

Meadow v 205 E. 77th St. Tenants Corp.

2011 NY Slip Op 30121(U)

January 11, 2011

Sup Ct, NY County

Docket Number: 400689/08

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 400689/2008

MEADOW, JON C.

vs
205 EAST 77TH STREET TENANTS

Sequence Number : 004

OTHER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *and cross motion are*

decided per attached

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

FILED

JAN 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/11

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
JON C. MEADOW,

Plaintiff,

-against-

Index No. 400689/08

FILED

205 EAST 77TH STREET TENANTS CORP.,

Defendant.

JAN 20 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

205 East 77th Street Tenants Corp., the landlord-owner of a co-operative apartment building located on the Upper East Side of Manhattan (the Corporation) bring this motion to confirm in part, and reject in part, the decision of the Special Referee in this action commenced by plaintiff shareholder and long term resident Jon C. Meadow, for a declaratory judgment prohibiting the Corporation's sale of his shares of stock appurtenant to his apartment and for a stay of the termination of his proprietary lease. Plaintiff cross moves to confirm in part, and reject in part, the Referee's Report.¹

As noted in the Decision and Order, dated July 13, 2009 (the Decision), it appeared that the decision to terminate plaintiff's Lease was based primarily on allegations that the apartment was

¹Plaintiff's motion for summary judgment and the Corporation's cross motion for summary judgment for a judgment of ejectment, a money judgment and attorneys' fees, were held in abeyance pending a decision on the reference, (see Decision and Order, dated July 13, 2009).

unclean, disorderly, and excessively cluttered, which allegedly rendered the apartment a fire hazard or unsafe. In light of the Court of Appeals directive in 40 West 67th Street v Pullman (100 NY2d 147 [2003]), to exercise a heightened vigilance where ejectment is at issue, a reference was directed. In the Decision, the Court noted that "[c]ertainly if the cooperative were to inspect many of the apartments in its building, it would find that many of them are kept in an unclean or cluttered manner. Accordingly, the issue is really whether the internal conditions of the apartment result in an external threat to the occupants of the rest of the building."

Both motions are denied and the Special Referee's Report is confirmed in its entirety. The Corporation seeks to selectively excise certain portions of the Referee's Report it deems unfavorable, on the basis that the Special Referee noted in the decision that the scope of his reference did not include a determination of whether the prior stipulations of settlement entered into between the parties foreclosed the Corporation's consideration of plaintiff's conduct occurring during the period of the stipulations, based on res judicata. Accordingly, the Referee made different findings depending on the time period at issue. There is nothing erroneous or prejudicial about the Special Referee clarifying that he will not hear argument on res judicata because it was beyond the scope of the reference, or

make findings regarding different periods of time.² Further, there is nothing improper about the finding that "if only conduct of plaintiff occurring after the July 2007 Stipulation may be considered in determining the good faith of the Board in February 2008, the existence of good faith has not been shown as no evidence was presented as to the conditions and conduct between July 2007 and February 2008 to justify the termination."

Although the Corporation maintains that plaintiff failed to provide access to the apartment in September 2007, as required by the Stipulation in 2006, and failed to make certain payments, the Referee's statement must be viewed in the context of the scope of the reference, of which the Referee was keenly aware, which was solely to address the nature of the conditions in the apartment. Accordingly, the Referee's statement does not preclude the Court from accepting evidence unrelated to the scope of the Reference. Further, although the Corporation is correct that the burden is on plaintiff to prove bad faith, the Referee's factual statement regarding the existence of good faith, which "has not been shown as no evidence was presented as to the conditions and conduct between July 2007 and February 2008 to justify the termination"

²This Court will decide whether it was proper for the Corporation to terminate plaintiff's lease "based on the totality of his objectionable conduct" and what effect, if any, the stipulations resolving the prior housing court cases have on the basis for termination, issues not yet addressed by the Court.

* 5]
does not alter the burden of proof, which the Court will correctly apply.

The cross motion is also denied.³ There is no basis to reject the Referee's conclusion as to the good faith of the Corporation if all conduct is considered (including conduct covered by prior stipulations), especially given evidence of the deplorable state of the apartment in 2005. The argument that the evidence was improperly and illegally obtained is unpersuasive. The Referee found no evidence of a "break in" and even if the pictures were not taken during the cleanup, plaintiff has not shown that such evidence, even if obtained without his consent, should be excluded (as perhaps in a criminal trial). The characterization that plaintiff has a history of objectionable conduct is not improper as the Referee is the finder of fact and the record supports his finding. It was also in the province of the Referee to accept the testimony of the witnesses, and nothing in Report indicates that lay witnesses were improperly considered expert witnesses.

It is hereby

³The Corporation complains that no "Notice" was attached to the cross motion, but cites no prejudice which would prevent the Court from disregarding such a defect under CPLR 2001. It further complains that plaintiff did not timely move to confirm or reject the Report under Uniform Rule 202.44, but provides no support for a determination that plaintiff has therefore waived the right to seek relief. In any event, even if the cross motion was improper, it would still be considered as opposition-which would achieve the same results.

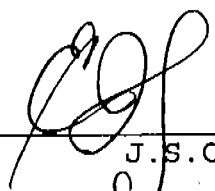
ORDERED that the motions are both denied;
and it is further

ORDERED that the Report of the Special Referee is confirmed
in its entirety.

This Constitutes the Decision and Order of the Court.

Dated: January 11, 2011

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED

JAN 20 2011

**NEW YORK
COUNTY CLERK'S OFFICE**