

**Tantaro v Common Ground Community Hous. Dev.
Fund, Inc.**

2015 NY Slip Op 30379(U)

March 17, 2015

Supreme Court, New York County

Docket Number: 152701/2013

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
RACHEL TANTARO,

Index Number: 152701/2013

Plaintiff,

Sequence Number: 002

- against -

Decision and Order

COMMON GROUND COMMUNITY HOUSING
DEVELOPMENT FUND, INC. and ALLIEDBARTON
SECURITY SERVICES LLC,

Defendants.
-----X

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5 were used on defendant Common Ground Housing Development Fund, Inc.'s motion, and defendant AlliedBarton Security Services LLC's cross-motion, both pursuant to CPLR 3212, for summary judgment dismissing the complaint:

Papers Numbered:

Notice of Motion - Affidavit - Affirmation - Exhibits	1
Notice of Cross-Motion - Affirmation - Exhibits	2
Affirmation in Opposition to Motion and Cross-Motion	3
Reply Affirmation in Further Support of Motion	4
Reply Affirmation in Further Support of Cross-Motion	5

Upon the foregoing papers, the motion and cross-motion for summary judgment dismissing the complaint are granted.

Preliminary Statement

This case presents the question of whether, under New York's intricate and interwoven statutes, regulations and rules governing possession of real property, plaintiff, who consistently visited her boyfriend, a rent-stabilized tenant in a low-income housing building, is afforded the same protections against "unlawful eviction" as are "tenants," "permanent tenants" and "occupants," as those terms are defined the Real Property Actions and Proceedings Law ("RPAPL"), the Rent Stabilization Code (9 NYCRR § 2500 et seq) ("RSC"), and the New York City Administrative Code ("Admin. Code").

Background

In this action, plaintiff Rachel Tantaro claims that on several occasions between March and October 2012, defendants Common Ground Community Housing Development Fund ("Common Ground") and AlliedBarton Security Services LLC ("AlliedBarton") unlawfully evicted her from Apartment 109 (the "Apartment") at the premises located at 255 West 43rd Street, New York,

New York (the "Building"), where, she claims, she resided with her boyfriend/fiancé, Alfred Guglielmo ("Guglielmo"), who was the tenant of the Apartment as of July 2007, starting in March 2011. Common Ground is the owner of the Building which provides housing to low-income tenants pursuant to certain Regulatory Agreements with the New York City Department of Housing Preservation and Development ("HPD"). AlliedBarton provided 24 hour round the clock security and fire safety services at the Building pursuant to "Security Officer Service Agreements."

The complaint, filed on March 22, 2013, alleges that plaintiff was a "permanent resident" and "occupant" of the Apartment within the meaning of the RPAPL, RSC and Admin. Code, entitling her to notice and legal process prior to her alleged evictions and prohibiting defendants from harassing her. The complaint alleges that plaintiff occupied the Apartment for thirty (30) consecutive days and that she was "unlawfully, wrongfully and illegally evicted" therefrom by the defendants on "March 26, 2012; March 27, 2012; April 9, 2012; May 23, 2012; June 26, 2012; July 5, 2012; August 3, 2012; September 5, 2012; and October 28, 2012." The complaint asserts seven causes of action, as follows: (1) treble damages for unlawful eviction, pursuant to RPAPL § 853, against Common Ground and AlliedBarton (first and second causes of action); (2) damages for unlawful eviction pursuant to RPAPL § 711, Admin. Code § 26-521, and the RSC (9 NYCRR § 2520.6(j) and 9 NYCRR § 2524.1), against Common Ground and AlliedBarton (third and fourth causes of action); (3) intentional infliction of emotional distress against AlliedBarton (fifth cause of action); (4) negligent hiring, training, retention and supervision against AlliedBarton (sixth cause of action); and (5) damages for harassment under 9 NYCRR § 2525.5, Local Law 7 (The New York City Tenant Protection Act), Admin. Code § 27-2004 and § 27-2115, against Common Ground and AlliedBarton (seventh cause of action).

In its answer, Common Ground set forth a "general denial"; raised affirmative defenses, including failure to state a cause of action and lack of standing; and asserted a counterclaim for use and occupancy of the Apartment from October 2012 through May 2013. Similarly, AlliedBarton denied the material allegations of the complaint and raised various affirmative defenses, including failure to state a cause of action and lack of standing. Thereafter, the parties engaged in discovery, including depositions.

Common Ground now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The motion is supported by, inter alia, the affidavit of Felix Nnorom, Common Ground's Assistant Director of Security for the Building ("Nnorom Aff."); the pleadings and pertinent portions of the parties' deposition transcripts herein; litigation documents from Common Ground's licensee holdover proceeding against plaintiff; the "Regulatory Agreement" between Common Ground and HPD for the Building; the rent-stabilized lease, dated July 2, 2007, between Common Ground and Guglielmo for the Apartment (the "Lease") and subsequent renewal leases; and documents generated during and as a result of Common Ground's efforts to restrict plaintiff from the Building. In the main, Common Ground argues that, as demonstrated by the Lease, plaintiff's deposition testimony, Guglielmo's Section 8 household income certifications and other documents, there are no questions of fact and, as a matter of law, plaintiff lacks standing to sue because she was merely a visitor/licensee of Guglielmo, and was never a "tenant" of the Apartment in her own right, and therefore is not entitled to relief under RPAPL §§ 711 and 853, Admin. Code § 26-521, 9 NYCRR § 2520.6(j) and 9 NYCRR § 2524.1.

Common Ground also argues that plaintiff's claim for damages as a result of alleged harassment under Local Law 7 (Admin. Code § 27-2004 and § 27-2115) and 9 NYCRR § 2525.5, fails because: (a) plaintiff, as a licensee, lacks standing to sue for damages under these regulations; (b) the regulations provide only for fines to be paid to the City of New York and do not afford an individual, like plaintiff, with a private right to collect damages; (c) Common Ground's actions in restricting plaintiff from the Building were taken to enforce its visitor policy, and not to cause vacatur or surrender of the Apartment; and (d) Common Ground has not engaged in any of the conduct proscribed in Admin. Code § 27-2004(a)(48).

AlliedBarton adopts and incorporates Common Ground's arguments in support of its request for dismissal of the unlawful eviction and harassment causes of action asserted against it under the RPAPL, RSC and Admin. Code (the second, fourth and seventh causes of action). AlliedBarton also argues that: (a) it cannot be held liable for any alleged evictions because it is not the owner or landlord of the Building; (b) the fifth cause of action for intentional infliction of emotional distress must be dismissed because plaintiff failed to allege or produce any discovery demonstrating "extreme and outrageous conduct" by defendants; and (c) the sixth cause of action for negligent hiring, training, retention and supervision must be dismissed because AlliedBarton's security guards were acting within the scope of their employment, as demonstrated by the "Security Officer Service Agreements" and the "Security Department Memo" issued by Common Ground that specifically addressed how to handle plaintiff's attempts to enter the Building without the tenant, Guglielmo.

In opposition to the motion and cross-motion, plaintiff submits the affirmation of her attorney (consisting of 53 pages containing facts and law), to which is annexed the complete transcripts of the parties' depositions; her bill of particulars; NYPD incident reports; transcript of proceedings in Housing Court; the 1991 Regulatory Agreement between Common Ground and HPD for the Building; the DOB property profile for the Building; DHCR Registration Information for the Apartment; expert witness disclosure; and the affidavit of Arnold Wachtel, sworn to on September 14, 2014, who attests that he witnessed plaintiffs' March 26, 2012 eviction from the Apartment. Plaintiff requests that the Court "search the record" and grant summary judgment in her favor upon the grounds that all of the documents submitted on the motions establish, as a matter of law, that she is entitled to protection from unlawful eviction under RPAPL § 711 and Admin. Code § 26-521 because: (a) the building in which the Apartment is located is a single room occupancy hotel ("hotel"), which plaintiff "lawfully occupied" for thirty (30) consecutive days and requested a lease therefor; (b) plaintiff moved into the Apartment in March of 2011 with Guglielmo, the "tenant of record," and made it her "permanent residence"; and (c) Common Ground "acquiesced" in plaintiff's occupancy of the Apartment for one year prior to any attempts to evict her therefrom. Plaintiff also argues that the complete transcript of her two-day deposition, as well as the affidavit of Wachtel and the NYPD incident reports, establish that she was "repeatedly subjected to unpredictable evictions, at all hours of the night," which "affected her both physically and emotionally." Alternatively, plaintiff argues that there are multiple issues of fact about whether the Building is a hotel or an SRO and, therefore, whether defendants could engage in "self-help" in evicting plaintiff from the Apartment, precluding summary judgment dismissing the complaint.

Plaintiff did not address or dispute Common Ground's showing that she has no private right of action for damages under the harassment statutes asserted in the seventh cause of action (9

NYCRR § 2525.5 and Admin. Code § 27-2004 and § 27-2115). Nor did plaintiff address or dispute AlliedBarton's showing that the fifth cause of action for intentional infliction of emotional distress, and the sixth cause of action for negligent hiring, training, retention and supervision, should be dismissed.

In reply, Common Ground argues that: (1) plaintiff failed to refute its showing that, as a mere licensee of Guglielmo, and not a tenant or occupant of a hotel, she has no cause of action for alleged unlawful eviction under RPAPI §§ 711 and 853, Admin. Code § 26-251 or 9 NYCRR §§ 2520.6 and 2524.1, entitling it to summary judgment on the first and third causes of action; (2) the cases cited by plaintiff in support of her claims under the RPAPL and regulations are inapposite; and (3) the seventh cause of action for harassment and attorneys fees should be dismissed for plaintiff's failure to oppose that request. Common Ground also argues that even if plaintiff was improperly denied access to the Apartment, the alleged lockouts lasted "a matter of hours," and do not entitle plaintiff to treble damages under RPAPL § 853. AlliedBarton argues that the fifth and sixth causes of action should be dismissed because plaintiff failed to oppose dismissal, and otherwise reiterates its arguments in support of the cross-motion.

Discussion

This Court's function on the instant motions for summary judgment is issue finding, not issue determination. See Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Because summary judgment is a drastic remedy, it should not be granted where triable issues of fact exist, even if such issues are only "arguable" or "debatable." See Sillman v Twentieth Century-Fox Film Corp., *supra*; Stone v Goodson, 8 NY2d 8, 12-13 (1960) ("It now seems well established that if the issue is fairly debatable a motion for summary judgment must be denied."). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim ... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

Here, plaintiff's case rises or falls on whether she belongs to one of the classes of persons entitled to protection from "unlawful eviction" under the RPAPL, RSC and Admin. Code. Thus, as a threshold matter, plaintiff must be a "tenant," "permanent tenant," or "occupant" of the Apartment in order to sustain causes of action for unlawful eviction and harassment under the statute, regulations and rules. If plaintiff is not a "tenant," "permanent tenant" or "occupant," she is not entitled to relief as a matter of law, in which case the Court need not address the issue of whether Common Ground's alleged conduct amounted to unlawful eviction or harassment.

Plaintiff failed to refute AlliedBarton's showing that it did not own the Building, was not as an "owner" or landlord within the meaning of the RPAPL, RSC or Admin. Code, and, therefore, could not be held liable to plaintiff thereunder. AlliedBarton merely provided security services to the Building and followed Common Ground's policies, procedures and directions. Accordingly, the second and fourth causes of action for unlawful eviction, pursuant to RPAPL §§ 853, 711, 9 NYCRR § 2524.1 and Admin. Code § 26-521, as against AlliedBarton must be dismissed.

Common Ground has met its burden of establishing that there are no questions of fact and, as a matter of law, plaintiff is neither a “tenant,” “permanent tenant” nor “occupant” of the Apartment within the meaning of the RPAPL, RSC and Admin. Code. The proof demonstrates that plaintiff was never a “tenant” of the Apartment within the meaning of the RSC, which defines tenant as “any person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use or occupancy of a housing accommodation.” See 9 NYCRR § 2520.6(d). Plaintiff does not dispute that she never had a lease for the Apartment in her own name or jointly with Guglielmo. The only lease in place for the Apartment during the time of the alleged unlawful evictions was the rent-stabilized Lease between Common Ground and Guglielmo, which identifies Guglielmo – and no other person – as the “Tenant.” The Lease also provides, in pertinent part, that the Apartment “may be occupied by [tenant] alone and no other person.”

Rather, plaintiff’s claim of “tenancy” derives solely from her argument that the Building is a “hotel” and that she “occupied” the Apartment for thirty (30) days or longer and requested a lease, thus making her a “tenant” under RPAPL § 711; a “permanent tenant” under 9 NYCRR § 2520.6(j); and entitling her to protection from unlawful eviction under Admin. Code § 26-521. However, Common Ground established, as a matter of law, that the Building is not a hotel, and plaintiff failed to refute Common Ground’s showing in this regard. The Regulatory Agreements submitted by Common Ground (Exhibit “F” to Common Ground’s main moving papers, and Exhibit “AA” to its reply papers), conclusively establish that, pursuant to a 1991 loan from HPD, the Building was renovated in 1992, during which the single room occupancy hotel units were changed to rent-stabilized “apartments,” with all of the existing residents to be moved from hotel units to “efficiency unit[s] with cooking and sanitary facilities” and all “new tenants” to enter into one-or-two year rent-stabilized leases. Moreover, the building services registration filed with DHCR post-renovations (Common Ground Reply, Exhibit “BB”), and the correct DHCR registration for Apartment “0109” (Id., Exhibit “CC”), do not list “maid service,” “linen service,” or “furniture and furnishings” as services provided to tenants, as required to establish that the Building is a hotel within the meaning of 9 NYCRR § 2521.3. Indeed, plaintiff does not dispute that the Apartment consisted of a “living room[], arranged to be occupied as a unit separate from all other rooms within a dwelling, with lawful sanitary facilities and a lawful...kitchenette for the exclusive use” of Guglielmo, and therefore is an “apartment” within the meaning of Admin. Code § 27-2004(a)(14).

Contrary to plaintiff’s claim, neither the 1991 Regulatory Agreement nor the DHCR apartment registration for Apartment “109,” establish that the Building is a hotel or even creates a question of fact on the issue. Plaintiff’s reliance on statements by Common Ground’s attorney in the holdover proceedings, and witness deposition testimony herein, to establish that the Building is an “SRO” is without merit because a building’s status under the RSC can not be waived or altered by a landlord’s actions. See 546 W. 156th St. HDfC v Smalls, 43 AD3d 7, 12 (1st Dep’t 2007) (“In determining whether a dwelling unit is subject to rent regulation, what the parties think might be its status or even what they agree to be its status is not dispositive; what is controlling is whether the premises meet the statutory criteria for protection under the applicable regulatory statute.”)

Consequently, because the Building is not a hotel, plaintiff was not and could not have been: (1) an “occupant...of one or more rooms in a hotel!” within the meaning of RPAPL § 711; or (2)

a “permanent tenant” of a “housing accommodation located in [a] hotel[.]” within the meaning of 9 NYCRR § 2520.6(j); or (3) an “occupant of a dwelling unit who...has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law” within the meaning of Admin. Code § 26-521(a), as contended. Moreover, the cases that hold that a landlord may not engage in self-help to evict a “permanent tenant” under 9 NYCRR § 2520.6(j) are inapposite because plaintiff was not a “permanent tenant.”

Thus, the record establishes, as a matter of law, that plaintiff was not a “tenant,” “permanent tenant” or “occupant” within the meaning of the statute, regulations and rules, and, therefore, she is not entitled to relief for the alleged unlawful evictions. Indeed, plaintiff failed to refute Common Ground’s showing that at all times from March 2011 through October 2012, plaintiff was a mere “visitor” to the Building, a licensee of Guglielmo, the only tenant and, thus, the only person entitled to possession of the Apartment. Plaintiff did not take issue with Common Ground’s “Visitors Log from 1/1/11 to 5/30/13,” recording her entries and exits from the Building as a “visitor.” Indeed, plaintiff testified at her deposition that tenants had “ID pass[es],” while she had a purported “Access ID Paper.” Plaintiff conveniently ignored Guglielmo’s May 2012 “Visitor Access Request,” in which plaintiff is identified as “visitor [who] will be assisting tenant with household chores while he recovers from back surgery,” and Guglielmo’s “Section 8 Participant Household Summary” forms dated July 5, 2011 and June 27, 2012, which do not list plaintiff as a household member.

Plaintiff’s reliance upon her affidavit submitted in support of her motion for summary judgment in the licensee holdover proceeding, in which she sought “succession rights,” that purportedly demonstrates that she was a “permanent resident” of the Apartment, is unavailing. Plaintiff’s motion was denied and the case settled by written Stipulation, pursuant to which plaintiff vacated the Apartment. Moreover, the undisputed proof in the record shows that plaintiff never paid rent for the Apartment at any time. Plaintiff’s January 2013 payment of one month of use and occupancy in the sum of \$822 was made in exchange for an adjournment of the licensee holdover proceeding and without prejudice, and therefore does not prove that plaintiff was a tenant or occupant.

In view of the foregoing, plaintiff is not entitled to treble damages for alleged unlawful eviction as against Common Ground under RPAPL § 853 because she was not in possession of a valid lease at any time. See *Bozewicz v Nash Metalware Co., Inc.*, 284 AD2d 288, 289 (1st Dep’t 2001) (“The defendants were entitled to summary judgment dismissing so much of the complaint as sought to recover treble damages pursuant to RPAPL 853 on behalf of the plaintiff Peter Bozewicz, a/k/a Piotr Bozewicz, since he was not a party to the lease”). Accordingly, the first cause of action, for treble damages, pursuant to RPAPL § 853, as against Common Ground, must be dismissed.

Additionally, plaintiff is not entitled to damages for unlawful eviction pursuant to RPAPL § 711, 9 NYCRR § 2524.1 or Admin. Code § 26-521(a), because she was not a “tenant,” “permanent tenant” or “lawful occupant” of the Apartment, the classes of persons to which such laws apply. Rather, as established by Common Ground, as a matter of law plaintiff was a mere a licensee who was not entitled to legal process prior to being restricted from the Building, and Common Ground could engage in self-help to restrict plaintiff therefrom. See *P&A Bros. v City of N.Y.*

Dept. of Parks & Recreation, 184 AD2d 267, 268 -269 (1st Dep't 1992) (explaining that "tenants as defined in RPAPL 711 may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected" and that "a servant or licensee acquires no possessory interest in property"); Paulino v Wright, 210 AD2d 171 (1st Dep't 1994) (owners "acted within their statutory rights in ordering the police to remove" illegal occupants who had no property interest in the premises). Accordingly, the third cause of action, for damages for unlawful eviction, pursuant to RPAPL § 711, 9 NYCRR § 2524.1 or Admin. Code § 26-521(a), as against Common Ground must be dismissed.

The issue of whether Common Ground and AlliedBarton's alleged conduct amounted to unlawful eviction or harassment need not be reached in view of this Court's finding that Common Ground was entitled to use self-help; plaintiff failed to raise a question of fact on these issues. Plaintiff's claim as to the alleged March 19, 2012 eviction is barred by the Statute of Limitations, which ran on March 19, 2013, three days prior to the date plaintiff commenced this action. See Gold v Schuster, 264 AD2d 547, 549 (1st Dep't 1999) ("Wrongful eviction' claims are governed by the one-year Statute of Limitations applicable to intentional torts"). Furthermore, the record demonstrates that the alleged "evictions" from March 26 - September 5, 2012 were merely restrictions of plaintiff's access to the Building in accordance with Common Ground's Visitor Policy. Plaintiff did not dispute that the Lease required Guglielmo, as tenant, to "obey all Owner's rules listed in this Lease," including Common Ground's "Visitor's Policy," which provides in pertinent part:

All visitors must sign in and present a valid photo ID at the Security desk. Tenants must come to the lobby to receive their guests. NO VISITOR MAY BE IN THE BUILDING UNESCORTED. Security reserves that right to ask visitor to show visitor's pass at any time. Any visitor who stays more than one night must receive the Owner's consent. Prior to such visits, tenants are required to submit a VISITOR REQUEST FORM to Management for approval. No visitor may stay for more than fourteen (14) days consecutively. Visitors are required to observe the same rules that apply to residents. If any guest violates the house rules, creates a nuisance or is considered to be breaking the criminal law, building management may ask the visitor to leave the building or call the police. To prevent such circumstances from recurring, Management may also deny the visitor access to the building.

The Court notes in passing that plaintiff also did not dispute that she and Guglielmo were involved in fights and/or altercations within the Apartment in March of 2012, including one on March 19, 2012 during which plaintiff bit Guglielmo, who then requested AlliedBarton to call the police. As a result of the March 2012 disturbances, Common Ground, in accordance with its policy, restricted plaintiff from the Building for 21 days. Plaintiff also did not dispute that her June 2012 restriction from the Building resulted from an Order of Protection being issued against her and in favor of Guglielmo. The Court also notes that when Common Ground actually sought plaintiff's eviction from the Apartment in November of 2012, following the death of Guglielmo,

it did so by way of a licensee holdover proceeding against plaintiff, which ultimately resulted in her vacating the Apartment (thus a plausible argument could be made that plaintiff's claims are barred by waiver and/or estoppel).

Plaintiff failed to refute AlliedBarton's showing that: (1) the fifth cause of action, for intentional infliction of emotional distress, must be dismissed because plaintiff failed to allege or produce any discovery demonstrating "extreme and outrageous conduct" by defendants, see Howell v New York Post Co., Inc., 81 NY2d 115 (1993) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"); and (2) the sixth cause of action, for negligent hiring, training, retention and supervision, must be dismissed because AlliedBarton's security guards were acting within the scope of their employment, as demonstrated by the "Security Officer Service Agreements" and the "Security Department Memo" issued by Common Ground, which specifically addressed how to handle plaintiff's attempts to enter the Building without the tenant, Guglielmo, see Karoon v New York City Transit Authority, 241 AD2d 323, 324 (1st Dep't 1997) ("Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention"), and plaintiff did not otherwise show that any AlliedBarton knew that its security guards engaged in or had a propensity for the alleged harassing conduct. See Ronessa H. v City of New York, 101 AD3d 947, 948-949 (2nd Dep't 2012) ("A necessary element of a cause of action alleging negligent retention or negligent supervision is that the "employer knew or should have known of the employee's propensity for the conduct which caused the injury"). Accordingly, the fifth and sixth causes of action as against AlliedBarton must be dismissed.


Plaintiff admits that she is not entitled to damages for alleged harassment under Admin. Code § 26-521, and otherwise failed to refute Common Ground's showing that there is no private right of action for damages under the harassing statutes – 9 NYCRR § 2525.5 and Admin. Code § 27-2004 and § 27-2115 – as asserted in the seventh cause of action. Accordingly, the seventh cause of action as against Common Ground and AlliedBarton must be dismissed.

The Court has considered plaintiff's other arguments and has found them to be without merit.

Conclusion

Motion and cross-motion for summary judgment granted. The Clerk is hereby directed to enter judgment dismissing the complaint.

Dated: March 17, 2015



 Arthur F. Engoron, J.S.C.