

O'Neill v Zolot

2012 NY Slip Op 30074(U)

January 13, 2012

Sup Ct, Queens County

Docket Number: 15099/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

GERARD O'NEILL,

Plaintiff,

-against-

CHARLES ZOLOT, CHARO GONZALES,
CHONG-ZHONG CHEN, JONATHAN GONZALES,
UNNAMED SISTER OF NELLIE GONZALES,
CHRISTIAN/FELIPIE UNKNOWN LAST NAME.

Defendants.

Index No: 15099/11

Motion Date:10/19/11

Motion Cal. No.: 16

Motion Seq. No.: 1

The following papers numbered 1 to 22 read on this motion by defendant, Chang Zong Chen i/s/h as CHONG-ZHONG CHEN (hereinafter Chen), and cross-motion by defendant Zolot to dismiss the complaint insofar as it is asserted against the moving defendants pursuant to CPLR 3211(a) (1) & (7)

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 10
Notice of Cross-Motion-Affidavits-Exhibits	11 - 16
Answering Affidavits-Exhibits.....	17 - 18
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Upon the foregoing papers it is ordered that these motions are determined as follows.

On or about November 9, 2010, Nelly Gonzales (hereinafter Gonzales), the prime tenant, of an apartment at the premises located at 37-31 87th St., Jackson Heights, N.Y. commenced a holdover proceeding in the Housing Part of the Civil Court against Frank Smith. The proceeding was settled in December, 2010 by stipulation in which Frank Smith acknowledged that he is also known as Gerard O'Neill, the plaintiff herein, agreed to vacate the premises on or before February 14, 2011 and consented to the

issuance of a warrant forthwith and execution stayed until February 14, 2011.

Plaintiff commenced the instant action to recover damages claiming illegal and constructive eviction, fraudulent tenancy, negligent maintenance of the building and violations of New York City and New York State Landlord & Tenant Laws and violation of the Fair Housing Act (42 USCA §3600 et seq).

The complaint alleges the following facts. The plaintiff was evicted by court order on February 14, 2011 as roommate at 37-31 87th St., Corona, N.Y., 3rd floor. Nellie Gonzales defendant/prime tenant negotiated the tenancy. Charles Zolot, Esq represented Gonzales and Chen in the eviction proceeding. Chen, the owner of the premises, lives on the first floor knew of the tenancy and encouraged the eviction. There are four apartments in the premises and Multiple Dwelling Law requires that it be registered as a multiple dwelling. Zolot signed the Holdover Petition in which he stated that the premises are a two family dwelling. The defendant, Jonathan Gonzales, Gonzales' brother also resided in the apartment and acted as interpreter for Gonzales regarding complaints of a gas leak. Gonzales' sister, whose name is claimed to be unknown, made misleading statements and threats of reporting plaintiff as a sex offender to the police. Christian/Filipe became the prime tenant after Gonzales abandoned the apartment admitted not reporting bedbug infestation to Cheng. The plaintiff twice reported the bedbug infestation to Cheng. The plaintiff sustained COPD from smoke inhalation from a kitchen fire.

The defendants, Chen moves pursuant to CPLR 3211(a)(1) and (7) and Zolot separately moves pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as it is asserted against the movants.

When deciding a motion to dismiss the complaint pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; Kraut v. City of New York, 85 AD3d 979, 980 [2011]). However, bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence, are entitled to such consideration (see Gershon v. Goldberg, 30 AD3d 372 [2006]; O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp., 198 AD2d 154, 154 [1993]). The court may consider affidavits submitted in opposition to the motion to remedy any defects in the complaint in its consideration of the motion to dismiss (Rovello v. Orofino Realty Co., 40 NY2d 633, 635 [1976];

see Fay Estates v. Toys "R" Us, Inc., 22 AD3d 712 [2005]; McGuire v. Sterling Doubleday Enterprises, L.P., 19 AD3d 660, 661 [2005], lv denied 7 NY3d 701 [2006]).

To obtain a dismissal pursuant to CPLR 3211(a)(1), a defense founded upon documentary evidence, the documentary evidence must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83, 87 [1994]). To qualify as 'documentary evidence,' the document must be unambiguous, authentic, and undeniable (Granada Condominium III Assn. v. Palomino, 78 AD3d 996, 996 [2010]; Fontanetta v. John Doe 1, 73 AD3d 78, 83 [2010]). Affidavits are not considered 'documentary evidence' within the meaning of CPLR 3211(a)(1) see Granada Condominium III Assn. v. Palomino, 78 AD3d at 997; Berger v. Temple Beth-El of Great Neck, 303 AD2d 346 [2003]).

The defendant, Chen's, motion to dismiss the complaint insofar as it is asserted against him is denied insofar as the complaint alleges a cause of action for negligent maintenance, and granted as to the causes of action for illegal and constructive eviction, fraudulent tenancy, breach of the New York State and New York City landlord and tenant laws and the Fair Housing Act, which are dismissed.

The Fair Housing Act (see 42 USCA §3600 et seq.) does not apply to the premises or to the plaintiff's tenancy (see 42 USCA § 3603[b][2]).

Chen contends that he had no landlord tenant relationship with petitioner, that the tenant of the apartment was Nelly Gonzales and that he took no action to remove the plaintiff from the premises. In support, Chen submitted as documentary evidence a copy of the deed to the property, a copy of a lease between "Nelly Beatriz" as the tenant and Liu Mei Xian as landlord, the thirty day notice of termination together with the affidavit of service upon Frank Smith, the Notice of Petition and Holdover Petition and the Stipulation settling the holdover proceeding. It is noted that although the lease names "Nelly Beatriz" as tenant it was executed by Nelly Gonzales. Chen's affidavit was not considered since it is not documentary evidence within the meaning of CPLR 3211(a)(1) (see Granada Condominium III Assn. v. Palomino, supra; Berger v. Temple Beth-El of Great Neck, supra).

Although the plaintiff submitted opposition to the motion, it could not serve to supplement the complaint since it was not in affidavit form (see CPLR 2106; Grasso v. Angerami, 79 NY2d

813, 814-815 [1991]). In any event, plaintiff's opposition contains arguments as to the merit of his claims rather than allegations of fact.

The factual allegations in the complaint together with the defendant's documentary evidence conclusively demonstrate that plaintiff was a subtenant of Gonzales and that no landlord-tenant relationship existed between Chen, or his wife Liu Mei Xian, and the plaintiff has no cause of action against Chen for illegal or constructive eviction, fraudulent tenancy or for breach of the warranty of habitability, which is the only statutory violation discernable from the factual allegations. A landlord-tenant relationship is created by contract, either express or implied. Stern v. Equitable Trust Co., 238 NY 267 [1924]). A sublease is a transfer by a tenant of a part of her estate or interest in the leased premises (see BLF Realty Holding Corp. v. Kasher, 299 AD2d 87 [2002]; Tiller v. Shuboney, 2009, 26 Misc.3d 727 [2009]). Plaintiff became a roommate/sublessee of a portion of the subject apartment pursuant to an oral sublease with Gonzales, the prime tenant, and there is no claim of any lease or other contract as between Chen, or his wife, and plaintiff (see McCarthy v. Board of Mgrs. of Bromley Condominium, 271 AD2d 247 [2000]; Wright v. Catcendix Corp., 248 AD2d 186 [1998]).

However, a cause of action for negligence does not depend on the existence of an underlying contractual or landlord-tenant relationship. Although poorly drafted, the complaint adequately pleads a cause of action against Chen as an owner of the property for negligent maintenance of the premises (see Wright v. Catcendix Corp., supra).

The defendant's Zolot's, cross-motion to dismiss the complaint insofar as it is asserted against him is granted. Even affording the complaint a liberal construction, the complaint fails to state any cognizable claim as against defendant Zolot. Zolot, as attorney for Gonzales in the holdover proceeding, verified the Notice of Petition and Petition and the allegation that the premises were a two family dwelling was based "upon information and belief". Verification by the petitioner's attorney and allegations based upon information and belief are permitted pursuant to Real Property Actions and Proceedings Law (RPAPL) RPAPL 741. There are no other allegations in the complaint as against Zoot.

The plaintiff's claim that the Housing Part lacked jurisdiction to grant possession because the premises were in violation of the multiple dwelling law does not state a claim for illegal eviction. Even assuming that the allegation in the

Petition that the subject premises is not a multiple dwelling is erroneous, the Housing Part has subject matter jurisdiction to grant a final judgment of possession (see Czerwinski v. Hayes, 8 Misc.3d 89 [2nd Dept., App. Term 2005]; Chan v. Adossa, 195 Misc. 2d 590 [2nd Dept., App. Term, 2003]; Chan v. Kormendi 118 Misc.2d 1026 [Civ Ct., 1983]). In the instant case, the plaintiff consented to vacate the premises as well as to the issuance of a warrant of eviction apparently without asserting any defense to the proceeding.

Dated: January 13, 2012
D# 47

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J.S.C.