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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 104070/2009
WRIGHT, LOUIS T.
VS.
AKAKEO, KOSSI
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

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

affirmed

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/4/11

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: IAS PART 17

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LOUIS T. WRIGHT HDFC,

Plaintiff,

-against-

Index No.
104070/09

KOSSI AKAKEO, IMOROU BABAODIN, MASSHOUDOU ADEDEJI, AGABAGNI DIANATOU, HAKIM BURNETTE, LIONEL MENDEZ, "JOHN DOE" NO. 1, "JANE DOE" NO. 1,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

This action for ejectment is brought by Louis T. Wright HDFC (hereinafter, LTW), a Section 402 not-for-profit corporation having its principal offices c/o Ecumenical Community Development Organization, 443 West 125th Street, New York, New York, 10027, as owner and grantee of the premises known as 455 Convent Avenue (Block 2064, Lot 47), 457 Convent Avenue (Block 2064, Lot 46), and 511 West 149th Street (Block 2081, Lot 124), New York, New York (the Premises).

Pursuant to a deed of November 21, 2006 between the Secretary of Housing and Urban Development (HUD) as grantor and LTW as grantee, LTW became the owner of the Premises, among other properties, as of November 21, 2006 (the Deed). Concurrently, HUD and LTW executed a Land Disposition Agreement (LDA) which obligated LTW to commence rehabilitating the Premises and converting the Premises into three-unit or four-unit family dwellings within 60 days of the closing of the LDA.

Defendant Kossi Akakeo is a tenant at 457 Convent Avenue, New York, with Imorou Babaodin as an occupant. Defendant Masshoudou Adedeji is a tenant at 455 Convent Avenue, New York, Apartment 3. Defendants Hakim Burnette and Lionel Mendez are tenants at 511 West 149th Street, New York, in Apartments 3, and 1, respectively.

The parties agree that LTW, pursuant to the LDA and the Neighborhood Homes program of the Department of Housing Preservation and Development (HPD), was required to relocate the defendants prior to rehabilitation of the Premises. *See* Berthoud Aff. ¶ 10; McCune Aff. ¶ 21. Nonetheless, in the latter part of 2008, LTW served 30-day Notices of Termination of tenancy on the defendants, requiring that the defendants "remove from and surrender the demised [P]remises" to LTW. *See* Complaint, Exh. A. The defendants did not comply with the Notices of Termination, and, as of March 10, 2009, LTW brought this action to eject the defendants. Defendants Burnette and Mendez are the movants herein, and will together be referred to as the "B&M." B&M seek summary judgment dismissing the action because: 1) LTW never made any attempts to relocate B&M; and 2) LTW has no intention or capacity to rehabilitate the premises. The motion for summary judgment is denied.

With regard to attempts to relocate B&M, the complaint, and LTW's submissions, attest that attempts at relocation were made around January 24, 2008 and February 26, 2008 (the remaining attempts listed by LTW were allegedly made only after the initiation of this action). According to defendants, however, no such attempts were ever made, and the president of LTW was unable to identify a single effort at relocation during deposition.

Summary judgment is governed by CPLR 3212, which provides in subsection (b) that plaintiff must show that "there is no defense to the cause of action or that the cause of action or

defense has no merit." Here, B&M must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

Only once this prima facie showing has been made does the burden shift to LTW to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman*, 49 NY2d at 562). Further, because it is B&M that are the movants, LTW is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties (*see Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]).

Although this court is cognizant of the difficulty B&M face in attempting to prove a negative (*see Reed v State of New York*, 78 NY2d 1, 10 [1991]), B&M have not demonstrated entitlement to judgment. CPLR 3212. The evidence that the president of LTW was unable to identify relocation efforts does not in any way prove that no such efforts were ever made. Moreover, it is well established that "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 (4th Dept 1992).

In addition, the issue of whether there were proper, or any, relocation attempts, is an issue of fact, requiring that the court assess the credibility of the opposing sides. However, upon summary judgment, the role of the court is one of issue-finding, not issue-determination

(*Sillman*, 3 NY2d 395, 404; *Wiener v Ga-Ro Die Cutting*, 104 AD2d 331, 333 [1st Dept 1984], *affd* 65 NY2d 732 [1985]). The credibility of the parties is not a proper consideration for the court (*S.J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), and LTW's statements made in opposition to the motion, unless inherently incredible, must be accepted as true (*Creighton v Milbauer*, 191 AD2d 162, 166 [1st Dept 1993]). As such, this aspect of the motion for summary judgment must be denied.

B&M also argue that LTW has no intention or capacity to rehabilitate the premises. LTW affirms (*see* Berthoud Aff. ¶¶ 20-26) that there are plans and financing with regard to the rehabilitation, and LTW's assertions are entitled to the deference of the court on this motion. *Myers*, 64 NY2d at 806. B&M cannot be granted summary judgment based upon alleged gap in LTW's proofs or when issues of fact are contested. *George Larkin Trucking Co.*, 185 AD2d at 615. However, neither side has addressed a related issue; i.e., whether plaintiff may rely on relocation efforts allegedly made in 2005 through 2008, when in fact no rehabilitation has commenced as of 2011, or, is even in place. In other words, assuming that LTW does have the intent and capacity to rehabilitate the premises at some point in the future, does LTW have an obligation to make efforts to relocate defendants again, given that its prior efforts occurred more than three years ago?

Accordingly, it is hereby

ORDERED that the motion of defendants Hakim Burnette and Lionel Mendez for summary judgment dismissing the complaint is denied; with leave to renew after the close of discovery.

This Constitutes the Decision and Order of the Court

Dated: October 4, 2011

JSC
EMILY JANE GOODMAN