

**235 W 71 Units LLC v Zeballos**

2014 NY Slip Op 30202(U)

January 22, 2014

Sup Ct, New York County

Docket Number: 157466/2013

Judge: Eileen A. Rakower

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# SUPREME COURT OF THE STATE OF NEW YORK

## NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 157466/2013  
 235 W 71 UNITS LLC AS  
 vs  
 ZEBALLOS, MARIA ARIAS  
 Sequence Number : 001  
 DISMISS

PART 15

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 3

Replying Affidavits \_\_\_\_\_ No(s). 4

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 1/22/2014

 \_\_\_\_\_, J.S.C.

**HON. EILEEN A. RAKOWER**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
235 W 71 UNITS LLC, as successor in interest to Index No.  
WEST 71<sup>ST</sup> DEVELOPMENT, LLC,  
Plaintiffs,

157466/2013

**DECISION  
and ORDER**

- v -

Mot. Seq. 1

MARIA ARIAS ZEBALLOS  
"JOHN DOE" and/or "JANE DOE"

Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff 235 W 71<sup>st</sup> Units, LLC, as successor in interest to 235 West 71<sup>st</sup> Development LLC ("Plaintiff"), brings this action against defendant Maria Arias Zeballos ("Defendant" or "Zeballos") for breach of the parties' lease agreement based on non primary residence. The Complaint seeks an Order granting Plaintiff judgment of ejectment from the premises, a writ of assistance to remove Zeballos and defendants "John Doe" and "Jane Doe" from the subject premises, and attorneys' fees.

The Verified Complaint alleges that Plaintiff is the owner of the property located at 235 West 71<sup>st</sup> Street, Apartment #8-C a/k/a Apartment #83, New York, New York 10023 ("the Premises"), and that Zeballos is the tenant of the premises. It alleges that the premises are not subject to the New York City Emergency Housing Rent Law or the Rent Stabilization Law of 1969 as amended and the building is a multiple dwelling and currently registered with the HPD.

The Verified Complaint alleges that on or about June 10, 2006, Zeballos entered into an agreement with Plaintiff's predecessor pursuant to which Zeballos agreed to reside in the premises as her primary residence, and Zeballos breached

that agreement by not occupying the premises as her primary residence, not maintaining an “ongoing, substantial, physical nexus with the premises for actual living purposes,” and “has not resided in the premises for at least 183 days in the last year and other years in the last five years.” The Verified Complaint further alleges that on or about April 29, 2013, Zeballos was served with a Notice of Landlord’s Intention to Commence Proceeding to Recover Housing Accommodations Based on Non-Primary Residence, which demanded Zeballos to quit, vacate and surrender the premises on before July 31, 2013, and that Zeballos failed to vacate the premises and continues in possession of the premises. Based on these allegations, Plaintiff seeks a judgment of ejectment from the premises, a writ of assistance to remove Zeballos and defendants “John Doe” and “Jane Doe” from the subject premises, and attorneys’ fees.

Presently before the Court is Zeballos’ motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7). Plaintiffs oppose.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Zeballos submits an affidavit, which annexes a copy of the 2008 buyout/relocation agreement and lease Agreement executed between Plaintiff's predecessor and Zeballos on June 10, 2008 relating to the subject apartment, a copy of a 2009-2011 lease renewal, and a copy of the 2011-2013 lease renewal. In the 2008 buyout/relocation Agreement, Zeballos, who had resided in Apt 54 in the Building, agreed to move to Apt. 8C in the Building upon payment of a \$225,000 renovation payment and other terms.

Paragraph 5 of the 2008 buyout/relocation Agreement states, in relevant part:

Tenant shall be a "Free Market" tenant. Notwithstanding the foregoing, Landlord and Tenant agree that with respect to the percentage increase of rent only, Tenant's percentage increase, shall be governed by the applicable laws governing Rent Stabilization tenants. Tenant's tenancy shall be for the duration of Tenant's life. There will be no right of survivorship. Landlord shall renew the Lease either annually or every two (2) years at the election of the Tenant. Tenant may surrender the Lease and her rights to the Premises at any time without liability. Tenant's son may continue to reside in the Premises in Tenant's absence provided Tenant maintains the Premises as her Primary Residence, as such term is defined in the Rent Stabilization Code and Law."

Paragraph 23 of the 2008 Lease Agreement states, in relevant part,

A Landlord must give Tenant written notice of default stating the type of default. The following are defaults and must be cured by Tenant within the time stated: (1) Failure to pay rent or added rent on time, 3 days. . . (5) Failure to comply with any other term or Rule in the Lease, 10 days. If Tenant fails to cure the default in the time stated, Landlord may cancel the Lease by giving Tenant a cancellation notice. The cancellation notice will state the date the Term will end which may be no less than 10 days after the date of this notice.

Zeballos avers that she has used the subject apartment as her primary residence, but that nonetheless, the June 2008 Agreement, which is binding on Plaintiff, “gives plaintiff no grounds for maintaining this action or for refusing to offer me a renewal lease on the grounds stated in the complaint or in the April 25, 2013 Notice. The landlord’s obligation to ‘renew the Lease either annually or every (2) years at the election of the tenant’ derives solely from the provisions of Paragraph 5 of the June 10, 2008 Agreement, and is an unconditional obligation for the duration of my life.” Zeballos further contends that the April 25, 2013 Notice was insufficient under the 2008 Lease Agreement, which requires the landlord to serve a notice of default affording Zeballos a ten-day period in which to begin to cure a default and no such notice to cure was served in the instant case.

Plaintiff, in its opposition papers, contends that the 2008 buyout/relocation Agreement entered between the parties, supplements the Lease and Rider and controls in the case of conflict, provides that the issue of Defendant’s primary residence in the Apartment is subject to the “Rent Stabilization Code and Law” and therefore the April 25, 2013 Notice was sufficient.

Accepting Plaintiff’s allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff’s complaint adequately plead a cognizable claim for breach of the parties’ agreement. Furthermore, Defendant’s documentary evidence does not flatly contradict Plaintiff’s complaint and does not conclusively establish a defense to the asserted claim as a matter of law. As such, dismissal at this juncture is not warranted.


Wherefore, it is hereby

ORDERED that Defendant’s motion is denied; and it is further

ORDERED that Defendant shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 22, 2014



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HON. EILEEN A. RAKSYLER

Check one: FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE