388 Broadway LLC v Salaway
2017 NY Slip Op 32252(U)
October 16, 2017
Civil Court of the City of New York, New York County
Docket Number: 71312/2013
Judge: Jack Stoller

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART N

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388 BROADWAY LLC,

Petitioner,

Index No. 71312/2013

- against -

DECISION/ORDER

ELIZABETH SALAWAY and MARIO BOSQUEZ,

Respondents

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Present: Hon. Jack Stoller
Judge, Housing Court

388 Broadway LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Mario Bosquez, a respondent in this proceeding ("Respondent"), and Elizabeth Salaway, another respondent in this proceeding ("Co-Respondent"), seeking possession of 388 Broadway #4E, New York, New York ("the subject premises") on the ground that the subject premises is subject to Article 7-C of the Multiple Dwelling Law, commonly known as the "Loft Law", that Co-Respondent does not maintain the subject premises as her primary residence, and that Respondent's occupancy is derivative Co-Respondent's tenancy. Respondent interposed an answer containing a defense that he had been the victim of an illusory tenancy scheme of Respondent and Petitioner. The Court held a trial in this matter on June 5, 2017, August 31, 2017, and September 25, 2017.

The trial expediter referred this proceeding to the trial part contemporaneous with a referral of a licensee holdover proceeding that Co-Respondent had commenced against Respondent, captioned at Salaway v. Bosquez, Index # L/T 90628/2012 (Civ. Ct. N.Y. Co.) ("the

licensee holdover proceeding"), in which Respondent had also interposed an answer containing an illusory tenancy defense. Upon referral of the licensee holdover proceeding, Co-Respondent discontinued it against Respondent and entered into a stipulation with Petitioner ("the Stipulation") according to which Petitioner released Co-Respondent from this proceeding and assumed any liability of Co-Respondent vis a vis Respondent's counterclaim.

Petitioner proved that it is the proper party to commence this proceeding; that the subject premises is subject to the Loft Law; and that Petitioner properly and timely served a predicate notice in this proceeding.[1]

Petitioner's managing member ("the managing member") testified that the building in which the subject premises is located ("the Building") has five stories; that there is a commercial unit on the ground floor; that there are two units each on the second through the fifth floors; that he knows the subject premises; that Co-Respondent was the tenant of the subject premises; that Co-Respondent paid the rent every month; that he found out that someone else occupied the subject premises in 2011 at a meeting that Respondent attended at the Loft Board; that he does not remember having heard of Respondent before that; that he did not get written communications from Respondent before that; that Co-Respondent had not notified him in writing that she was not occupying the subject premises; that he did not give Respondent permission to occupy the subject premises; that he never accepted rent from Respondent before the commencement of this proceeding; and that Co-Respondent informed him that she had

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[1] The appropriate predicate notice to serve on a Loft Law tenant in a nonprimary residence holdover proceeding is a thirty-day notice. Mazda Realty Assocs., L.L.P. v. Green, 187 Misc.2d 419, 420 (App. Term 1st Dept. 2000). The Court file shows that Petitioner effectuated service of such a notice.

commenced a holdover proceeding against Respondent a month before he had this proceeding commenced.

Petitioner introduced into evidence a rent ledger that showed Co-Respondent's rent as $891.00 a month. The managing member testified that if Co-Respondent moved, he would have paid for her fixtures as per the Multiple Dwelling Law and that comparable units in the Building rent for $5,700.00 a month to $7,000.00 a month.

The managing member testified on cross-examination that he has owned the Building since May of 1999; that he interacts with tenants of the Building relatively rarely; that the Building is self-managed; that he is not aware of repairs needed in the subject premises; that his son ("the managing member's son") would be in charge of repairs and who would deal with access in the last two or three years; that he would call a contractor before that to deal with repair issues after hearing about it from a secretary; that he would know which unit a complaint came from but not necessarily the identity of the person making the complaint; that he didn't have reasons to assume that Co-Respondent wasn't using the subject premises as her primary residence; that he first met Respondent at a Loft Board meeting five or six years before his testimony that concerned input from residents of the Building into Petitioner's narrative statement;[2] and that Respondent signed in as representing Co-Respondent at the meeting and said that he was Co-Respondent's roommate.

Respondent introduced into evidence two lists of people at Loft Board meetings on July 30, 2007, December 16, 2010, and October 15, 2015, all of which show the managing member at the meetings and no other party to this proceeding at the meetings.

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[2] This testimony was taken on August 31, 2017.

The managing member testified on redirect examination that Respondent may have attended a meeting in the other apartment on the same floor at the subject premises ("the next door unit").

The tenant of the next door unit ("the next door neighbor") testified that she has lived in a prior incarnation of the next door unit since 1976, i.e., the entire floor, which encompassed what is now the subject premises and the next door unit; that the floor was divided and her roommate sold fixtures pursuant to the Loft Law for half of the fourth floor, thus creating the subject premises and the next door unit; that Respondent has lived in the subject premises since 2002; that Co-Respondent moved into the subject premises in the early 1980s; that Co-Respondent stayed in the subject premises for a few years before renting out the subject premises to a series of subtenants, so many of whom, she did not remember all of them or how many there were; that she met people who lived in the subject premises because the peculiar history of the configuration of the next door unit and the subject premises requires occupants of the subject premises to pass by the next door unit en route to the subject premises; and that, in addition to that, Respondent calls or texts her to access the subject premises.

The next door neighbor testified that in June of 2012, the managing member attended a meeting in the next door unit with her and other tenants of the Building; that Respondent attended that meeting; that this meeting was the first time that she knew of that Respondent met with the managing member; that she has been to several meetings at the Loft Board with the managing member and that Respondent was never there; that she has since been with the managing member and Respondent on several other occasions, like a walk-through of each unit in the Building; that Respondent has called the management of the Building regarding issues in

need of repair at the Building; that Con Edison billed the subject premises together with the next door unit on the same meter until 2009; and that Respondent paid for the subject premises' share of the electricity before that.

Respondent testified that he first heard of the subject premises because he referred friends of his who needed an apartment to Co-Respondent, who is the sister of a former co-worker of Respondent's; that his friends lived there from about 2000 until 2002; that he does not know if Co-Respondent lived in the subject premises during this time; that he met Co-Respondent before he moved into the subject premises; that he himself moved into the subject premises around November or December of 2002; that shortly before he moved in, a person he did not know who seemed to have lived in the subject premises gave him a walk-through; that the subject premises was furnished at the time; that Co-Respondent charged him $2,200.00 a month; that the rent did not change; and that Co-Respondent did not live with him.

Respondent testified that during a period in which Petitioner engaged in construction in the Building, Co-Respondent contacted him about moving into the subject premises; that he started communicating with neighbors in the Building, who asked him how much rent he was paying; that he confronted Co-Respondent about the amount of rent he was paying her; that she did not answer; and that she started refusing his tenders of rent after that. Respondent introduced into evidence a letter dated September 4, 2012 that Co-Respondent sent him that stated that she was refunding him for his overpayment of the legal rent. The letter states that the total amount refunded was $59,320.00. Respondent testified that this amount had been deposited into a bank account of his.

Respondent testified that, from 2003 through 2006, he has greeted the managing member

and the managing member's son in the common areas of the Building; that the managing member saw him going into the Building; that the managing did not ask Respondent what Respondent was doing in the Building; that he does not remember if the managing member saw Respondent enter the subject premises; that Respondent interacted with the managing member more frequently after that; that Respondent never appeared at the Loft Board; that in 2012, the managing member asked Respondent for a walk-through of the subject premises to see about paint; that Respondent was in touch with an architect that Petitioner employed about an HVAC system; that he interacted on a daily or near-daily basis with a variety of workers on a crew working on the legalization of the Building pursuant to the Loft Law; and that these workers would text Respondent asking Respondent for access to the subject premises.

Respondent testified that, in May of 2011, a crew began to renovate floors, which spewed plumes of dust into the Building; that he and other residents of the Building commissioned a dust report; that he mentioned the dust report to the managing member in June of 2012; that the managing member asked Respondent to send the report to him; that he sent the managing member an email with the dust report on August 13, 2012; that on August 16, 2012, Respondent was coming to the Building; that the managing member was in the lobby, which was small, at the time with two or three other people; that, as he was about to put his key into the door to the Building, the managing member reached over and opened door and said, "Hello, Mario," and let him in; that the managing member friended him on Facebook; and that the managing member unfriended him shortly thereafter.

Respondent introduced into evidence texts from the workers on the construction crew asking Respondent for access to the subject premises from 2011, 2012, and 2013.

Respondent testified on cross-examination that he didn't speak to the managing member in 2002; that he didn't notify the managing member that he moved in 2002 until this case started; that he didn't notify the managing member that he was the sole occupant renting the subject premises from Co-Respondent; that he didn't notify Petitioner that he was renting the subject premises for an amount over the legal regulated rent; that he never paid rent to the managing member or anyone associated with Petitioner from 2002 to 2013; that he didn't say to workers on various crews that he was subletting the subject premises from Co-Respondent; that these workers referred to the subject premises as "his apartment"; that he never saw Co-Respondent's lease; that he never asked for a written lease from Co-Respondent; that he never asked Petitioner for a lease to the subject premises from 2002 until the commencement of this proceeding; and that, between 2002 and 2011, he occasionally saw the managing member at the Building.

The managing member testified on Petitioner's rebuttal case that the architect often works for him; that the architect first worked for him in the early 2010; that the architect became an unregulated tenant of the Building about six or seven years prior to his testimony; that he did not ask the architect and the architect didn't tell him who was occupying the subject premises; that the names of workers that Respondent mentioned as contacting Respondent sound familiar as sub-contractors who were working on the legalization process; that their sole duty was to work in the Building and gain access to apartments there for that purpose; that he thought Respondent was a roommate before 2012; that he did not know about a sublet; that neither Respondent nor Co-Respondent informed him of a sublet; that he collected $735.00 a month from Co-Respondent; that he never collected anything from Respondent; that he had no relationship with Co-Respondent other than a landlord/tenant relationship; and that he didn't get any

additional money from Co-Respondent.

The managing member testified on cross-examination that the architect was responsible to gain access to other apartments in the Building; that the architect had blanket authority to fix a de minimis repair; that the managing member approved general plans to install an HVAC system; that he doesn't know how workers gained access to individual apartments; and that he never gives lists of names of tenants to contractors for access.

A prime tenancy is an illusory tenancy when it is a sham in that the prime tenant does not occupy the apartment but instead subleases the apartment for profit and/or deprives the subtenant of rights under the Rent Stabilization Law. Ogisu Corp. v. Allen, 25 Misc.3d 135(A) (App. Term 1st Dept. 2009), West 46 Equities v. Henry, N.Y.L.J., Sept. 8, 1997, at 26:6 (App. Term 1st Dept.), 255 W. 88th Co. v. Gelband, N.Y.L.J. Jan. 5, 2005 at 20:1 (Civ. Ct. N.Y. Co.). The length of time for which a tenant has relinquished occupancy of the premises, the intent of the asserted tenant to resume occupancy, and the question of whether the landlord or the prime tenant exercises dominion and control over the subject premises are salient considerations. Bruenn v. Cole, 165 A.D.2d 443, 447-49 (1st Dept. 1991), 270 Riverside Drive, Inc. v. Wilson, 195 Misc.2d 44, 49 (Civ. Ct. N.Y. Co. 2003). Thus, the length of Respondent's occupancy of the subject premises, the ten-and-a-half years from the end of 2002 through the commencement this proceeding, on July 25, 2013, militates in favor of his illusory tenancy defense. See 545 Eighth Ave. Assoc., L.P. v. Shanaman, 12 Misc.3d 66, 67-68 (App. Term 1st Dept. 2006)(a ten-year occupancy supports an illusory tenancy defense), Envoy Towers Assoc. v. Dias, 15 Misc.3d 1104(A)(Civ. Ct. N.Y. Co. 2006)(a thirteen- or fourteen-year occupancy supports an illusory tenancy defense).

Profiteering is a *sine qua non* of an illusory tenancy. Square Block Assoc., Inc. v. Fernandez, 29 Misc.3d 138(A)(App. Term 1st Dept. 2010). While the evidence shows that Co-Respondent did indeed profiteer off of Respondent, the evidence also shows that Co-Respondent refunded overpayments to Respondent. In other contexts, a rent-regulated tenant who profiteers off of a subtenant may cure the breach in the lease by refunding the overcharged amounts. Cambridge Dev., LLC v. Staysna, 68 A.D.3d 614, 615 (1st Dept. 2009), Ariel Assocs., LLC v. Brown, 271 A.D.2d 369, 369-370 (1st Dept.), *leave to appeal dismissed*, 95 N.Y.2d 844 (2000), 672 Ninth Ave. LLC v. Burbach, 14 Misc.3d 1236(A)(Civ. Ct. N.Y. Co. 2007), Husda Realty Corp. v. Padien, 136 Misc.2d 92, 94 (Civ. Ct. N.Y. Co. 1987) (Tom, J.). While Co-Respondent undeniably profiteered at Respondent's expense at lease at some point, Co-Respondent's refund at the very least compromises this element of Respondent's illusory tenancy defense.

Involvement and/or knowledge of Petitioner with regard to Co-Respondent's sublet to Respondent comprises another element of an illusory tenancy defense. While there is no absolute requirement that there be evidence of collusion on the part of the landlord before an illusory tenancy will be found, "there should be a showing of at least constructive knowledge on the part of the landlord of the subleasing arrangement." Primrose Mgmt. Co. v. Donahoe, 253 A.D.2d 404, 405-406 (1st Dept. 1998), Bruenn, supra, 165 A.D.2d at 447, Salaway v. Bosquez, 45 Misc.3d 130(A)(App. Term 1st Dept. 2014),[3] Vesky v. Antunez, 191 Misc.2d 246, 247 (App. Term 1st Dept. 2002), 255 W. 88th Co., supra, N.Y.L.J. Jan. 5, 2005 at 20:1. When a landlord deals directly with a subtenant for a decade or more, 545 Eighth Ave. Assoc., L.P., supra, 12 Misc.3d at 67-68, Envoy Towers Assoc., supra, 15 Misc.3d at 1104(A), or when a former super

[3] This matter was an appeal of a decision rendered on the licensee holdover proceeding.

of a building "clearly" knew of a tenant's subterfuge, a landlord has the requisite constructive knowledge of a sublet. Primrose Mgmt. Co., supra, 253 A.D.2d at 405-406.

Conversely, no illusory tenancy will be found when the subtenant participates in a scheme to hide a sublet from a landlord by, for example, inducing a landlord to settle an illegal sublet holdover proceeding by representing that the subtenant is a roommate of a tenant, 68-74 Thompson Realty, LLC v. Heard, 54 Misc.3d 144(A)(App. Term 1st Dept. 2017), by failing to notify a landlord that a tenant had vacated, Id., Square Block Assoc., Inc., supra, 29 Misc.3d at 138(A), 270 Riverside Drive, Inc., supra, 195 Misc.2d at 51, and by paying rent to a landlord from a joint account of the tenant and subtenant. 68-74 Thompson Realty, LLC, supra, 54 Misc.3d at 144(A), Square Block Assoc., Inc., supra, 29 Misc.3d at 138(A).

The evidence adduced at trial in support of Petitioner's constructive knowledge of Co-Respondent's sublet to Respondent consists of terse, noncommittal exchanges between Respondent and the managing member and communications between Respondent and workers in the Building about the work they were doing in the Building, mostly concerning access to the subject premises. Respondent did not prove what the connection was between the workers he communicated with and Petitioner. Thus, Respondent asks the Court to infer that his communications with these workers was tantamount to notice to Petitioner and furthermore that such communications gave Petitioner notice of Co-Respondent's sublet to Respondent. These communications do not compare with a landlord who bills a subtenant directly or designates a subtenant as a fire marshal, 545 Eighth Ave. Assoc., L.P., supra, 12 Misc.3d at 68, or a landlord who accepts "dozens of checks" from a subtenant and who deals with the subtenant in Court proceedings. Envoy Towers Assoc., supra, 15 Misc.3d at 1104(A). Aside from dissimilarities to

other factfindings of illusory tenancies, the communications as described by Respondent are not tantamount to notice to Petitioner of Co-Respondent's sublet to Respondent.

Nor does the Stipulation amount to collusion. The stipulation occurred on the date of trial, a little short of four years after the commencement of this proceeding. Such a settlement of litigation does not prove collusion pre-dating the commencement of said litigation more than four years prior.

The compromised extent of Co-Respondent's profiteering off of Respondent and Respondent's inability to prove, at minimum, Petitioner's constructive knowledge of Co-Respondent's sublet outweighs the longevity of Co-Respondent's subletting of the subject premises and Respondent's occupancy therein. Accordingly, the Court dismisses Respondent's defense of illusory tenancy.

Petitioner otherwise proved its *prima facie* case. The Court therefore awards Petitioner a final judgment of possession against Respondent. Issuance of the warrant of eviction is permitted forthwith, execution thereof stayed through November 17, 2017 for Respondent to vacate possession of the subject premises. On default, the warrant may execute on service of a marshal's notice.

In its closing argument, Petitioner made an application for a hearing on Petitioner's application for market use and occupancy and for attorneys' fees in the event that the Court granted Petitioner a final judgment. The Court calendars the matter for November 3, 2017 at 9:30 a.m. in part N, Room 819 of the Courthouse located at 111 Centre Street, New York, New York, not for a hearing, but for a conference on those issues to attempt to obtain a resolution and for parties to retrieve their trial exhibits. If no resolution is reached, the Court will calendar a

hearing for a future date.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 16, 2017

HON. JACK STOLLER
J.H.C.