This action is the latest in an ongoing landlord/tenant dispute. The eighty-plus-year-old plaintiff, Anne Weisenthal (“plaintiff” or “Weisenthal”), has been the tenant of Apartment #4D, in defendant landlord’s residential condominium apartment building at 220 East 65th Street in Manhattan (the “Apartment”), since 1989 (Affirmation of Thomas C. Lambert in Opposition to Motion and in Support of Cross Motion [Lambert Affirm.], Ex. “G”). Weisenthal commenced the instant action seeking, among other relief, a mandatory injunction directing defendant landlord, Gotham Realty Holdings, LLC (“defendant” or “Gotham”), to provide her with a rent-stabilized renewal lease and to recover damages for past rent overcharges and breach of the warranty of habitability. Gotham answered the complaint and asserted counterclaims, *inter alia*, to recover rent arrears and seeking a declaration that any renewal lease be based upon the last renewal lease which terminated in 2007.

Gotham now moves for an order directing Weisenthal to post a bond in the amount of \$38,339.95 as security for her potential liability for past use and occupancy (at the rate of \$2,555.99) during the 15-month period from the commencement of this action in April 2009 through June 30, 2009 and, prospectively, to pay use and occupancy from July 1, 2010, at the rate of \$2,555.99 per month, until the final determination of this action, all without prejudice to any determination concerning the amount of use and occupancy that may ultimately be awarded based upon a determination as to the legal monthly rate.

Plaintiff opposes the motion and cross moves for an order pursuant to CPLR § 3124 compelling defendant to provide responses to her Notice for Discovery and Inspection and Notice to Take Deposition upon Oral Examination, both dated July 2, 2010.

Defendant alleges, and plaintiff does not deny, that plaintiff has paid no rent since March 1, 2009 (Affirmation of Alyne I. Diamond in Support of the Motion [Diamond Affirm.], ¶ 4; Affidavit of Charles Ishay in Support of Motion ¶ 3). Gotham contends that plaintiff should not be permitted to live in the Apartment rent-free while this dispute concerning the rental rate and plaintiff's entitlement to a rent-stabilized renewal lease is litigated. In support of its position, defendant principally relies upon a decision of the Appellate Division, First Department in *Levinson v 390 W. End Assocs., LLC* (22 AD3d 397 [2005]). In *Levinson*, a tenant commenced an action, *inter alia*, to recover for past rent overcharges. The landlord counterclaimed to validate the rent tenant had been paying and require the tenant to accept the renewal lease increasing his prior rent in accordance with the rent stabilization guidelines or vacate the apartment. The landlord sought an order awarding past use and occupancy and prospective use and occupancy pending final determination of the action. The trial court granted the landlord's application only to the extent of directing the tenant to pay use and occupancy prospectively during the pendency of the action. The Appellate Division modified the order appealed from to require that the tenant post a bond to cover his potential liability for past use and occupancy, in addition to raising the rate of the prospective payments of use and occupancy. The Appellate Division, citing Real Property Law § 220, stated that "it has long been held that a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis" (*id.* at 403). The court further held that the possibility the landlord's ultimate liability for past overcharges may exceed the amount the tenant owed for the period during which he paid no rent did not mandate a different result. In this regard, the court noted that there was no evidence the landlord would be unable to satisfy any potential final judgment in the action.

Plaintiff opposes the motion arguing that the line of cases upon which Gotham relies are inapposite because they involved claims by the respective landlords for possession of the occupied premises. Plaintiff contends, citing a decision of the Appellate Term of the First Department in *Matera v Stram* (27 Misc3d 1 [2010]), that there is no basis for an award of interim use and occupancy in plenary actions, such as the instant action, where the landlord is not raising possessory issues. In *Matera*, a plenary action by landlords for breach of contract against a rent-regulated tenant to recover rent arrears dating back several years, the Appellate Term held that the landlord was not entitled to an award of use and occupancy pending resolution of the action. Specifically, the court stated that the landlords could not properly rely on either the statutory framework allowing for such interim relief under Article 7 of RPAPL-a, which governs special proceedings in which eviction

remedies are available, or cases upholding a landlord's right to interim use and occupancy in landlord/tenant disputes involving possessory issues "having elected to pursue their rent claims, sans any possessory remedy, by way of a pure breach of contract action. In this posture, plaintiffs may not be heard to complain of any perceived unfairness in having to await the final outcome of the litigation before receiving the rental amounts prayed for herein" (*id.* at 3).

The holding in *Matera* is difficult to reconcile with a decision of the First Department Appellate Division in *Oxford Towers Co., LLC v Wagner* (58 AD3d 422 [2009]), which was rendered after *Levinson* (22 AD3d 397, *supra*), and which cites *Levinson* as support for its determination directing the tenants to pay use and occupancy pendente lite and to post a bond to cover past due use and occupancy. The landlord in that case commenced an action seeking, among other relief, declarations that an agreement between landlord's previous employee and tenants, granting them the right to automatic lease renewals with rent increases as set by the rent stabilization law, was contrary to public policy and that landlord was under no obligation to offer tenants a renewal lease. Nothing in the decisions of either the Supreme Court (2007 WL 6881707 [2007]) or the Appellate Division indicates that the landlord/tenant dispute involved possessory issues. Nor is any mention made of a statutory basis for the court's determination. Rather, the Appellate Division apparently reached its determination on the basis of the court's broad discretion in landlord/tenant disputes to award use and occupancy pendente lite (*see, Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]).

The *Oxford Towers Co.* holding is consistent with an earlier decision of the Appellate Division, First Department, involving a landlord's breach of contract action against a tenant, which sought use and occupancy pursuant to Real Property Law § 220. Although the agreement which was breached required the tenant to vacate the premises, the decision was premised upon equitable principles rather than upon statutory provisions. The court stated that:

The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both' (*Eli Haddad Corp. v Cal Redmond Studio*, 85 AD2d 176, 447 NYS2d 480). It is manifestly unfair that defendant [tenant] herein should be permitted to remain in possession of the subject premises without paying for their use (*see, Albright v Shapiro*, 92 AD2d 452, 453-454, 458 NYS2d 913).

Similarly, here, this court finds that plaintiff has no right to continue to live in the Apartment rent-free during the pendency of this action. There is no question that plaintiff had entered a rent-stabilized lease with landlord's predecessor-in-interest, which was thereafter periodically renewed for various terms, one of which expired on March 31, 2005. The monthly rent as of that lease was \$2,555.99. Landlord failed to offer plaintiff a rent-stabilized renewal lease, resulting in plaintiff filing a complaint with the New York State Division of Housing and Community Renewal ("DHCR"). In a decision and order dated March 20, 2008, DHCR noted that there existed a renewal lease that expired on March 31, 2007, at a monthly rental rate of \$2,722.13, but Gotham had failed, upon expiration of that lease, to timely offer a renewal lease (Complaint ¶ 14). Thus, DHCR directed Gotham to furnish plaintiff with an amended renewal lease commencing on May 1, 2007 and expiring on April 30, 2009. The commencement date of the amended renewal lease was set by DHCR at 90 days from the date Gotham had untimely offered a renewal lease, to wit, January 25, 2007. The rent in the renewal lease was \$2,905.87.

Defendant apparently failed to provide plaintiff with the renewal lease as directed by DHCR. In her complaint, plaintiff contends that the last binding lease was the one that expired on March 31, 2005, and, therefore, plaintiff is not permitted to collect rent in excess of \$2,555.99 (Complaint ¶¶ 24-25). Notwithstanding those allegations, plaintiff alleges that she paid rent at the monthly rate of \$2,722.13, from April 2005 through March 2007, and at the monthly rate of \$2,905.87 from April 2007 through March 2009 (*id.* ¶¶ 26-30). However, plaintiff is seeking rent overcharges for those periods from April 2005 through March 2009 (*id.* ¶¶ 32-34).

Plaintiff, therefore, acknowledges her obligation to pay use and occupancy in the sum of \$2,555.99 based upon the last fully executed lease. Accordingly, the court finds, in the exercise of its discretion, that an interim award of prospective use and occupancy is rationally related to the circumstances of this case and the parties' competing interests and will offer fair protection to both parties while preserving the status quo until a final determination is reached (*see, Scharf v Heller Realty*, 232 AD2d 340, 341 [1st Dept 1996; *MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). However, the court will not, at this juncture, direct plaintiff to post a bond as security for past use and occupancy in light of the delays in this action which are largely attributable to defendant, defendant's acknowledged failure to comply with the DHCR order and its wrongful conduct toward plaintiff, as noted by a Judge of the New York County Civil Court in a decision and order, dated June 2, 2010, in a summary holdover proceeding commenced by Gotham to obtain possession of the

Apartment (Lambert Affirm. ¶ 11, Ex. "B"). Gotham will not be prejudiced by the lack of a bond as Gotham is not precluded from seeking available remedies at trial upon its counterclaims.

Turning to plaintiff's cross motion, the court notes that in a prior decision and order, dated May 27, 2010, this matter was scheduled for a preliminary conference in this IAS Part on July 14, 2010. The preliminary conference was subsequently adjourned to September 14, 2010. Generally, discovery related issues are best addressed at a preliminary conference. The cross motion is also made in contravention of the court's Part Rules requiring, in the event good faith efforts at resolution of discovery disputes fail, that the parties seek judicial intervention via a teleconference with the Court before filing a formal motion. Consistent with the aims of the CPLR, the Part Rules are intended to foster the just, speedy and inexpensive determination of civil cases (*see* CPLR § 104).

Summary denial of the instant cross motion would also generally be mandated when it is made without any affirmation of good faith as required by 22 NYCRR 202.7 (a) (*see, Dunlop Development Corp. v Spitzer*, 26 AD3d 180 [1st Dept 2006]; *Sixty-Six Crosby Assocs. v Berger & Kramer, LLP*, 256 AD2d 26 [1st Dept 1998]; *Matos v Mira Realty Mgmt Corp.*, 240 AD2d 214 [1st Dept 1997]). Here, plaintiff has not submitted an affirmation or affidavit of good faith.

Based upon the foregoing discussion, it is

ORDERED that defendant's motion is granted only to the extent that beginning with the month of September 2010 and each month thereafter during the pendency of this action, plaintiff is directed to pay use and occupancy as and when due at the monthly rate of \$2,555.99, without prejudice to the amount of use and occupancy that may ultimately be awarded or other issues raised by the parties in this action, and in all other respects defendant's motion is denied; and it is further

ORDERED that plaintiff's cross motion to compel discovery is denied.

This constitutes the decision and order of the court.

DATED: August 27, 2010

ENTER,



O. PETER SHERWOOD

J.S.C.