

Dodds v 1926 Third Ave. Realty Corp.

2011 NY Slip Op 32164(U)

July 20, 2011

Sup Ct, NY County

Docket Number: 100602/10

Judge: Judith J. Gische

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

PRESENT: Gische
Justice

PART 10

Dadds, Anthony
Herrero, Rebeca

INDEX NO. 100602/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 5

1926 Third Ave Realty, et al

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No


JUL 21 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: June 20, 2011


HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 10

----- X
ANTHONY DODDS and REBECCA HERRERO,
Plaintiffs,

-against-

1926 THIRD AVENUE REALTY CORPORATION,
JOSE LUIS LOPEZ, LUZ MARIA GORDILLO,
MARCELLO COFONE, JULIO VALDEZ,
JOSE MORALES and ROSS & ROSS, LLC a/k/a
ROSS & ROSS,
Defendants,

-and-

TAFA FIADZIGBE a/k/a TAFA LAWRENCE,
MARGARITA VERSATEGUI, GREG SMITH and
ERIC EIGEN,
Nominal Defendants.

DECISION/ORDER

Index No.: 100602/10

Seq No. 005

Present:

Hon. Judith J. Gische, JSC

FILED

JUL 21 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's OSC (TRO and U&O) w/RL affirm, AD affid, exhs,	1
RG affirm in support of TRO	2
TARC, RR and Lopez x/m (3211) w/WJ affirm, JL affid, exhs	3
Pltf's opp to x/m w/RG affirm, AD affid, exhs	4
TARC, RR and Lopez reply w/WJ affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

In this residential landlord/tenant action, plaintiffs move for partial summary judgment on a portion of the complaint and for ancillary relief, and three of the defendants cross-move for summary judgment to dismiss a portion of the complaint (motion sequence number 005). For the following reasons, both motions are denied.

BACKGROUND

Plaintiffs Anthony Dodds (Dodds) and Rebecca Herrero (Herrero) and their minor child are the occupants of apartment 2-3 in a building (the Building) located at 176 East 106th Street in the County, City and State of New York. *See* Order to Show Cause, Dodds Affidavit, ¶ 12.

Plaintiffs claim that corporate co-defendant 1926 Third Avenue Realty Corporation (TARC) is the owner of the building, and that corporate co-defendant Ross & Ross, LLC a/k/a Ross & Ross (R&R) is a holding company that owns TARC. *See* Order to Show Cause, Exhibit A (complaint), ¶¶ 3-5, 13-14.

The rent-regulated status of plaintiff' apartment is at issue in this action. Plaintiffs contend that the Building has no certificate of occupancy (C of O), but that it is zoned for residential use, even though it is used mainly for commercial purposes. *Id.*, ¶¶ 26-30. As a result, plaintiffs contend that their tenancy is rent stabilized by operation of the Loft Law. *Id.*, ¶ 127-132, 185. Plaintiffs also allege that TARC leased the Building's second floor to defendant Jose Luis Lopez (Lopez), leased its fourth floor to defendants Luz Maria Gordillo (Gordillo), Marcello Cofone (Cofone) and Julio Valdez (Valdez), and leased its fifth floor to defendant Jose Morales (Morales). *Id.*, ¶¶ 33-36. Plaintiffs further allege that they initially rented apartment 2-2 from Lopez in February 2008, and then moved into apartment 2-3 in July 2009 at Lopez's request. *Id.*, ¶¶ 42-47. Plaintiffs state, however, that Lopez illegally changed the locks on apartment 2-2 before they left, and that they had to seek assistance from the police in order to retrieve their belongings from that apartment. *Id.*

In this court's decision of August 25, 2010 deciding defendants' motion to dismiss (motion sequence number 001), this court noted that, on October 30, 2009, Lopez, acting on

behalf of TARC, had commenced a commercial holdover proceeding against plaintiffs in the Civil Court of the City of New York (Index No. 89980/09). That summary proceeding was eventually dismissed by Judge Singh on June 2, 2010.

In deciding to dismiss that proceeding, Judge Singh found that Lopez's testimony on the issue of the Building's use was not credible, and determined that Lopez had rented commercial units in the Building for tenants to occupy residentially. At some point after Judge Singh's dismissal of the commercial holdover proceeding, defendants commenced a residential non-payment proceeding against plaintiffs herein in Civil Court (Index No. 74591/10). The plaintiffs later moved, successfully, to have the Civil Court action consolidated with the instant action (motion sequence number 002). The court notes that, in a stipulation dated August 26, 2010, plaintiffs agreed to pay TARC ongoing use and occupancy in the amount of \$1,100.00 per month (described therein as the "last registered rent"), in order to secure TARC's consent to the granting of plaintiffs' motion. *See* Order to Show Cause, Exhibit F.

Plaintiffs originally commenced this action on January 15, 2010, and later filed an amended complaint on December 22, 2010 that sets forth causes of action for: 1) a declaratory judgment that their tenancy is governed by the Rent Stabilization Law and Code; 2) a declaratory judgment that all of the named defendants are jointly and severally liable to them as regards any recovery had herein; 3) a declaratory judgment that defendants may not return apartment 2-2 to commercial use, and a permanent injunction to prevent them from doing so; 4) a declaratory judgment that the Building is an "interim multiple dwelling," as defined in the Loft Law, as well as an injunction requiring defendants to restore plaintiffs to possession of apartment 2-2 and to legalize the entire Building in accordance with the Multiple Dwelling Law; 5) a money judgment

against TARC; and 6) an award of legal fees against TARC and Lopez. *See* Order to Show Cause, Exhibit A. The defendants herein (i.e., TARC, R&R and Lopez) filed a combined answer in this action on February 8, 2010. *Id.*; Exhibit B. Now before the court are two motions for partial summary judgment; the first by plaintiffs, and the second by defendants TARC, R&R and Lopez.

DISCUSSION

Plaintiffs' Motion

In their motion, plaintiffs seek partial summary judgment on four (4) aspects of their complaint. Each claim is examined separately later in this decision. Plaintiffs also seek preliminary injunction restraining defendants for their allegedly "harassing conduct." The request for a preliminary injunction is considered first.

Pursuant to CPLR 6301,

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 (2005), citing

Doe v Axelrod, 73 NY2d 748, 750 (1988). The first of these elements, i.e., the “probability of success on the merits” of the claim, involves plaintiffs’ claim of “harassment.” Plaintiffs specifically allege three instances of such “harassment,” the first of which is defendants’ purported violation of Rent Stabilization Code (RSC) § 2525.5, which provides that:

It shall be unlawful for any owner or any person acting on his or her behalf, directly or indirectly, to engage in any course of conduct (including but not limited to interruption or discontinuance of required services, or unwarranted or baseless court proceedings) which interferes with, or disturbs, or is intended to interfere with or disturb, the privacy, comfort, peace, repose or quiet enjoyment of the tenant in his or her use or occupancy of the housing accommodation, or is intended to cause the tenant to vacate such housing accommodation or waive any right afforded under this Code.

Here, plaintiffs allege that the landlord (i.e., TARC) “requested the commercial tenant downstairs, a barber shop, to play loud music at all hours of the day and night ... to make us move out of our apartment.” *See* Order to Show Cause, Dodds Affidavit, ¶ 6. Defendants’ responsive papers include a sworn affidavit from Everesto Fernandez (Fernandez), the barber shop’s owner, who denies either playing his radio loudly, or acting on behalf of TARC to harass plaintiffs. *See* Notice of Cross Motion, Exhibit C.

Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court’s discretion, even be issued where there are disputed facts (*Terrell v. Terrell*, 279 AD2d 301 [1st Dept 2001]), generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (*O’Hara v. Corporate Audit Co.*, 161 AD2d 309 [1st Dept 1990]). In reply, plaintiffs do not address Fernandez’s statements and they cannot be reconciled with the

dramatically different statements by Dodds. Consequently, plaintiffs have failed to meet their burden of showing a likelihood of success in demonstrating that defendants committed harassment by violating RSC § 2525.5.

Next, plaintiffs allege that defendants committed harassment by violating section 26-521 of the Administrative Code of the City of New York (Administrative Code), which provides that:

§ 26-521. Unlawful eviction.

a. It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit or has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order by:

- (1) using or threatening the use of force to induce the occupant to vacate the dwelling unit; or
- (2) engaging in a course of conduct which interferes with or is intended to interfere with or disturb the comfort, repose, peace or quiet of such occupant in the use or occupancy of the dwelling unit, to induce the occupant to vacate the dwelling unit including, but not limited to, the interruption or discontinuance of essential services; or
- (3) engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to, removing the occupant's possessions from the dwelling unit, removing the door at the entrance to the dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying the occupant with a key.

Here, plaintiffs specifically allege as follows:

In about June of 2009, defendant Lopez asked us to temporarily vacate apartment 2-2 because he wanted to move the tenant of

[apartment] 2-1, Francesco Giglio, into 2-2 so that defendant Lopez could rent out 2-1, a larger apartment with three bedrooms, to short term tenants.

We agreed to vacate in July of 2009, however defendant Lopez changed the locks on 2-2 prior to our removing all of our belongings. We had to seek the intervention of the police in order to retrieve our things. My wife and I filed a complaint of harassment.

The foregoing sets forth facts supporting an alleged violation of Administrative Code § 26-521 but it is a static past event, not an ongoing situation. Plaintiffs admit that “Lopez moved out of the Building last summer.” *See* Dodds Reply Affidavit, ¶ 13. Thus, there is no present danger of Lopez attempting to commit another illegal eviction on behalf of TARC. Plaintiffs have failed to establish the “danger of irreparable injury” element of their preliminary injunction request and the second harassment claim does not form an adequate basis for the relief requested.

Plaintiffs’ final harassment claim restates their first two claims, but also states that “it is submitted that the conduct to be enjoined is also a common law tort” without any elaboration. Since this argument is based upon the same set of facts as the first two claims, plaintiff’s motion for a temporary restraining order on that basis is denied as well.

For each of the foregoing reasons plaintiffs’ motion for relief pursuant to CPLR 6301 is denied in its entirety.

The second branch of plaintiffs’ motion is for “summary judgment as to the Loft Law coverage issues.” This request relates to the first portion of plaintiffs’ fourth cause of action, which is for a declaratory judgment that the building is an “interim multiple dwelling,” as

defined in the Loft Law.¹ See Order to Show Cause, Exhibit A (amended complaint), ¶¶ 127-150.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003).

Declaratory judgment is a discretionary remedy which may be granted “as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” CPLR 3001; see e.g. *Jenkins v State of New York Div. of Hous. and Community Renewal*, 264 AD2d 681 (1st Dept 1999). Further, it has long been the rule that, in an action for declaratory judgment, the court may properly determine respective rights of all of the affected parties under a lease. See *Leibowitz v Bickford's Lunch System*, 241 NY 489 (1926).

Here, plaintiffs cite to Multiple Dwelling Law § 281, which provides, in pertinent part, as follows:

5. Notwithstanding the provisions of paragraphs (i), (iii) and (iv) of subdivision two of this section, but subject to paragraphs

¹ The second portion of plaintiffs' fourth cause of action seeks an order compelling defendants to restore plaintiffs to possession of apartment 2-2 and to comply with the requirements of the Multiple Dwelling Law. Plaintiffs do not address this request for injunctive relief in their current summary judgment motion.

(i) and (ii) of subdivision one of this section and paragraph (ii) of subdivision two of this section, the term “interim multiple dwelling” shall include buildings, structures or portions thereof that are located in a city of more than one million persons which were occupied for residential purposes as **the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January first, two thousand eight, and ending December thirty-first, two thousand nine**, provided that the unit: is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, has at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and is at least five hundred fifty square feet in area. The term “interim multiple dwelling” as used in this subdivision shall not include ... (ii) units in any building that, at the time this subdivision shall take effect, also contains a use actively and currently pursued, which use is set forth in use groups fifteen through eighteen, as described in the zoning resolution of such municipality in effect on June twenty-first, two thousand ten, and which the loft board has determined in rules and regulation is inherently incompatible with residential use in the same building, provided that if a building does not contain such active uses at the time this subdivision takes effect, no subsequent use by the owner of the building shall eliminate the protections of this section for any residential occupants in the building already qualified for such protections... . A reduction in the number of occupied residential units in a building after meeting the aforementioned twelve consecutive month requirement shall not eliminate the protections of this section for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of this subdivision shall be offered for residential use only after the obtaining of a residential certificate of occupancy for such space and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling. (*Emphasis added*)

Plaintiffs then argue that the instant Building is an “interim multiple dwelling,” pursuant

to the statutory definition, because they, and a number of other tenants,² occupied it for residential purposes during the 2008-2009 window period. *See* Order to Show Cause, Dodds Affidavit, ¶¶ 11-44. Defendants respond that the building does not meet the criteria of an “interim multiple dwelling” because: 1) plaintiffs’ apartment unit 2-2 is not “at least five hundred fifty square feet in area”; and 2) no other families apart from plaintiffs occupied the building residentially during the window period. *See* Notice of Cross Motion, Jennings Affirmation, at 6-8 (pages not numbered).

To support the former claim, defendants present an affidavit from architect Paul Gregory (Gregory), who inspected apartment 2-2 and prepared a floor plan that indicates that that apartment is only approximately 300 square feet in area. *See* Notice of Cross Motion, Gregory Affidavit. To support the latter claim, defendants present affidavits from all of the individually named defendants in this action, all of whom aver that they do not use their units in the Building for residential purposes.³ *See* Notice of Cross Motion, Morales and Valdez Affidavits, Exhibit B.

In their reply papers, plaintiffs present their own floor plan showing that their apartment was approximately 900 square feet in area, and included both a kitchen and bathroom. They also

² Plaintiffs specifically allege: 1) that Lopez leased the Building’s third floor from TARC, subdivided it, and sub-leased apartments thereon to co-defendants Tafa Fiadzigbe a/k/a Tafa Lawrence (Lawrence), Margarita Verasategui (Verasategui), Eric Eigen (Eigen) and Greg Smith (Smith), as well as to a non-party named Mariano Cinat (Cinat); 2) that Valdez leased the Building’s fourth floor from TARC, subdivided it, and sub-leased apartments thereon to co-defendants Gordillo and Cofone; and 3) that Morales leased the Building’s third floor from TARC.

³ Defendants specifically present affidavits from Morales, Valdez, Fiadzigbe, Verasategui, Smith and Eigen, as well as an affidavit from TARC’s vice president, John LeMarier (Le Marier). *See* Notice of Cross Motion, LeMarier, Morales and Valdez Affidavits, Exhibit B.

provides some photographs purporting to show kitchen and bathroom fixtures in other apartments. *See* Dodds Reply Affidavit, ¶¶ 4-10; Exhibits A, B, C, D, F, G. Plaintiffs further note that none of the affidavits from the deponent-tenants that defendants presented includes any statement (or proof) as to where those deponent-tenants actually live. *See* Grimble Reply Affirmation, ¶ 4.

At the June 2, 2010 hearing before Judge Singh, he dismissed defendants' commercial holdover proceeding finding that that Lopez had, in fact, leased commercial units in the Building to various tenants for residential use. *Id.*; Exhibit E. There is, however, conflicting evidence (i.e. the competing floor plans, contradictory testimony) presented on these motions, precluding the court from deciding whether, as a matter of law, the Building meets the factual criteria set forth in Multiple Dwelling Law § 281 for designation as an "interim multiple dwelling." That determination will have to await the trial of this action. Only after that determination is made will the court be able to resolve the issue of whether plaintiffs' tenancy is rent stabilized by operation of the Loft Law. Therefore, the second branch of plaintiffs' motion is denied as there are triable issues of fact which must be decided before the law can be applied. In the third branch of their motion, plaintiffs "ask the court to order and direct that a doorbell or bell buzzer or intercom system be installed promptly" in the Building. *See* Order to Show Cause, Dodds Affidavit, ¶ 50. Aside from asking for this relief, plaintiffs fail to further address this claim or identify any grounds whatsoever for making this request. Furthermore, none of the subsequent submissions by either plaintiffs or defendants mentions this request at all. Therefore, this (third) branch of plaintiffs' motion for summary judgment is denied.

The final branch of plaintiffs' motion seeks summary judgment "to obtain a stay as to the

use and occupancy order.” See Order to Show Cause, LoGuidice Affirmation, ¶ 3. Plaintiffs’ counsel cites the decisions by the Appellate Division, Second Department, in *Caldwell v American Package Co., Inc.* (57 AD3d 15 [2d Dept 2008]) and *Forrester v American Package Co., Inc.* (55 AD3d 787 [2d Dept 2008]) as precedential support for defendants’ argument that “an order to pay use and occupancy under circumstances very close to those of this case is improper,” an apparent reference to the legal proscription against a landlord’s collecting use and occupancy when the building in question does not have a C of O. Multiple Dwelling Law § 302 (1) (b) .

Defendants acknowledge that the Building does not have a c of o. They argue, however, that on August 26, 2010, while represented by counsel, both parties signed the stipulation by which plaintiffs agreed to pay TARC ongoing use and occupancy in the amount of \$1,100.00 per month as a *quid pro quo* for TARC’s consenting to plaintiffs’ motion to consolidate the Civil Court action with the action at bar. Thus, defendants contend that plaintiffs are trying to circumvent the parties’ agreement that plaintiffs would pay use and occupancy.

It is well settled law that a tenant is estopped from asserting Multiple Dwelling Law § 302 (1) (b) as a defense to the payment of use and occupancy where that tenant knows the subject apartment is not legally registered. See *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 (1st Dept 1984), citing *Lipkis v Pikus*, 99 Misc 2d 518, 520 (App Term, 1st Dept 1979), *affd* 72 AD2d 697 (1st Dept 1979). Furthermore, plaintiffs’ papers do not contain address any factual or legal grounds for why the parties’ stipulation should be vacated. It is clear that Dodds knew and has known for some time that both of the apartments that he and his wife occupied in the Building were never legally registered for residential use. Therefore, Multiple Dwelling Law

§ 302 (1) (b) is not a ground upon which to request the vacatur of the August 26, 2010 stipulation and this branch of plaintiffs' motion for summary judgment is denied as well.

Defendants' Cross Motion

In their cross motion, defendants seek summary judgment dismissing plaintiffs' fourth cause of action for a declaratory judgment regarding the Building's status under the Loft Law. For the same reasons that the court denied plaintiffs' motion, i.e. there are factual disputes that have to be resolved before the law can be applied, defendants' cross motion must be denied as well.

Conclusion

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED plaintiffs' motion is denied in its entirety; and it is further

ORDERED that the cross motion by defendants 1926 Third Avenue Realty Corporation, Ross & Ross, LLC a/k/a Ross & Ross and Jose Luis Lopez pursuant to CPLR 3212 is also denied in its entirety; and it is further

ORDERED that any relief not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

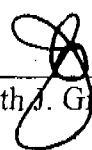
FILED

Dated: New York, New York
July 20, 2011

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Hon. Judith J. Gische, J.S.C.