

Nucci v Nabi

2019 NY Slip Op 32675(U)

September 11, 2019

Supreme Court, New York County

Docket Number: 101217/2013

Judge: W. Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

ANNAMARIA NUCCI

Plaintiff,

- v -

MASOOD NABI,

Defendant.

-----X

INDEX NO. 101217/2013
MOTION DATE 08/26/2019
MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for TRIAL PREFERENCE

In motion sequence number 004, plaintiff Annamaria Nucci ("Plaintiff") moves, pursuant to CPLR 3403(a)(3), for an order granting Plaintiff a preference in trial scheduling on the grounds that Plaintiff is currently eighty years of age. Defendant Masood Nabi ("Defendant") opposes the motion and cross-moves for an order striking Plaintiff's demand for a jury trial.

BACKGROUND

Plaintiff commenced this action on or about September 3, 2013, alleging, inter alia, that Defendant entered into a lease agreement with Plaintiff on December 21, 2007 (the "Lease"), under which Defendant was and did occupy Plaintiff's apartment unit 11-G in the building located at 106 Central Park South, New York, New York (the "Unit"). Plaintiff alleges that, upon expiration of the lease term on or about March 14, 2019, Plaintiff agreed to reduce Defendant's rent based on Defendant's fraudulent representation that Defendant intended to use the Unit for storage only. Plaintiff further alleges that Defendant ultimately refused to vacate the Unit, and remained in the Unit until on or about March 11, 2010. Plaintiff's complaint seemingly asserts a single cause of action seeking the unpaid monthly rent for the Unit from the date of March 15,

2009 through March 11, 2010, together with unpaid electricity charges, in the total sum of \$96,263.65.

Plaintiff filed her Notice of Issue and Certificate of readiness at the conclusion of discovery. The Note of Issue, filed July 25, 2019, demands a jury trial.

DISCUSSION

Plaintiff now moves for a trial preference, pursuant to CPLR 3403(a)(4), on the grounds that Plaintiff is currently eighty years old.

CPLR 3403 states, in relevant part, that:

(a) Preferred cases. Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference:

4. in any action upon the application of a party who has reached the age of seventy years.

“[T]he plaintiff has the burden of establishing the right to a preference under the rule, and the application may not be lightly granted” (*Meyers v City of New York*, 7 A.D.2d 903 [1st Dept 1959]). Trial preference is improper where plaintiff “fails to present unequivocal proof of the special circumstances required to warrant the granting of a preference” (*Smith v. Horn Const. Co.*, 208 N.Y.S.2d 1003, 1004 [1st Dept 1961]).

Here, the Court finds that Plaintiff has made a sufficient evidentiary showing in support of her motion for a trial preference. The Court, in its discretion, chooses to overlook the procedural defects in Plaintiff’s initial moving affirmation, which was refiled along with Plaintiff’s reply as an affidavit, along with a copy of Plaintiff’s driver’s license. Defendant has not argued and has presented no proof to refute Plaintiff’s allegation and supporting documentation that establish that Plaintiff was born in 1939 and is currently approximately eighty years of age. Accordingly, Plaintiff’s motion for a trial preference is granted.

Defendant cross-moves to strike Plaintiff's demand for a jury trial, arguing that Plaintiff waived her right to a jury trial under the terms of the Lease. Paragraph 24 of the Lease states: "Landlord and Tenant agree not to use their right to a Trial by Jury in any action or proceeding brought by either against the other, for any matter concerning this Lease or the Unit. The giving up of the right to a Jury Trial is a serious matter." (NYSCEF Doc. No. 38). Plaintiff, in their reply in further support of their motion for a trial preference, consents to entry of an order striking Plaintiff's demand for a jury trial in accordance with the Lease (NYSCEF Doc. No. 41). Accordingly, Defendant's cross-motion to strike Plaintiff's demand for a jury trial is granted.

CONCLUSION

Thus, it is hereby

ORDERED that Plaintiff's motion for a trial preference is granted on the ground that Plaintiff has reached the age of 80 years; and it is further

ORDERED that counsel for the movant shall, within 15 days from entry of this order, serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to place this case on the appropriate trial calendar at the head of said calendar except for actions in which a preference was previously granted; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that Defendant's cross motion is granted and that the Demand for a Jury Trial, dated July 25, 2019, filed by Plaintiff is hereby stricken.

Any requested relief not otherwise discussed has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

9/11/19
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: