Tantaro v Common Ground Community Hous. Dev. Fund, Inc.
2015 NY Slip Op 31379(U)
July 27, 2015
Supreme Court, New York County
Docket Number: 152701/2013
Judge: Arthur F. Engoron

[* 1]

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

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RACHEL TANTARO,

Plaintiff,

- against -

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

Defendants.

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Index Number: 152701/2013

Sequence Number: 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on plaintiff's motion to reargue this Court's Decision and Order dated March 17, 2015, which granted defendants' separate motions for summary judgment:

	Papers Numbered:
Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition (Common Ground)	2
Affirmation in Opposition (Allied Barton)	3
Reply Affirmation	4

Upon the foregoing papers, and after oral argument heard on July 20, 2015, the Court grants re-argument, and upon re-argument, adheres to its prior determination.

Plaintiff has failed to demonstrate how the Court overlooked or misapprehended any pertinent facts or controlling law in dismissing her claims for "unlawful eviction" upon the ground that she was a "licensee" of the subject rent-stabilized apartment of her fiancé, Alfred Guglielmo. Indeed, in large measure, plaintiff's instant motion improperly re-asserts her arguments made on the prior motions. See Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 (1st Dep't 1984) (motion to reargue may not "serve as a vehicle for an unsuccessful party to argue once again the very questions decided").

Plaintiff has failed to identify any facts offered on the initial motions, which compel a finding that she was a lawful "occupant" of a rooming house or hotel within the meaning RPAPL § 711, or a "permanent tenant" of a hotel within the meaning of 9 NYCRR 2520.6(j), as a matter of law, or even creating a triable question of material fact on the issue. Plaintiff does not now, nor did on the initial motions, dispute that: (1) Guglielmo resided in an "apartment" within the meaning of Admin. Code § 27-2004(a)(14), and not a "rooming unit" (i.e., one that does not have both "lawful sanitary facilities and lawful cooking facilities") as defined in Admin. Code § 27-2004(a)(15) and as found in single room occupancy residences; (2) Guglielmo did not receive

maid or linen service, furniture or furnishings, as is required for rooms in a hotel (See 9 NYCRR § 2521.3), at any time during his tenancy, which commenced in 2007; (3) Guglielmo had a rent-stabilized lease for the apartment throughout his tenancy; (4) Guglielmo's rent-stabilized lease provided that the apartment "may be occupied by [tenant] alone and no other person"; (5) during the period of plaintiff's alleged "unlawful evictions" plaintiff did not possess a Tenant ID Pass and instead consistently signed in as a "Visitor" to the building; (6) in May of 2012, during the time of the alleged "unlawful evictions" – when plaintiff had notice that Common Ground considered her to be a *visitor only* with no occupancy or tenancy rights – Guglielmo submitted a "Visitor Access Request" identifying plaintiff as a visitor; and (7) Guglielmo never identified plaintiff as a household member on his Section 8 income verification forms, including on the form dated June 27, 2012.

Indeed, in apparent recognition that she had no valid legal claim of occupancy or tenancy, plaintiff consented to *voluntarily vacate* the apartment in resolution of a prior Licensee Holdover Proceeding. Pursuant to the So-Ordered, two-attorney Stipulation of Settlement therein, plaintiff expressly consented to entry of a "final judgment of possession" against her, agreed to vacate the apartment on or before April 30, 2013, and acknowledged that she "is restricted from gym & other CUCS operated facilities." Plaintiff did not preserve and instead abandoned her purported tenancy rights, whether as a "permanent tenant" or "occupant." Thus, plaintiff arguably waived any claim for monetary damages, which is all she seeks herein.

In the face of the overwhelming, undisputed proof that plaintiff was a mere "licensee" with no occupancy or tenancy rights to the apartment, plaintiff's deposition testimony that she resided with Guglielmo in the apartment for a year prior to the alleged evictions and printouts of her 911 calls to the police during the evictions – all of which the Court considered on the prior motions – are insufficient to create a question of fact on this issue. The opinion of plaintiff's expert witness, Joseph Costales, that plaintiff "lawfully occupied" the apartment and was entitled to protection "from being evicted without court proceedings," is of no probative value. While Mr. Costales may be competent to testify as to the contents of the NYC Police Department Patrol Guide and his own experience as a police officer, he is not the court and, thus, not competent to render a legal conclusion as to plaintiff's legal status under the RPAPL, Rent Stabilization Code and Administrative Law.

On the law, plaintiff does not allege that she is an "occupant" within the meaning of 9 NYCRR § 2520.6(l), which, referring to RPL § 235-f, defines an occupant as a "person, other than a tenant or member of a tenant's immediate family, occupying a premises with the consent of the tenant." Rather, plaintiff relies exclusively on the definition of "occupant" set forth in of a RPAPL § 711, that is to say an occupant of a rooming house or hotel "who has been in possession for thirty consecutive days or longer." This Court's review of cases in which the courts found "permanent tenant" status under 9 NYCRR § 2520.6(j), or "occupant" status under RPAPL § 711, requiring notice and court proceedings prior to eviction, reveal that it applies to a discrete, limited class of people to which plaintiff does not belong – "historically vulnerable and marginalized SRO dwellers." Crossbay Equities LLC v Balzano, 47 Misc.3d 1203(A), 4 (Civil Court New York County 2015). Moreover, the cases demonstrate that the permanent tenant or occupant had a direct relationship with the landlord, who consented to the permanent tenant or occupant taking possession of the premises in the first instance. See generally Branic Intl. Realty

Corp. v Pitt, 106 AD3d 178 (1st Dep't 2013) (respondent who continuously resided in SRO more than six months pursuant to agreement between SRO and NYC Human Resources Administration ["HRA"], which paid SRO nightly rate on behalf of respondent, was "permanent tenant" under 9 NYCRR § 2520.6(j)), *rev'd*, 24 NY3d 1005 (2014) (reversed and remanded to Appellate Division for dismissal, solely as moot, because respondent moved out of SRO); Kanti-Savita Realty Corp. v Santiago, 18 Misc.3d 74 (App. Term 2nd Dep't 2007) (SRO tenants were "permanent tenants" because they continuously resided in premises more than six months); Crossbay Equities LLC v Balzano, supra (respondent who continuously resided in SRO more than six months pursuant to agreement between SRO and NYC HRA was "permanent tenant" under 9 NYCRR § 2520.6(j)); Shearin v Back On Track Group, Inc., 46 Misc.3d 910 (Civil Court Kings County 2014) (resident of three-quarter house who resided at premises 97 days with knowledge and consent of owner, illegally evicted as RPAPL § 711 and Admin. Code § 26-521 require special proceeding after person in possession of premises thirty consecutive days); McCormick v Resurrection Homes, 38 Misc.3d 847 (Civil Court Kings County 2012) (RPAPL § 711 and Admin. Code § 26-521 require special proceeding to remove veteran who resided in premises pursuant to housing assistance program more than thirty days). Here, to the contrary, the undisputed proof established that Common Ground had no direct relationship with plaintiff; had no oral or written agreement with plaintiff; and did not consent to plaintiff taking possession of, or residing in, the apartment at any time.

In view of the foregoing, plaintiff's claim that she may rely on Admin. Code § 26-521 to establish that she is an "occupant" who is protected from unlawful evictions, is unavailing. Plaintiff's claim during oral argument that any person who moves into an apartment in New York City automatically obtains "occupant" status under Admin. Code § 26-521 simply by residing there for thirty consecutive days, regardless of the landlord's knowledge of and/or consent to the person's taking possession of the apartment, is unsupported. Plaintiff cites no case which stands for such broad proposition, and, as far as this Court can tell, there is none. Indeed, the cases are to the contrary. See generally Shearin v Back On Track Group, Inc., supra; McCormick v Resurrection Homes, supra. Second, even if plaintiff was an occupant under Admin. Code § 26-521 (and she is not), the statute does not provide plaintiff with a private right of action for damages for unlawful eviction.

For the same reasons, Admin. Code § 26-521 does not provide a means by which AlliedBarton may be held liable for plaintiff's alleged evictions. Additionally, while the statute is not limited, by its express terms, to landlords and owners, the cases which construe it make clear that the person held liable thereunder for attempting to evict a tenant or occupant, had his or her own independent interest in the premises. Indeed, plaintiff relies solely upon People v Goli, 33 Misc.3d 61 (App. Term First Department 2011), a case in which one roommate locked out and evicted another, to support this claim and cites no authority for the proposition that liability for an unlawful eviction may be imposed upon "security guards, doormen ... and superintendents." Plaintiff does not show that the Court overlooked any facts which establish that AlliedBarton had an interest, possessory or otherwise, in the apartment. AlliedBarton was simply an agent for a disclosed principal.

Plaintiff was no more than a "licensee," who was properly restricted from the building pursuant to Common Ground's Visitor Policy. See generally Korelis v Fass, 26 Misc.3d 133(A) (App.

Term 1st Dep't 2010) (judgment after trial dismissing petition seeking restoration to an apartment affirmed, as petitioner "was only a licensee – and therefore had no independent right to possession of the apartment"). Notably, plaintiff takes no issue with Common Ground's Visitor Policy; her apparent claim is that the policy did not apply to her. Plaintiff's argument that the Court misapprehended controlling law in concluding that Common Ground could engage in peaceful self-help to evict plaintiff, a residential "licensee," because it relied on cases involving self-help eviction of commercial licensees, is unavailing. Indeed, appellate authority cited by plaintiff herself makes clear that the common-law remedy of peaceful self-help in evicting non-tenants, who have not established that they are lawful occupants or permanent tenants, applies equally to residential and commercial landlords alike. See Almonte v City of New York, 166 Misc.2d 376-377 (App. Term, 2nd Dep't 1995); see also P&A Bros. v City of N.Y. Dept. of Parks & Recreation, 184 AD2d 267, 268 -269 (1st Dep't 1992) ("non-tenants may be removed summarily so long as it is done without violence"). And plaintiff cites no legal authority to support her apparent claim that the self-help remedy is only available for "squatters," such as those in Paulino v Wright, 210 AD2d 171 (1st Dep't 1994), and not "licensees."

The Court did err in citing Bozewicz v Nash Metalware Co., Inc., 284 AD2d 288, 289 (2nd Dep't 2001), as a First Department case, and hereby amends its prior decision solely to reflect the correct citation. Contrary to plaintiff's claim, however, this typographical error does not change the result – plaintiff, who was not a party to the Guglielmo lease, is not entitled to treble damages under RPAPL § 853. See Bozewicz v Nash Metalware Co., Inc., 284 AD2d at 289 (plaintiff not entitled to treble damages under RPAPL § 853 because he was not party to lease). Plaintiff's reliance on Golonka v Plaza at Latham, 270 AD2d 667 (3rd Dep't 2000) and By The Stem, LLC v Optimum Props., Inc. 20 Misc.3d 54 3 (Civil Court, Kings County 2008), is misplaced as those cases are factually distinguishable. In Golonka the plaintiff seeking RPAPL § 853 damages held fee title to the property; here, plaintiff has no legal or equitable interest in the subject building or apartment. In By The Stem, the court found that the parties had an oral agreement pursuant to which the landlord granted the plaintiff "a license" to use the premises within the meaning of RPAPL § 713 and entitling plaintiff to notice prior to its eviction – in other words, the plaintiff therein had some possessory interest in the property; here, however, there is no proof that Common Ground granted plaintiff, whether orally or in writing, a license to reside in the apartment. Plaintiff's argument that Common Ground had to establish that it was a "special class of housing" prior to allegedly evicting plaintiff "without due process," is similarly without merit. McCormick v Resurrection Homes, supra, upon which plaintiff relies to support this claim, is inapposite, as there was a landlord-tenant relationship between the parties and the Court determined that a provision in the resident agreement permitting self-help was unenforceable.

Nor did the Court disregard plaintiff's argument on the initial motions that Common Ground was required to first terminate Guglielmo's tenancy before attempting to evict her. Rather, the Court considered the argument, but, upon finding that plaintiff was a mere non-tenant "licensee" against whom Common Ground could use non-violent self-help, rejected it. See P&A Bros. v City of N.Y. Dept. of Parks & Recreation, supra, 184 AD2d at 268 ("RPAPL 713 merely permits a special proceeding as an additional means of effectuating the removal of nontenants, but it does not replace an owner's common-law right to oust an interloper without legal process"). In this Court's considered view, Westway Plaza Assoc. V Doe, 179 AD2d 408 (1st Dep't 1992) and PML I LLC v Ravix, 2008 WL 2078671 (Supreme Court Kings County 2008), which stand for

the proposition that a rent-stabilized tenancy must be terminated before proceeding against a licensee of the rent-stabilized tenant-of-record pursuant to RPAPL § 713, are not offensive to the rule set forth in P&A Bros. Rather, these cases merely explain the procedure an owner/landlord must follow if it chooses to forego self-help and commences a special proceeding to evict a licensee. To the extent that plaintiff is now claiming that Common Ground's November 2012 Licensee Holdover Proceeding against her was somehow defective because Common Ground did not proceed against Guglielmo's estate, plaintiff waived such claim by settling the License Holdover Proceeding and vacating the apartment.

Plaintiff also failed to show any error in the Court's finding that the alleged "evictions" were merely restrictions of plaintiff from the building in accordance with Common Ground policy based upon disputes and disturbances between plaintiff and Guglielmo and an Order of Protection issued in favor of Guglielmo. If plaintiff was properly restricted from the building – and the record demonstrates, unequivocally, that she was – plaintiff has no claim of "unlawful eviction."

Finally, plaintiff has failed to explain how depositions of the AlliedBarton security officers involved in the alleged evictions would provide facts essential to opposing dismissal of her intentional infliction of emotional distress and negligent hiring, training, retention and supervision claims. The parties engaged in substantial discovery, including party depositions, prior to moving for summary judgment, and plaintiff failed to refute defendants' showing, based upon such discovery, that those claims had no validity and should be dismissed.

Conclusion

Motion for re-argument granted and upon re-argument, the Court adheres to its prior determination.

Dated: July 27, 2015

Arthur F. Engoron, J.S.C.