1810 3rd Ave. Assoc. LLC v Hees
2019 NY Slip Op 32412(U)
August 9, 2019
Supreme Court, New York County
Docket Number: 156503/2017
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

1810 3rd AVENUE ASSOCIATES LLC,

Index No.: 156503/2017

Plaintiff,

- against-

DECISION AND ORDER

RACHEL HEES,

Defendant.

HON. SHLOMO S. HAGLER, J.S.C.:

In this Motion Sequence Number 002, plaintiff 1810 3rd Avenue Associates LLC (the "Landlord") moves to dismiss all affirmative defenses and counterclaims pursuant to CPLR 3211 (a) (1) and (7), based on documentary evidence and for failure to state a cause of action.

BACKGROUND FACTS

Plaintiff alleges in the amended complaint (the "Amended Complaint") that it is the former owner of a residential apartment building located at 1810 Third Avenue in Manhattan that converted to condominium ownership by declaration dated May 2, 2016. Plaintiff was the landlord of defendant Rachel Hees (the "Tenant"), who was the tenant of apartment A4A (the "Apartment"), which was rent-stabilized.

Defendant vacated the Apartment on March 17, 2017 pursuant to the terms of a March 15, 2017 "Settlement Agreement and Mutual Release" (the "Settlement Agreement", Wozman aff, Exhibit "O"),

which was negotiated out-of-court. The Tenant was represented by counsel in the negotiation of the Settlement Agreement; and the Landlord was not represented by counsel.

At the time of the negotiation of the Settlement Agreement, the Tenant was two months in arrears on rent. In consideration for her surrender of the Apartment, the Landlord agreed to waive those arrears, return the security deposit without regard to the condition of the Apartment, and provide positive references to a future landlord. The Settlement Agreement provides for payment of a "Vacate Payment" in the amount of the security deposit. The Landlord contends that the security deposit would have been offset against the two-months of rent arrears but for the Settlement Agreement.

After the Tenant vacated the Apartment pursuant to the Settlement Agreement, according to the Amended Complaint, the Landlord attempted on numerous occasions to tender the final vacatur payment to the Tenant, who has not responded to any of the Landlord's communications.

DISCUSSION

The first cause of action in the Amended Complaint seeks various declaratory relief related to the Settlement Agreement, including: authorizing the Landlord to pay the Vacate Payment to the Attorney General; declaring essentially that the Settlement Agreement is valid and enforceable, and is dispositive of all of

the Tenant's affirmative defenses and counterclaims.

The second cause of action, alternatively, seeks a judgment of $14,300 against defendant for use and occupancy charges relating to the Apartment. The third cause of action seeks an award of attorneys' fees.

The Tenant filed an answer, verified only by counsel, asserting as a "first defense," that the Settlement Agreement is void as against public policy because a

> "landlord cannot use unlawful means, including harassment and threats against the tenant and their family members to unlawfully force a tenant's vacatur of [a rent stabilized] apartment"

(Verified Answer, ¶ 29).

Paragraph 30 of the Answer, which is part of the "first defense", alleges that the Settlement Agreement "states, in explicit detail, the harassing behavior that the landlord will stop doing in exchange for her vacatur" (*id.* [emphasis omitted]). However, the Settlement Agreement does not include such language. It merely contains in paragraph 5 a "No Harassment" clause whereby the Landlord agrees to "refrain" from all harassment of Tenant and her family, and describes what constitutes harassment. Nowhere is there any admission by the Landlord that it had harassed the Tenant, or that Harassment "will stop in exchange for her vacatur" as alleged, although the first defense does allege "months of continuous harassment and intimidation of

Defendant and her family by the landlord" (*id.*).

The Landlord's motion to strike the "first defense" is granted, pursuant to CPLR 3211 (a) (1), to the extent of striking the following language from the Verified Answer, "which [the Settlement Agreement] states, in explicit detail, the harassing behavior that the landlord will stop doing in exchange for her vacatur," and is otherwise denied.

The first affirmative defense, captioned "duress and/or undue influence," alleges that the Landlord engaged in a regular harassment of the Tenant and her family members for the purpose of forcing her to leave her Apartment without resorting to eviction proceedings. It alleges that the Landlord's agent, Pete Polow contacted the Tenant's mother and mother-in-law to inform them incorrectly that they were guarantors on the lease, and thus liable for any lawsuit (Verified Answer ¶ 33). Counsel for the Landlord conceded at oral argument that there was no guaranty. The first affirmative defense alleges that the Tenant believed she had no choice but to leave the Apartment. While it does not contain sufficient factual allegations to plead either duress or undue influence, the first affirmative defense does sufficiently allege harassment. The motion to strike the first affirmative defense is therefore denied.

The second affirmative defense, captioned "misrepresentation and/or fraud," alleges that the characterization of the return of

the security deposit as a Vacate Payment is fraudulent because return of the security deposit was a preexisting duty. The second affirmative defense is stricken pursuant to CPLR 3211 (a)(1), based on the Settlement Agreement and email correspondence which make it abundantly clear that the parties understood that the security deposit could have been set off against the two months of rent arrears; and that it would be returned without consideration of the condition of the Apartment. That it is characterized as a "Vacate Payment" is neither fraudulent nor a misrepresentation.

The third affirmative defense, alleging a lack of consideration, is stricken. The documentary evidence conclusively demonstrates that the waiver of two months of rent arrears is consideration, as are the mutual promises.

The standard for assessing the sufficiency of a counterclaim under CPLR 3211(a)(7) is whether, it contains "factual allegations which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

The first counterclaim alleges harassment under New York City Administrative Code section 27-2005(d), which provides that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupy such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter"

(*id.*). Administrative Code section 27-2004(a)(48), Subdivision (d) defines harassment as "commencing repeated baseless or frivolous court proceedings," and subdivision g, the catch-all provision, defines harassment as "other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of" a tenant (*see* New York City Administrative Code 27-2004[a][48][g][internal quotation marks omitted]).[1] The first counterclaim for harassment alleges, without detail, that the Landlord

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[1] "Harassment" is defined, in pertinent part, as: "any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy . . .: f-1. contacting any person lawfully entitled to occupancy of such dwelling unit, or any relative of such person, to offer money or other valuable consideration to induce such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, for 180 days after the owner has been notified, in writing, that such person does not wish to receive any such offers, except that the owner may contact such person regarding such an offer if given express permission by a court of competent jurisdiction or if notified in writing by such person of an interest in receiving such an offer . . .; g. other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause such person to vacate such dwelling unit (*id.*).

"threatened to use force against, or ma[de] express or implied threats that force will be used against, Defendant and her family members" (Verified Answer, ¶ 49 [a]). Taking the allegations as true, the first counterclaim states a cause of action and the documentary evidence does not conclusively demonstrate the landlord's entitlement to judgment as a matter of law.

The second counterclaim alleges a rent overcharge. It is stated in entirely conclusory terms, and is devoid of evidentiary facts. This counterclaim fails to allege what the initial rent was and whether it was increased, and if so, by what percentage. As such, defendant's second counterclaim for a rent overcharge is dismissed unless defendant repleads said counterclaim within thirty days.

The third counterclaim, which alleges unlawful eviction and seeks damages pursuant to Real Property Actions and Proceedings Law ¶ 852, an apparently nonexistent section of the RPAPL, is dismissed for failure to state a cause of action, with leave to replead.

The fourth counterclaim seeks restoration of possession and restoration of defendant's rent-stabilized lease. Said counterclaim is improperly pled. The Apartment was sold to a third party, and in any event, the subject apartment building was converted to condominium ownership by declaration dated May 2, 2016, prior to defendant's vacatur of the Apartment. Therefore,

plaintiff is an improper counterclaim defendant, and as such, defendant's fourth counterclaim for restoration of possession is dismissed without prejudice.[2]

The fifth through seventh counterclaims, allege, respectively, a violation of New York State Human Rights Law ¶ 296 (5)(a)(2); a violation of the New York City Human Rights Law § 8-107 (5), based on disability; and a violation of the Fair Housing Act (42 USC 3604 [f]), based on disability. The fifth through seventh counterclaims are lacking in evidentiary facts, and are dismissed for failure to state a cause of action, with leave to replead. The facts alleged by counsel in the memorandum of law in opposition have no evidentiary value and will not be considered by this Court. Those statements are neither sworn to nor based on personal knowledge, and cannot be used to supplement an otherwise deficient pleading in the manner that sworn affidavits may be used under the authority of *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

> "The facts stated in the memoranda of law submitted by both parties are merely unsworn statements not based on personal knowledge, and are not part of the record. They have no evidentiary value any more than facts stated in an attorney's affidavit"

(*Rogers v Krauss*, 2012 WL 10464762, at *4 (Sup Ct, NY County 2012]; *see also Chiarini v County of Ulster*, 9 AD3d 769, 770 [3d

[2]At the very least, defendant would need to name the current owners of the Apartment and Board of Managers of the subject apartment building in order to assert a claim for restoration of possession.

Dept 2004])(stating: "[t]he affidavit of defendant's attorney, who claimed no personal knowledge of the germane facts, was probatively valueless and without evidentiary significance" [*id.* at 770][internal quotation marks and citations omitted]).

The eighth counterclaim, seeking punitive damages is dismissed on the basis that a demand for punitive damages is not a separate cause of action (*see Bader's Residence For Adults v Telecom Equip. Corp.*, 90 AD2d 764, 764 [2d Dept 1982]).

Agreements similar to the Settlement Agreement have been upheld for rent-stabilized apartments provided that they do not violate section 26-408 of the Administrative Code of the City of New York, which provides protections against evictions, or otherwise offend public policy; and where "there is no evidence of bad faith or overreaching by the landlord;" and the agreement is made by the tenant with the advice of counsel (*Merwest Realty Corp. v Prager*, 264 AD2d 313, 313-14 [1st Dept 1999]). Inasmuch as the Tenant is pleading harassment and discrimination, both of which offend public policy, the Settlement Agreement is not determinative of either party's rights at this stage of the action.

CONCLUSION

Accordingly, it is

ORDERED that the motion by plaintiff 1810 3rd Avenue Associates LLC, to dismiss the "first defense" is granted, to the

extent of striking the following language in the first defense in paragraph 30 of the Verified Answer and Counterclaims: "which states, in explicit detail, the harassing behavior that the landlord will stop doing in exchange for her vacatur", and the motion to dismiss the second and third affirmative defenses is granted. The fourth and eighth counterclaims are dismissed without prejudice for failure to state a cause of action; the second, third and fifth through seventh counterclaims are dismissed for failure to state a cause of action, with leave to replead within thirty days; and the motion is otherwise denied.

Dated: August 9, 2019

ENTER:

HON. SHLOMO S. HAGLER, J.S.C.