

Simry Realty Corp. v Bishop
2018 NY Slip Op 30905(U)
May 7, 2018
Supreme Court, New York County
Docket Number: 100871/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 100871/2016

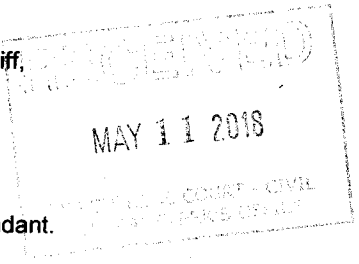
SIMRY REALTY CORP.,

Plaintiff,

- v -

DOROTHY BISHOP,

Defendant.



MOTION SEQ. NO. 002 and 003

DECISION AND ORDER

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RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

MOTION SEQUENCE NO. 002

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIRMATION AND AFFIDAVIT IN SUPPORT, AND EXHIBITS ANNEXED	1-3 (Exs. A-E)
AFFIRMATION AND AFFIDAVITS IN OPPOSITION, AND EXHIBITS ANNEXED	4-6 (Exs. A-F)
REPLY AFFIRMATION	7

MOTION SEQUENCE NO. 003

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFFIRMATION AND AFFIDAVIT IN SUPPORT, AND EXHIBITS ANNEXED	1-3 (Exs. A-J)
AFFIRMATION IN OPPOSITION	4

UPON THE FOREGOING CITED PAPERS, THE DECISION AND ORDER ON THE MOTIONS IS AS FOLLOWS:

In this action, plaintiff, the owner of real property located at 315 West 45th Street, New York, NY 10019, seeks an order of ejectment, use and occupancy, and damages for the unlawful subletting of the first floor and cellar of the building, which unit is referred to as either Apartment 18 or 1F. Defendant, who has occupied the unit for 22 years, now moves for partial

summary judgment dismissing the complaint in its entirety. (Mot. Seq. No. 002.) The motion is only partial in the sense that defendant does not seek affirmative relief on her counterclaim for attorney's fees. (*See generally* Real Property Law § 234.) Plaintiff opposes.

Plaintiff also moves, by order to show cause, for an order permitting disclosure to proceed notwithstanding the pendency of the summary judgment motion and requiring defendant to deposit into court \$51,238.64, which represents the amount in controversy of use and occupancy. (Mot. Seq. No. 003.) Defendant opposes.

For the reasons that follow, **defendant's motion for partial summary judgment dismissing the complaint is granted to the extent that the cause of action for ejectment is dismissed, and is otherwise denied; and plaintiff's motion is granted to the extent that defendant shall be required to deposit an amount of use and occupancy into escrow, and is otherwise denied, as moot.**

The unit at issue in this action ambiguously occupies both the first floor and the cellar of the building. The court characterizes the unit's boundaries as ambiguous because they are not defined in a lease contained in the papers before it. Despite defendant's undisputed assertion that she has lived in the unit for 22 years, it appears that she has never been on a written lease and has never demanded one. A December 1983 certificate of occupancy provides that the first floor of the building may support one dwelling unit and four habitable rooms, but that the cellar is suitable for storage only. (Ex. C to defendant's motion.) Notwithstanding this limitation in the certificate of occupancy, defendant claims that the unit was rented as a duplex, although she does not provide any documentation to support that assertion.

Defendant further claims that the unit is subject to rent stabilization and, indeed, the notice of termination at issue in this action cites violations of the Rent Stabilization Code. The

papers do not reveal a dispute between the parties that defendant would be entitled to receive a rent-stabilized lease upon demand. She does not explain why she has never attempted to obtain a lease, and the papers are notable for their obscurity as to what any agreement between the parties entailed. In any event, whatever arrangement the parties may have had abruptly ended in July 2014, when the Department of Buildings issued a violation against plaintiff on the ground that the use of the first floor and cellar as an “illegal duplex” constituted “occupancy contrary to that allowed by the cer[ificate] of occupancy.” (Ex. D to defendant’s motion.)

Plaintiff contends that, without its consent, defendant sublet the rooms of the first floor to two separate individuals, and that she illegally occupied the basement herself. In April 2016, on this basis, plaintiff issued a thirty-day notice of termination of tenancy to defendant. The notice of termination indicated that the subtenancy violated applicable provisions of both the Real Property Law as well as the Rent Stabilization Code. No notice to cure was issued to defendant.

Defendant argues that, since plaintiff rented the duplex to her in a manner inconsistent with the applicable certificate of occupancy, it is not entitled to collect rent from her. Defendant further asserts that, since she is a rent-stabilized tenant, plaintiff could not issue a notice of termination without first issuing a notice to cure, and that its failure to do so vitiates its entitlement to ejection.

On a motion for summary judgment, the movant bears the initial burden to “make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” after which the burden shifts to the opposing party “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986]; see *Schmidt v One N. Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 [1st Dept 2017].)

As for the cause of action for ejectment, it is well settled that, where the basis for termination of a rent-stabilized leasehold is the illegal subletting of the unit, a proceeding to recover possession must be preceded by a 10-day notice to cure the violation. (See Rent Stabilization Code [9 NYCRR] § 2524.3 [a]; *Hudson Assoc. v Benoit*, 226 AD2d 196 [1st Dept 1996]; *Mansfield Owners, Inc. v Phillip*, 50 Misc 3d 139[A], 2016 NY Slip Op 50148[U] [App Term, 2d Dept, 2d, 11th and 13th Jud Dists 2016]; *Graham Ct. Owners Corp. v Taylor*, 49 Misc 3d 7, 8-9 [App Term, 1st Dept 2015]; *Tribeca Equity Partners, L.P. v Jacobson*, 45 Misc 3d 132[A], 2014 NY Slip Op 51652[U] [App Term, 1st Dept 2014].) Considering that the notice of termination, by its terms, cited violations of the Rent Stabilization Code, and that plaintiff otherwise has not set forth any reasons to the contrary, this Court must treat defendant as a rent-stabilized tenant rather than a month-to-month tenant. Hence, plaintiff's failure to serve a notice to cure renders its cause of action for ejectment infirm. It had no right to serve a notice of termination or to commence an action for ejectment in the absence of a notice to cure. Plaintiff failed to raise an issue of fact in opposition. This determination also vitiates the third cause of action for damages for wrongful withholding of possession. (See generally RPAPL 601.)

Turning to the branch of the motion seeking dismissal of the cause of action for use and occupancy, defendant has failed to sustain her prima facie burden to prove that plaintiff is barred from collecting rent or use and occupancy because the building lacks a certificate of occupancy. (See generally Real Property Law § 220; *Tan Holding Corp. v Eklund*, 33 AD3d 487, 487-488 [1st Dept 2006]; *Lutine Realty Corp. v Perry Films, Inc.*, 33 AD3d 486, 487 [1st Dept 2006]; *Hart-Zafra v Singh*, 16 AD3d 143, 143-144 [1st Dept 2005].) Contrary to defendant's argument,

the building has a certificate of occupancy, and she has not proved that plaintiff ever leased her the basement as residential space, as opposed to storage. There is no written lease agreement, so there is at the very least a question of fact as to whether the basement was leased to defendant as residential space. There is also a question of fact as to whether defendant was “complicit in the existence and maintenance of [an] illegal apartment.” (*58 E. 130th St. LLC v Mouton*, 25 Misc 3d 509, 511 [Civ Ct, NY County 2009].)

As for defendant’s motion, since there is an active controversy as to plaintiff’s entitlement to use and occupancy, this Court finds it appropriate to direct that the amount of alleged rent arrears that have accrued since this action was commenced be placed in an escrow account. (*See generally* RPAPL 745 [2]; *Silverman v D’Arco*, 149 AD3d 527, 528 [1st Dept 2017]; *Sima Realty v Phillips*, 282 AD2d 394, 395 [1st Dept 2001].)

With respect to the branch of plaintiff’s motion seeking discovery related relief, since the parties have not yet had a preliminary conference, the motion is denied without prejudice pending a conference with court staff. (*See Amelius v Grand Imperial LLC*, 57 Misc 3d 835, 855 [Sup Ct, NY County 2017].) The resolution of defendant’s motion for summary judgment renders the branch of plaintiff’s motion seeking an order lifting the automatic stay of discovery is rendered moot.

Accordingly, it is hereby

ORDERED that defendant’s motion for partial summary judgment dismissing the complaint is granted, in part, the cause of action for ejectment is dismissed, and the motion is in all other respects denied; and it is further

ORDERED that the branch of plaintiff's motion seeking to lift the stay on disclosure during the pendency of the summary judgment motion is denied, as moot; and it is further

ORDERED that the branch of plaintiff's motion seeking relief based on a failure to comply with disclosure demands is denied, without prejudice to renew the motion after a conference with the court; and it is further

ORDERED that plaintiff is directed to file and serve, by letter submission, an accounting of the use and occupancy arrears that have accrued since defendant was served with the summons and complaint to the court within 20 days after this order is entered; and it is further

ORDERED that defendant is directed to file and serve any objections to the amounts claimed as arrears within 20 days after the submission; and it is further

ORDERED that, pending the receipt of the updated accounting and any objections thereto, this Court reserves decision on the amount of arrears that defendant will be directed to place in escrow; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 2, at 80 Centre Street, Room 280, on August 7, 2018 at 2:15 p.m.

5/7/2018

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

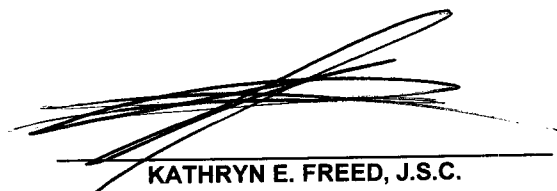
GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE


KATHRYN E. FREED, J.S.C.