Aurora Assoc., LLC v Hennen
2017 NY Slip Op 30032(U)
January 6, 2017
Supreme Court, New York County
Docket Number: 154644/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
---X
AURORA ASSOCIATES, LLC,

Plaintiff

v

MARK HENNEN and PIANO MAGIC COMPANY,

Defendant.
---X

Index No. 154644/2015

DECISION AND ORDER

MOT SEQ 002

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, for ejectment, the plaintiff landlord moves pursuant to CPLR 3212 for summary judgment on the third cause of action, which seeks a writ of ejectment, and dismissing the defendants' 10 affirmative defenses and counterclaim or, in the alternative, pursuant to CPLR 3211(b) striking those affirmative defenses and dismissing the counterclaim. The defendant Mark Hennen, a month-to-month tenant who remained in possession of the subject loft apartment after the expiration of a 1977 lease, cross-moves, together with his business, the defendant Piano Magic Company, for summary judgment dismissing both the third cause of action and the fourth cause of action, which is to recover use and occupancy, or, in the alternative, pursuant to CPLR 3211(a)(7) dismissing those causes of action for failure to state a cause of action. The plaintiff's motion is denied, those branches of the defendants'

cross motion which are for summary judgment dismissing the third and fourth causes of action are granted, and the cross motion is otherwise denied as academic.

II. BACKGROUND

The complaint alleges that, on numerous occasions, the defendants permitted several guests to occupy the subject loft apartment for periods of less than 30 days, charging them therefor at a rate greater than the legal rent, as calculated on a per diem basis and that, as a consequence, the defendants unlawfully operated the apartment as a hotel. The plaintiff seeks a permanent injunction prohibiting the defendants from employing the apartment in that manner, a judgment declaring that such conduct violates the Multiple Dwelling Law, a writ of ejectment, and to recover use and occupancy for the period of time it alleges that the defendants improperly remained in possession of the premises.

The defendants answered the complaint, denying all material allegations of wrongdoing. As affirmative defenses, they assert that the complaint fails to state a cause of action or allege the elements necessary to obtain injunctive relief (affirmative defenses nos. 1 and 2), the action is barred by the doctrines of waiver and unclean hands (affirmative defenses nos. 3 and 4), the cause of action to recover use and occupancy is barred by the plaintiff's failure to comply with the mandatory loft conversion

procedures of Multiple Dwelling Law §§ 285 and 302 (affirmative defense no. 5), the action is barred by the plaintiff's failure to serve a notice to cure or a 30-day notice of termination upon the defendants prior to commencement (affirmative defenses nos. 6 and 7), Hennen remained in possession of and occupied the premises at all times, including when others occupied the premises, and, hence, did not sublet the premises or put the premises to an unlawful use as a hotel (affirmative defenses nos. 8 and 10), and the action is barred by the Roommate Law (Real Property Law § 235-f) (affirmative defense no. 9). The defendant Mark Hennen counterclaims for an award of an attorney's fee.

III. DISCUSSION

A. THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE EJECTMENT CAUSE OF ACTION AND DISMISSING THE AFFIRMATIVE DEFENSES

The plaintiff moves for summary judgment on the ejectment cause of action and dismissing the affirmative defenses and counterclaim. In support of its motion, the plaintiff submits the pleadings, an affidavit of one of its members, a deed, a lease, a printout from the New York City Department of Buildings (DOB) purporting to show a list of each certificate of occupancy (CO) allegedly issued in connection with the subject building, a copy of a CO, advertisements referable to the alleged subletting of the apartment, and a notice of termination of the defendants' tenancy. The plaintiff contends that the defendants advertised

the subject apartment on the website of Airbnb at a per-night rate, several customers who had previously stayed at the apartment on a per-night basis posted reviews of the apartment, and several of its agents and employees witnessed persons who appeared to be tourists coming to and going from the apartment. The plaintiff asserts that it had entered into a lease with the defendants in 1977, and that the defendants violated the terms of their tenancy by operating an unlawful hotel from their apartment, and either subletting or permitting another to occupy the apartment without its consent.

The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the cause of action for ejectment. To establish entitlement to ejectment, the plaintiff must demonstrate that the defendants were in breach of a substantial obligation of their tenancy (see 80 Varick St. Group, L.P. v MacPherson, 102 AD3d 405, 405 [1st Dept. 2013]), and that it timely served them with a notice of termination prior to commencing an action seeking ejectment. See Domen Holding Co. v Aranovich, 1 NY3d 117, 125 (2003).

In the first instance, the plaintiff failed to establish, prima facie, that it timely served a notice of termination. The lease for the subject loft apartment was executed in 1977, and expired in 1982. Where, as here, legalization of the loft for use as a permanent class A multiple dwelling has not been

established, a New York City loft tenant such as Hennen, who remains in possession and pays rent, becomes a month-to-month tenant subject to the provisions of Real Property Law § 232-c. See Lazarus v Flournoy, 28 AD2d 685, 685 (2nd Dept. 1967); Matter of Bonner v Nash, 70 Misc 2d 752, 753 (App Term, 1st Dept. 1972); see also Matter of 27 Jay St., LLC v City of New York, 27 Misc 3d 938, 942 (Sup Ct, N.Y. County 2010)(confirming an NYC Loft Board determination that a loft tenant who remains after the expiration of a lease and pays rent becomes a month-to-month tenant). A month-to-month tenancy governed by Real Property Law § 232-c may only be terminated for breach of a tenant's obligation after a landlord complies with Real Property Law § 232-a, which requires a notice of termination to be served upon that tenant 30 days or more prior to the commencement of an action or proceeding seeking ejectment or eviction. That provision also requires that service of the notice be effected in the same manner as a notice of petition in summary proceeding, that is, by personal service. See Rose v Genesis Real Estate, 101 AD2d 427, 431 (1st Dept. 1984); Mazda Realty Assoc. v Green, 187 Misc 2d 419, 425 (App Term, 1st Dept. 2000); Kiamie-Princess Marion Realty Corp. v Lipton, 20 Misc 3d 423, 424-425 (Civ Ct, N.Y. County 2008). Inasmuch as the plaintiff's submissions do not reveal when or how it served the subject notice of termination upon the defendants, it failed to demonstrate, prima facie, that it satisfied this

condition precedent to the interposition of a cause of action for ejectment. In any event, the defendants raised a triable issue of fact in connection with that issue, as Hennen's asserts in his affidavit that the notice of termination was served by mail.

Nor has the plaintiff shown that the defendants were in breach of a substantial obligation of their tenancy. The plaintiff failed to demonstrate that a CO for a class A multiple dwelling has ever been issued with respect to the subject building, or that the building was anything other than a loft properly characterized as an "interim multiple dwelling" within the meaning of Multiple Dwelling Law § 281(1). Inasmuch as the prohibitions on rentals for fewer than 30 days, as articulated in Multiple Dwelling Law § 4(8) and its implementing regulations, are applicable only to dwelling spaces in class A multiple dwellings, the plaintiff failed to demonstrate that the statutory and regulatory prohibitions are applicable to the subject apartment. (See also Multiple Dwelling Law § 121, effective October 21, 2016, which prohibits the advertising of residential rentals for fewer than 30 days, but only in connection with class A multiple dwellings). In fact, the plaintiff's submissions included only a CO referable to a completely different building, while the DOB list accompanying that CO incorrectly references only the CO for that building, and otherwise indicates that no CO was issued for the subject building or that no image of such a CO

is available. Moreover, although a month-to-month tenancy created by Real Property Law § 232-c, such as the one here, is deemed to continue under the same terms as those set forth in the expired lease (see RLR Realty Corp. v Duane Reade, Inc., ____AD3d____, 2016 NY Slip Op 08119 [1st Dept. 2016]), and the expired 1977 lease purports to prohibit someone other than a named tenant from occupying the subject apartment without the plaintiff's consent, that restriction has been abrogated by the 1983 Roommate Law, which renders such a provision void as against public policy. See Real Property Law § 235-f(7). Hence, the plaintiff cannot even show that the need to obtain such consent was a condition of the defendants' tenancy.

Accordingly, the plaintiff's motion for summary judgment on the third cause of action, which seeks ejectment, must be denied, regardless of the sufficiency of the defendants' opposition papers. For the same reasons, the plaintiff failed to establish its entitlement to summary dismissal or the striking of the defendants' first, second, third, sixth, eighth, and tenth affirmative defenses, or Hennen's counterclaim.

Although the affidavit of the plaintiff's member established the plaintiff's prima facie entitlement to dismissal of the fourth affirmative defense (unclean hands), the defendants, by submitting affidavits of other tenants and its retained architect, as well as Loft Board documents and photographs, raise

triable issues of fact as to whether the plaintiff's 30-year delay in converting the loft to a class A multiple dwelling, in violation of the statutory mandate to effect such conversion (see Jo-Fra Props., Inc. v Bobbe, 81 AD3d 29, 33 [1st Dept. 2010]), bars any claim it has for equitable relief.

In addition, the plaintiff failed to establish its entitlement to dismissal of the fifth affirmative defense, which alleges that its failure to comply with Multiple Dwelling Law §§ 285(1) and 302 bars it from recovery of use and occupancy. Specifically, its submissions do not demonstrate that it took all required statutory measures to legalize the interim multiple dwelling by converting it into a class A multiple dwelling, or took all necessary steps to upgrade fire, electrical, structural, ingress and egress, and other safety features of the building so as to bring it into compliance with the Multiple Dwelling Law, which is a statutory prerequisite to its right to seek an award of use and occupancy. See Multiple Dwelling Law §§ 285(1), 302(1)(b); Jo-Fra Props., Inc. v Bobbe, supra.

The plaintiff also failed to establish its prima facie entitlement to dismissal of the seventh affirmative defense, which alleges that it improperly commenced this action prior to the timely service of a notice to cure any alleged violation of the terms of the tenancy, since it did not establish that it was unnecessary to serve such notice or that it in fact served the

notice. See generally RPAPL 711(1); Matter of Park Summit Realty Corp. v Frank, 56 NY2d 1025, 1026 (1982); 235 W 71 Units LLC v Zeballos, 127 AD3d 489, 490 (1st Dept. 2015).

In addition, the plaintiff failed to establish its entitlement to dismissal of the ninth affirmative defense, which alleges that the Roommate Law (Multiple Dwelling Law § 235-f) prohibits it from enforcing a provision in the expired 1977 lease restricting the occupancy of the apartment solely to Hennen in the absence of its consent. Although the plaintiff made a prima facie showing that persons occupying the apartment for less than periods of 30 days did so for commercial reasons, it did not establish that they were "sublessees," as opposed to simple "occupants" within the meaning of the Multiple Dwelling Law, since it failed to establish that Hennen did not simultaneously occupy the apartment with those persons. It thus did not show that, under the circumstances presented here, Multiple Dwelling Law § 235-f is inapplicable, or that it could therefore enforce the restrictive lease provision. In any event, Hennen asserted in his affidavit that he did in fact possess and occupy the apartment simultaneously with these other occupants, and that, under the particular circumstances of this case, those occupants could thus legally occupy the apartment with him, as permitted by Multiple Dwelling Law § 235-f, without violating any continuing obligations under the expired lease.

B. THE DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT DISMISSING THE EJECTMENT AND USE AND OCCUPANCY CAUSES OF ACTION

In support of their cross motion, the defendants submit floor plans and diagrams of the premises, a deed, an alteration application, photographs, New York City Loft Board orders and registrations, notices of Building Code violations, an order of the New York City Environmental Control Board, a glossary of the New York City Department of Housing Preservation and Development, rent bills, and cancelled rent checks. The defendants also submit an affidavit from Hennen, an affidavit of Salvador Rosillo, another tenant at the plaintiff's building, and an affidavit of the defendants' retained architect, Robert Tan.

The defendants established, prima facie, that, although the plaintiff took certain limited measures to legalize the building by applying to the Loft Board to convert the building from an interim multiple dwelling to a class A multiple dwelling, it never took all necessary measures, and neither finally obtained such approval nor obtained a CO permitting the use of the building as a class A multiple dwelling. The defendants' submission of Loft Board decisions and orders conclusively demonstrates that, as of the date that this action was commenced, the building remained an interim multiple dwelling without a CO. Specifically, the defendants' submissions show that the Loft Board concluded that the building was an interim dwelling and

thus subject to its jurisdiction, the Appellate Division, First Department, confirmed that determination (see Matter of Rosillo v New York City Loft Bd., 260 AD2d 237, 237 [1st Dept. 1999]), and the plaintiff's own numerous Loft Board filings between 1999 and 2015 concede that additional physical alterations remain uncompleted and that more work is required before a conversion may be approved or a CO issued. Since the defendants demonstrated that the prohibition on rentals of less than 30 days only applies to class A multiple dwellings, and does not apply to loft space properly characterized as an interim multiple dwelling within the meaning of Multiple Dwelling Law § 281(1), they established that they were not in violation of any condition of Hennen's month-to-month tenancy. In any event, the defendants also established, prima facie, that the plaintiff did not timely serve a notice of termination upon them prior to the commencement of this action. In addition, the defendants established that, inasmuch as the plaintiff has still not completed the physical work necessary to the effectuate the conversion, and has still not obtained the necessary CO, Multiple Dwelling Law §§ 285 and 301 preclude the plaintiff from seeking to recover use and occupancy. In opposition to these showings, the plaintiff failed to raise a triable issue of fact.

Accordingly, those branches of the defendants' motion which are for summary judgment dismissing the third and fourth causes

of action must be granted. Since the defendants answered the complaint, expressly sought relief pursuant to CPLR 3212, and have charted a summary judgment course (see Reiss v Financial Performance Corp., 279 AD2d 13, 16 n 2 [1st Dept. 2000]; Four Seasons Hotels v Vinnik, 127 AD2d 310, 320 [1st Dept. 1987]), the court denies as academic those branches of their motion which are pursuant to CPLR 3211(a).

IV. CONCLUSION

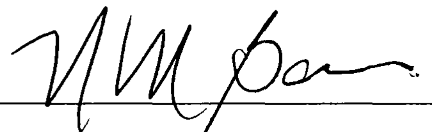
Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the third cause of action and dismissing or striking the defendants' affirmative defenses and counterclaim is denied; and it is further,

ORDERED that those branches of the defendants' motion which are for summary judgment dismissing the third and fourth causes of action are granted, and the defendants' motion is otherwise denied as academic.

This constitutes the Decision and Order of the court.

Dated: 1/6/17

ENTER: 

J.S.C.

HON. NANCY M. BANNON