

498 W. End Ave. LLC v Reynolds
2018 NY Slip Op 31708(U)
July 23, 2018
Civil Court of the City of New York, New York County
Docket Number: 70878/2016
Judge: Jack Stoller
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C

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498 WEST END AVENUE LLC,

Petitioner,

Index No. 70878/2016

- against -

DECISION/ORDER

JAN REYNOLDS and ARIEL ELIAZ,

Respondents.

----- X

Present: Hon. Jack Stoller
Judge, Housing Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Supplemental Affidavits Annexed.....	1, 2, 3
Affirmation and Affidavit In Opposition	4, 5
Reply Affirmation	6

Upon the foregoing cited papers, the Decision and Order on this Motion are as follows:

498 West End Avenue LLC, the petitioner in this proceeding (“Petitioner”), commenced this holdover proceeding against Jan Reynolds (“Respondent”), a respondent in this proceeding, and Ariel Eliaz (“Co-Respondent”), another respondent in this proceeding (collectively, “Respondents”), seeking possession of 498 West End Avenue, Apt. 10A, New York, New York (“the subject premises”) on the ground that Respondent incurably breached a substantial obligation of her tenancy by renting the subject premises out as if the subject premises was a hotel room. Respondent interposed an answer. Petitioner now moves for summary judgment in its favor.

There is no dispute of material fact that Petitioner is the proper party to commence this proceeding, that Respondent and Petitioner have been in a landlord/tenant relationship with one

another, that the subject premises is subject to the Rent Stabilization Law, that Respondent had a lease that commenced on January 1, 2013 and expired on December 31, 2014 with a legal regulated rent of \$4,475.21, or \$147.13 per day, and a preferential rent of \$3,698.39, or \$121.59 a day, and that Respondent had a subsequent lease commencing January 1, 2015 and expiring on December 31, 2016 with a legal regulated rent of \$4,500.00, or \$150.77 per day and a preferential rent of \$3,800.00, or \$124.76 per day.¹ The record on this motion practice shows no dispute of fact that, from September 10, 2014 through June 30, 2016, Respondent rented the subject premises out on Airbnb² to eighteen people, thirteen of whom for less than 30 days. There is no dispute that Petitioner effectuated service of a predicate notice on Respondent pursuant to the Rent Stabilization Code prior to the commencement of this proceeding, but did not serve a notice to cure.

The availability of a cure for Respondent comprises the central dispute between the parties. Rent-regulated tenants who rent out their apartments to transient individuals at rates higher than allowed by applicable regulations are engaged in conduct in the nature of subletting rather than taking in roommates, and engaged in conduct in the nature of profiteering, which is an incurable violation, for which no notice to cure is required. Aurora Assocs. LLC v. Hennen, 157

¹ The Court arrives at Respondent's daily rent for 2014 by multiplying her monthly rent by twelve and then dividing the product by 365. The Court arrives at Respondent's daily rent for 2015 and 2016 by multiplying Respondent's rent by twenty-four months and then dividing the product by 731, the number of days in the two years, to account for the leap year day in 2016.

² Airbnb is a company that provides an internet platform connecting individuals who offer accommodations to individuals who wish to book accommodations and, if the parties agree on the price and terms, they can complete the transaction, including payment, via such platform. Airbnb, Inc. v. Schneiderman, 44 Misc.3d 351, 354 (S. Ct. Albany Co. 2014).

A.D.3d 608 (1st Dept. 2018).

The Court can determine whether a rent-regulated tenant has profited by totaling the income the tenant generated from subletting and comparing that sum with the aggregate of the tenant's daily rent for the same number of days that the tenant sublet. Goldstein v. Lipetz, 150 A.D.3d 562, 565 (1st Dept.), *appeal dismissed sub nom. Pearce v. Lipetz*, 30 N.Y.3d 1009 (2017) (finding that a tenant had Airbnb guests for 338 days, that the tenant gained \$33,592.00 over the course of those 338 days, and that the tenant's rent liability, based on the tenant's daily rent, was only \$19,536.40 for those 338 days, thus showing profiteering, as the tenant collected 172% in sublet income of the tenant's rent liability for that period).³ Tenants may not cure when they collect more from subletting than they owe in rent. Id., 230 E. 48th St. LLC v. Campisi, 59 Misc.3d 148(A)(App. Term 1st Dept. 2018)(the tenant collected 400% of her aggregate rent liability), Brookford, LLC v. Penraat, 47 Misc. 3d 723, 725-26 (S. Ct. N.Y. Co. 2014) (Edmead, J.)(the tenant collected 212% of her aggregate rent liability), 335-7 LLC v. Steele, 2015 N.Y. Misc. LEXIS 4315, at *1-2 (Civ. Ct. N.Y. Co. 2015), *aff'd*, 53 Misc.3d 150(A)(App. Term 1st Dept. 2016), Cont'l Towers Ltd. P'ship v. Freuman, 128 Misc.2d 680, 680-81 (App. Term 1st Dept. 1985)(the tenants collected more than 200% of their aggregate rent liability), W. 148 LLC v. Yonke, 11 Misc.3d 40, 41 (App. Term 1st Dept. 2006)(the tenant collected 200% of her aggregate rent liability), Goldstein, supra, 150 A.D.3d at 565 (the tenant collected 172% of her

³ By this reasoning, the Court in Goldstein, supra, rejected an argument that Respondent herein makes, that the Court should consider the total rent Respondent paid, including days when she did not sublet the subject premises, in determining whether Respondent profited. Instead, the Court compared the tenant's daily rent with the nightly rate she charged her subtenants. Id. at 567.

aggregate rent liability).

By contrast, a rent stabilized tenant who overcharges a subtenant is not subject to eviction where her conduct does not rise to the level of profiteering and she has cured. 230 E. 48th St. LLC, supra, 59 Misc.3d at 148(A), 54 Greene St. Realty Corp. v. Shook, 8 A.D.3d 168 (1st Dept. 2004), *appeal denied*, 4 N.Y.3d 704 (2005)(an overcharge on a sublet was “small” and the record did not contain evidence of bad faith or intent to profiteer), Ariel Assocs., L.L.C. v. Brown, 271 A.D.2d 369, 369-70 (1st Dept. 2000). *Cf. Roxborough Apartments Corp. v. Becker*, 11 Misc.3d 99, 100 (App. Term 1st Dept. 2006)(a total overcharge of roommates totaling 107.4%, collectively, of the rent did not rise to a level of profiteering requiring eviction of the long-term tenant without giving him an opportunity to cure).⁴

The evidence Petitioner presents on its motion shows that the total Respondent collected in sublet income over the course of 303 days is \$28,992.00. However, the aggregate amount Respondent paid in rent over the course of those 303 days was \$38,232.15,⁵ more than the amount Respondent collected in sublet income. To be precise, the sublet income Respondent collected was 76% of her rent liability for the days on which she sublet the subject premises. No

⁴ Roxborough Apartments Corp., supra, evaluated the effect of overcharging on roommates, not subtenants, by a decision that pre-dated First Hudson Capital, LLC v. Seaborn, 54 A.D.3d 251 (1st Dept.), *appeal dismissed*, 11 N.Y.3d 894 (2008), Horseshoe Realty, LLC v. Meah, 47 Misc.3d 127(A)(App. Term 1st Dept. 2015), which found significant the distinction between roommates and subtenants. The Court nevertheless finds the holding of Roxborough Apartments Corp., supra, to be instructive to the issue on this matter.

⁵ The Court reaches this figure by multiplying Respondent’s daily rent of \$121.59 per day in 2014 by the 89 days she sublet the subject premises, for a total of \$11,533.51, and then adding that to the product of Respondent’s daily rent of \$124.76 in 2015 and 2016 and the 214 days that she sublet the subject premises, or \$26,698.64.

discernible apposite authority finds that a tenant who collected less sublet income than her rent liability profited to the point of precluding a cure.

Petitioner argues that the 76% of Respondent's rent that Respondent collected from her subtenants still precludes a cure as a matter of law by citing the proposition that rent-stabilized tenants may only charge roommates their proportionate share of the legal regulated rent, 9 N.Y.C.R.R. §2525.7(b) meaning, in essence, a pro rata share of the rent. 156-158 Second Ave., LLC v. Delfino, 18 Misc.3d 1144(A)(Civ. Ct. N.Y. Co. 2008). Petitioner cites authority in support of its position, to wit, a footnote from Goldstein, supra, that quotes the tenant therein characterizing her guests as "roommates" and concludes that the lawful charge would have been based on half of the tenant's rent, not the full rent. Goldstein, supra, 150 A.D.3d at 565 n.3.

Assuming *arguendo* that Respondent could have only charged her guests half of her rent, and as Respondent's aggregate rent liability for the 303 days that she sublet the subject premises was \$38,232.15, Respondent would have only been able to charge her subtenants \$19,116.08 in order to preserve an opportunity to cure. Respondent instead charged her subtenants \$28,992.00, an aggregate overcharge (by this logic) of \$9,875.92 ("the aggregate overcharge").

Respondent offers evidence in opposition to the motion that she refunded at least a portion of the aggregate overcharge to a number of her prior subtenants, a factual distinction between this proceeding and the authority depriving like tenants of an opportunity to cure. See Goldstein, supra, 150 A.D.3d at 571 ("not only does [the tenant] not allege that she has cured by refunding the overcharges to any of her 93 former subtenants, she has never offered, either before the motion court or upon this appeal, to refund the overcharges to the subtenants. This is not

surprising. Given that [the tenant] hosted 93 different subtenants, with whom she had no direct financial dealings, it appears that the overcharges that [the tenant] collected could not practicably be refunded.”) In contrast, Respondent shows in her opposition to the motion that she has already refunded \$4,701.00 to her various of her subtenants, which reduces the aggregate overcharge from \$9,875.92 to \$5,174.92.

Petitioner’s evidence shows that five people stayed at the subject premises for at least 30 days each. Respondent has not made a showing that she offered refunds those five individuals. However, an occupant of at least 30 days may not be considered “transient” for purposes of permitting a cure. It is the sublet of a rent-regulated apartment to “transient” individuals that constitutes an incurable violation. Aurora Assocs. LLC, supra, 157 A.D.3d at 608. The Multiple Dwelling Law defines “permanent residence purposes” as occupancy of a dwelling unit by the same natural person for 30 consecutive days or more, MDL §4(8)(a), compelling the conclusion that “transient occupancy” is defined as less than 30 days. City of N.Y. v. Smart Apartments LLC, 39 Misc.3d 221, 233 (S. Ct. N.Y. Co. 2013). See Also Brookford, LLC, supra, 47 Misc.3d at 745 (“[t]he apartment loses its ‘permanent’ residential character by hosting transient occupancies for less than 30 days”).

Of the five people who stayed in the subject premises for at least 30 days, two of those stayed at the subject premises for exactly 30 days, and one for 32 days. Given the borderline time frame of their occupancy, for the sake of argument, the Court gives Petitioner the benefit of the doubt and assumes that those three occupants are also “transient.” Of the remaining two occupants (“the two longer-term occupants”), Petitioner’s evidence shows that one stayed at the

subject premises for 53 days, paying Respondent a total of \$1,948.00, and the other stayed at the subject premises for 80 days, paying Respondent a total of \$5,017.00, both time frames comfortably greater than the 30-day time frame deemed to be “transient.”

Summary judgment is a drastic remedy. O’Brien v. Port Auth. of N.Y. & N.J., 29 N.Y.3d 27, 37 (2017). On a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party’s favor. Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012), Gronsky v. County Of Monroe, 18 N.Y.3d 374, 381 (2011), Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), Rollins v. Fencers Club Inc., 128 A.D.3d 401, 402 (1st Dept. 2015), People v. Greenberg, 95 A.D.3d 474, 484 (1st Dept. 2012), Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563, 565 (1st Dept. 2010). Applying this principle to Petitioner’s instant motion for summary judgment, the Court draws the inference that the two longer-term occupants were not “transient.” If they were not “transient,” and as Respondent avers in opposition to Petitioner’s motion that she resided in the subject premises contemporaneously with all of the occupants at the subject premises, which would include the two longer-term occupants, then Respondent raises an issue of material fact as to whether (at least) the two longer-term occupants were subtenants or roommates. Fairmont Manor v. Verdicchio, August 18, 1995 at 21:3 (App. Term 1st Dept.) (when someone other than the tenant of record resides at an apartment on a non-transient basis, the distinction between a roommate and a subtenancy is one of contemporaneous occupancy). If the two longer-term occupants were roommates, Petitioner would have not a cause of action to evict Respondent even if she charged them more than their

proportionate share of the rent. First Hudson Capital, LLC, *supra*, 54 A.D.3d at 251, Horseshoe Realty, LLC, *supra*, 47 Misc.3d at 127(A). Without such a cause of action, the amounts that Petitioner's evidence showed that the two longer-term occupants paid Respondent, \$1,948.00 and \$5,017.00, for a total of \$6,965.00, would therefore not count toward the aggregate overcharge. As this \$6,965.00 is actually greater than the \$5,017.00 remaining of the aggregate overcharge after Respondent refunded her other subtenants, no overcharge is left.

A question of fact concerning, *inter alia*, the amount of an overcharge precludes a motion for summary judgment on the proposition that a tenant who has rented out her apartment on a short-term basis has no opportunity to cure. 13775 Realty, LLC v. Foglino, 51 Misc.3d 126(A) (App. Term 1st Dept. 2016). As Petitioner's own evidence shows that Respondent actually collected an amount from her subtenants that is less than her rent liability, even when calculated on a per diem basis as opposed to a monthly basis, as Respondent raises an issue of fact that she has already refunded amounts to her subtenants that constitute overcharges, and as there is an issue of fact as to whether the occupancy of other individuals was transient for purposes of denying Respondent an opportunity to cure her breach of the lease, Petitioner is not entitled to a final judgment against Respondent on a summary basis.

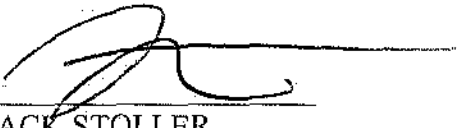
The Court is allowed to grant any part of a cause of action on a summary judgment motion. CPLR §3212(e). The Court may also specify what facts are not in dispute or are incontrovertible so that they may be deemed established for all purposes in the action, thus limiting the factual issues that must be established at trial. Phillip v. D&D Carting Co., Inc., 136 A.D.3d 18, 25 (2nd Dept. 2015). The Court finds that Petitioner has proven every element of its

prima facie case, including that Respondent rented out the subject premises on Airbnb, and awards Petitioner partial summary judgment to that effect, except that Petitioner has not proven that Respondent is not entitled to a cure, which remains an issue for trial. The Court further finds that Respondent does not controvert a chart that Petitioner provides for the Court on paragraph 14 on page 11 of Petitioner's affirmation in support of its motion, based on information Petitioner obtained in discovery from Respondent, that summarizes the names, amounts, and lengths of stay of people who paid Respondent to stay in the subject premises, and therefore deems this chart to be admissible at trial to prove the truth of the allegations therein. Kuehne & Nagel, Inc. v. Baiden, 36 N.Y.2d 539, 543-544 (1975), Madeline D'Anthony Enters., Inc. v. Sokolowsky, 101 A.D.3d 606, 609 (1st Dept. 2012).

Aside from this award of partial summary judgment, the Court denies the balance of Petitioner's motion for summary judgment, without prejudice to Petitioner's cause of action at trial of this matter, and without prejudice to Respondent's defenses thereto. The Court restores this matter for trial limited to the remaining unproven elements of Petitioner's case, for Respondent's case, and for Petitioner's rebuttal, to August 28, 2018 at 9:30 a.m. in part C, Room 844 of the Courthouse located at 111 Centre Street, New York, New York.

This constitutes the decision and order of this Court.

Dated: New York, New York
July 23, 2018



HON. JACK STOLLER
J.H.C.