Aurora Assoc. LLC v Hennen
2020 NY Slip Op 31248(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 154644/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON**, ***Justice*** — **PART** **IAS MOTION 42EFM**

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AURORA ASSOCIATES LLC,

Plaintiff,

- v -

MARK HENNEN, PIANO MAGIC COMPANY, JOHN DOE, JANE DOE

Defendant.

---X

INDEX NO. 154644/2015

MOTION DATE 03/20/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this motion to/for SUMMARY JUDGMENT.

In this ejectment action arising from the defendants' alleged profiteering from a rent-controlled apartment through improper subletting on Airbnb, the plaintiff moves pursuant to CPLR 3212 for partial summary judgment on its second and third causes of action seeking (i) a declaration that the defendants illegally profited from, and commercially exploited, the 5th floor East Loft in the building located at 78-82 Reade Street, New York, New York, (Apartment 5E), in violation of, *inter alia*, 29 RCNY 2-09(c)(4)(ii)(A) and paragraphs 2, 6, 11, and 17 of the underlying lease agreement and (ii) an order ejecting defendants from the apartment pursuant to, *inter alia*, 29 RCNY 2-09(c)(4)(ii)(A) and RPL 226-b. The defendants oppose the motion. The plaintiff's motion is partially granted.

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect

Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Under 29 RCNY 2-09(c)(4)(ii)(A), occupants of rent stabilized apartments have the right to sublet their units "pursuant to and in accordance with the procedures specified in [RPL 226-b]." RPL 226-b requires the written consent of a landlord in advance of any subletting, and further states that "[a]ny sublet or assignment which does not comply with the provisions of this section shall constitute a substantial breach of lease or tenancy." It is well settled that, when regulated tenants rent space on a short-term basis to transient individuals at rates higher than allowed by applicable regulations, that conduct is "in the nature of subletting rather than taking in roommates, and constitute[s] profiteering and commercialization of the premises," which is an "incurable violation." 220 W. 93rd St., LLC v Stavrolakes, 33 AD3d 491 (1st Dept. 2006). Once substantial profiteering has been established, the tenant is subject to eviction without any right to cure, as a matter of law. See Goldstein v Lipetz, 150 AD3d 562 (1st Dept. 2017).

In support of its motion, the plaintiff submits, *inter alia*, the underlying deed, the lease between the plaintiff and the defendants requiring the plaintiff's approval for any subletting of Apartment 5E, housing registrations for the building, the notice of termination of the lease sent to the defendants, and the affidavit of a member of the plaintiff who oversees management of the building, Albert Laboz, stating that the legal regulated rent for the apartment is $22.44 per night, or $682.57 per month. The plaintiffs further submit a printout of the Airbnb advertisements for the apartment, and the Airbnb records produced in response to a subpoena duces tectum showing that, over the 1348 day period that Airbnb maintained records for the defendants' transactions on the website, the defendants charged approximately $156,000.00 to transient individuals on a short-term basis. These submissions establish a blatant commercialization of the apartment and an incurable violation of the rent stabilization code.

The plaintiff's submissions further establish a prima facie case for ejectment, *i.e.* 1) that the plaintiff is the owner of the building, 2) that the building is a duly registered interim multiple dwelling, 3) that the defendant is the tenant of record, 4) that the defendant substantially violated the obligation of the tenancy, 5) that the tenancy was terminated, and 6) that the apartment has not been returned to the plaintiff. See RPAPL 641. Here, it is undisputed, and the submitted evidence demonstrates, that the plaintiff owns the building, that the building is a duly registered interim multiple dwelling, that the defendants' are the tenants of record for the apartment, that the defendants' tenancy was terminated, and that the apartment has not been returned to the plaintiff. As such, the only issue is whether the defendants' have substantially violated the obligations of the tenancy, which the plaintiffs submissions demonstrates inasmuch as the defendants' have substantially violated the 29 RCNY 2-09(c)(4)(ii)(A) and RPL 226-b by failing to obtain the consent of the landlord prior to subletting the apartment.

In response, defendants do not attempt to dispute any of the factual allegations in the plaintiff's papers, but rather attack the motion on two procedural grounds. They argue that the instant motion for summary judgment is an impermissible second summary judgment motion, and that the Airbnb records are inadmissible because the accompanying declaration is unsworn.

It is well established that successive motions for summary judgment are disfavored absent a showing of newly discovered evidence or other sufficient justification. See Jones v 636 Holding Corp., 73 AD3d 409 (1st Dept. 2010). A successive motion for summary judgment based entirely upon evidence available at the time the first motion was filed should not be entertained. Id. A court may find sufficient justification for granting a successive motion to the extent that it is substantively valid and granting the motion furthers the ends of justice while eliminating an unnecessary burden on the resources of the courts. See Elihu v Nicoleau, 173 AD3d 578 (1st Dept. 2019); Landmark Capital Investments, Inc. v Li-Shan Wang, 94 AD3d 418 (1st Dept. 2012); Detko v McDonald's Rests. Of N.Y., 198 AD2d 208 (2nd Dept. 1993). Here, there is sufficient justification for a second motion for summary judgment, inasmuch as the plaintiff's initial motion was brought prior to any discovery being conducted or any subpoenas being served, new evidence has since benn produced by Airbnb pursuant to the subpoenas, and granting the motion would further the ends of justice by relieving the court and the movants of the burden of a plenary trial.

The defendant further argues that because the certification provided in response to the subpoena duces tecum is not sworn in the form of an affidavit, as it is only made under penalty of perjury and not sworn before a notary, it is not evidentiary proof in admissible form such that it can be considered in a motion for summary judgment. The defendants are correct in that under CPLR 3122-a(a), "[b]usiness records produced pursuant to a subpoena duces tectum under CPLR 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian," and such requirements were not adhered to in this instance. However, the documents in question are not necessary for the plaintiff to establish an absence of triable issues of fact.

Even without considering the Airbnb documents produced pursuant to the subpoena duces tecum, the plaintiff still establishes its *prima facie* burden for ejectment. The affidavit of Albert Laboz and the printout of the Airbnb advertisements for the apartment demonstrate that the defendants have advertised the apartment in question on Airbnb. The defendants' answer corroborates that the apartment has previously been advertised on Airbnb. The printout of the Airbnb advertisements further shows pricing for the rooms at $130 or $150 per night and includes 54 reviews for one of the rooms and 37 reviews for another, each of which discusses a respective stay in the apartment. This evidence establishes that the defendants have sublet the apartment, without the landlord's consent, in violation of RPL 226-b and such a violation is a substantial breach of lease or tenancy such that ejectment is proper.

As the court has determined that the defendants Mark Hennen and Piano Magic Company violated 29 RCNY 2-09(c)(4)(ii)(A) and RPL 226-b and the underlying lease agreement, the court does not reach the plaintiff's motion for ejectment based upon 29 RCNY 2-08.1(a)(2), and RPAPL 711(5).

Accordingly, it is,

ORDERED that the plaintiff's motion for partial summary judgment on its second cause of action seeking a declaration that the defendants Mark Hennen and Piano Magic Company illegally profited from, and commercially exploited, the 5th floor East Loft in the building located at 78-82 Reade Street, New York, New York, in violation of 29 RCNY 2-09(c)(4)(ii)(A), RPL 226-b, the underlying lease agreement, 29 RCNY 2-08.1(a)(2), and RPAPL 711(5) is partially granted to the extent discussed herein and otherwise denied; and it is further,

ADJUDGED and DECLARED that defendants Mark Hennen and Piano Magic Company are in violation of 29 RCNY 2-09(c)(4)(ii)(A), RPL 226-b, and their underlying lease agreement due to their unauthorized subletting of the 5th floor East Loft in the building located at 78-82 Reade Street, New York, New York; and it is further,

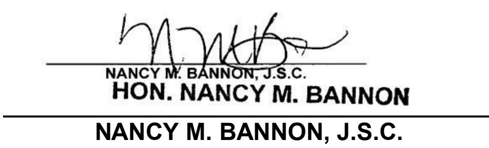
ORDERED that the motion of plaintiff for summary judgment on the third cause of action for ejectment is granted; and it is further,

ORDERED and ADJUDGED that plaintiff is entitled to possession of 5th Floor East Loft in the building located at 78-82 Reade Street, New York, New York, otherwise known as Apartment 5E as against defendants Mark Hennen and Piano Magic Company, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further,

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 5th Floor East Loft in the building located at 78-82 Reade Street, New York, New York, otherwise known as Apartment 5E, New York, New York, including entry thereto, as against defendants Mark Hennen and Piano Magic Company; and it is further,

ORDERED that the action is severed and discontinued as against defendants John Doe and Jane Doe.

This constitutes the Decision, Order, and Judgment of the Court.



HON. NANCY M. BANNON

5/6/2020
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**				**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**		**OTHER**