

933 Amsterdam Holdings, LLC v Jenkins
2020 NY Slip Op 32305(U)
July 14, 2020
Supreme Court, New York County
Docket Number: 155045/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

-----X

933 AMSTERDAM HOLDINGS, LLC,

Plaintiff,

- v -

KIMBERLY JENKINS, JOHN DOE, JANE DOE

Defendant.

-----X

INDEX NO. 155045/2019

MOTION DATE 11/01/2019

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this ejectment action, plaintiff, Amsterdam Holdings, LLC, moves, pursuant to CPLR 3211 (b) and 3212 (e), for an order granting plaintiff partial summary judgment on the first cause of action in the complaint seeking ejectment, dismissal of defendant Kimberly Jenkins (“defendant” or “Jenkins”) first affirmative defense; a judgment of possession against defendant, together with the issuance of a writ of assistance/warrant of ejectment in favor of plaintiff, based on the alleged illegal occupancy of Jenkins in the subject apartment, which is in violation of the certificate of occupancy for the subject building.

For the reasons set forth below, the motion is denied in part and granted in part.

Background

Plaintiff is the deed owner of a building located at 933 Amsterdam Avenue also known as 160 West 106 Street, County of New York, in the City and State of New York (the building).

Defendant Jenkins moved into an apartment, Unit #1C in the building (the premises), pursuant to a residential lease agreement with plaintiff dated September 12, 2017 for a term

beginning September 13, 2017 and ending August 13, 2018 at the monthly rate of \$2,475.00 per month (the lease) (plaintiff exhibit G). Paragraph 2 of the lease states: “Owner warrants that the apartment and building are fit for habitation and there are no conditions dangerous to health, life or safety” (*id.*). Paragraph 3 provides that “[t]he apartment is to be used and occupied for private residential purposes only, as the residence of Renter” (*id.*). And both the decretal statement and paragraph 58 provide that the “apartment is not subject to rent stabilization” (*id.*). Shortly after executing the lease, beginning in November 2017, Jenkins stopped paying the monthly rent, presumably after discovering that the apartment had never been registered as rent regulated despite the building being constructed in or around 1935.

On May 17, 2018, plaintiff commenced a summary nonpayment proceeding in Civil Court Housing Part seeking payment of the back rent or a judgment of possession of the premises (index No. LT-062570-18/NY) (defendant’s exhibit 3). According to defendant, despite the pending proceeding, after the lease expired, plaintiff offered Jenkins a lease renewal for a term of 12 months, which Jenkins accepted (unsigned renewal lease for period 09/01/18-08/31/19, defendant’s exhibit 4).

Jenkins amended her answer in the nonpayment proceeding raising a variety of defenses and counterclaims, including that plaintiff could not collect rent because: the apartment is illegal; there was no valid certificate of occupancy for the apartment; the apartment was not registered with the Division of Housing and Community Renewal (DHCR); and the apartment was de facto rent stabilized (defendant’s exhibit 5). Defendant Jenkins also raised counterclaims based on a rent overcharge and for attorneys’ fees (*id.*). According to Jenkins, in the nonpayment proceeding, plaintiff always represented that the apartment was a legal, residential market rate apartment that was exempt from rent regulation due to luxury decontrol. By email dated

December 19, 2018, through counsel, plaintiff offered Jenkins another apartment in another building, which plaintiff claims was at a lower rent of \$2,412.88 (defendant's exhibit 6). Jenkins claims, and the email reflects, that plaintiff did so in the spirit of settlement, not because of any claimed illegality (*id.*).

On January 7, 2019, the Honorable Timmie Erin Elsner granted summary judgment to Jenkins finding that the building, with more than six units was constructed in or about 1935, and "should have been registered with the DHCR at some point in time as rent regulated" (1/7/19 decision and order, plaintiff exhibit J). The court rejected plaintiff's argument that the apartment was exempted "because the legal regulated rent was \$2,000 or more prior to June 24, 2011" (*id.*). The court found that Jenkins is the first regulated tenant to occupy the apartment and dismissed the rent overcharge counterclaim, as the appropriate course would be to file a "Fair Market Rent Appeal" with the DHCR (*id.*). The legality of the subject premises was not discussed (*id.*).

On April 15, 2019, plaintiff served Jenkins with a notice of termination (plaintiff exhibit A). According to plaintiff, Jenkins' tenancy expired on April 30, 2019,¹ however, defendant remains in possession of the premises without plaintiff's permission. On or about May 17, 2019, plaintiff commenced the instant ejectment action against defendants alleging that the apartment is illegal as there is no valid certificate of occupancy for the apartment. According to a certificate of occupancy for the building, the premises is illegal, since only two apartments are permitted on the first floor of the building (*see* building's certificate of occupancy, plaintiff exhibit H).

The Building of the Third Apartment

According to plaintiff, in 2015, after a commercial tenant had left the building, Jenkins' apartment was created from the preexisting commercial space at the building with a storefront on

¹ It is not clear to the court why Jenkins' tenancy was set to expire on that particular date.

Amsterdam Avenue. Specifically, the commercial space was partitioned, creating a smaller commercial space in addition to a newly created residential space. The newly created residential premises, was contained entirely within the commercial premises. According to plaintiff, Jenkins' apartment is not one of the preexisting and legal residential apartments permitted on the first floor of the building, and was never legalized for residential use, as the certificate of occupancy was never amended. The current certificate of occupancy provides for four stores and two apartments at the first floor, not the three apartments which currently exist on that floor (plaintiff exhibit H).

Affidavit of Gregg Rothstein

Plaintiff submits the affidavit of Greg Rothstein, a New York, licensed architect, dated October 17, 2019 (Rothstein aff). For his over 30-year career, Rothstein has specialized in evaluating tenements and the conversion of multiple dwellings in New York City (Rothstein aff, ¶¶ 1-4). According to Rothstein, “on or about December 20, 2016, a member of [his] professional staff, inspected and conducted measurements of the inside of the subject premises” (*id.*, ¶ 6). Rothstein avers that he visited the other areas of the building on prior occasions (*id.*). He also avers that he reviewed available “construction documents, plans certificates of occupancy, Department of Buildings and Housing and Preservation and Development documents and websites related to the building to make a determination” concerning the legality of the building” (*id.*, ¶ 7).

Rothstein opines that the premises is illegal as the apartment: was created in contravention of the certificate of occupancy; does not comply with either the Americans with Disabilities Act (ADA), as it does not have a handicapped accessible bathroom and or kitchen; and does not meet the minimum requirements of the Multiple Dwelling Law and the City of New

York Housing Maintenance Code 27-2074, with respect to the size requirements of a bedroom (*id.*, ¶¶ 9 - 12). Rothstein further opines that the existing square footage of the premises, i.e., the kitchen, bathroom and bedroom cannot be made ADA compliant as they do not meet the minimum size requirements of the law (*id.*, ¶ 14). Also, Rothstein notes that the existing windows are illegal and not capable of being legalized, as they were commercial windows, and as residential windows would be required to look out on a courtyard with 30 feet of depth, as opposed to the current depth and space between the windows and the neighboring building is less than five feet (*id.*).

Discussion

It is well established that the proponent of a summary judgment motion “must ‘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’” (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party ‘to establish the existence of material issues of fact which require a trial of the action’” (*Nomura Asset Capital Corp.*, 26 NY3d at 49, quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation omitted]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party (*see Vega*, 18 NY3d 499). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*O’Sullivan v Presbyt. Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 100-101 [1st Dept 1995]).

In order to obtain summary judgment on a cause of action for ejectment, plaintiff must “show conclusive proof that the ... apartment is illegal” (*Hart-Zafra v Singh*, 21 Misc 3d 1142[A], 2004 NY Slip Op 51947[U], *2 [Sup Ct, NY County 2004]). Plaintiff alleges that the apartment is illegal because there is no certificate of occupancy for the apartment. Plaintiff’s expert opines that the premises violates the ADA, Multiple Dwelling Law (MDL) and the New York City Housing Maintenance Code. Plaintiff has not, however, supplied the court with any documentation from the New York City Department of Buildings (DOB) to show that it has been issued a violation for said premises (*see 366 Audubon Holding, LLC v Morel*, 22 Misc 3d 1108[A], 2008 NY Slip Op 52615[U], *6 [Sup Ct, NY County 2008] [“to successfully prevail on its claim that the [apartment] is illegal and in violation of MDL ... and obtain summary judgment on this centrally disputed issue, plaintiff must have produced an illegal occupancy violation issued by the DOB/ECB”]; *Fazio v Kelly*, 2003 NY Slip Op 51276[U], *10 [Civ Ct, Richmond County 2003] [“The case law is clear that once the Building Department makes a determination and gives notice to the landlord of the violation of law, the landlord is obligated to remove the illegal tenants]).

Moreover, the landlord may not remove a tenant on the ground of illegal occupancy “where the landlord himself created the illegality or took title with notice of an illegality created by a predecessor in title,” or “if the illegality is susceptible of cure without undue expense or difficulty” (*Hart-Zafra*, 2004 NY Slip Op 51947[U] at *4, quoting *Matter of K & G Co. v Reyes*, 52 Misc 2d 606, 609 [Civ Ct, NY County 1966]; *see also 81 Bowery Realty Corp. v Qui Hui Chen*, 20 Misc 3d 1103[A], 2008 NY Slip Op 51210[U], *3 [Sup Ct, NY County 2008] [“It is well settled that a landlord may not remove a tenant on the ground of illegal occupancy where: (1) the landlord created the illegality, or (2) where the landlord took title with notice of an

illegality created by a predecessor in title, and (3) the illegality is susceptible of cure without undue expense or difficulty”] [internal quotation marks and citation omitted]).

Here, there is no dispute the landlord created the apartment in 2015, and therefore, created the alleged illegality. Additionally, aside from plaintiff’s expert’s affidavit, plaintiff does not state whether it attempted to amend the certificate of occupancy permitting the third apartment on the first floor of the building (*625 West End, Inc. v Howard*, 2001 NY Slip Op 40496[U] [App Term, 1st Dept 2001] [(e)ven assuming the existence of a violation, landlord would be required to demonstrate that the certificate of occupancy is incapable of amendment”]; *Chelsea Partners I, LLC v Romano*, 66 Misc 3d 436, 440 [Civ Ct, NY County 2020]).

Further, the court rejects plaintiff’s expert opinion that the apartment cannot be altered into complying with applicable law because: (1) Rothstein did not personally conduct the inspection of the premises a “member of [his] staff” did; and (2) plaintiff’s expert is not permissible to support the granting of summary judgment in plaintiff’s favor (*see Measom v Greenwich & Perry St. Hous. Corp.*, 268 AD2d 156, 159 [1st Dept 2000]; *366 Audubon Holding, LLC v Morel*, 22 Misc 3d 1108[A], 2008 NY Slip Op 52615[U], *7 [Sup Ct, NY County 2008] [“plaintiff’s expert’s legal conclusion in support of plaintiff’s summary judgment motion is impermissible”]).

What the court finds particularly concerning is plaintiff’s submission of an expert attesting to inspecting the premises a year *before* plaintiff rented the apartment to defendant Jenkins. Regardless, the court finds issues of fact remain as to whether plaintiff applied to the DOB to amend the certificate of occupancy or for a permit to alter the premises to comply with the applicable law and codes (*see 366 Audubon Holding, LLC*, 22 Misc 3d 1108[A], 2008 NY

Slip Op 52615[U], *5-6). Considering these facts, plaintiff's motion for summary judgment is denied.

The court turns to plaintiff's motion to dismiss defendant's first affirmative defense. Pursuant to CPLR 3211 (b), "(a) party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211 [b]). On a motion to dismiss an affirmative defense pursuant to CPLR 3211 (b), "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. A defense should not be stricken where there are questions of fact requiring trial" (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011] [citations omitted]). Plaintiff bears the "heavy burden of showing that the defense is without merit as a matter of law" (*Pugh v New York City Hous. Auth.*, 159 AD3d 643, 643 [1st Dept 2018] [internal quotation marks and citations omitted]).

Defendant's first affirmative defense is that that plaintiff may not bring a cause of action for ejectment as the premises are subject to the Rent Stabilization Law and plaintiff has not registered the premises with the DHCR, nor has it served a notice of termination. Plaintiff argues that there is no basis in law for such a defense. Defendant does not address this argument in their opposition and therefore the first affirmative defense is abandoned.

In any event, to the extent that defendant claims in this affirmative defense, lack of service of a termination notice, it is well established that such notice is not required at common law prior to commencing an ejectment proceeding (*East 82 LLC v O'Gormley*, 295 AD2d 173, 173 [1st Dept 2002]; *Alleyne v Townsley*, 110 AD2d 674 [2d Dept 1985]). Nevertheless, plaintiff did serve a notice of termination, and has submitted an affidavit in support which reflects that the notice was personally served on Jenkins -- which defendant also does not dispute (*Hinds v 2461*

Realty Corp., 169 AD2d 629 [1st Dept 1991] [affidavit of a process server constitutes prima facie evidence of proper service]).

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is denied; and it is further

ORDERED that plaintiff’s motion to dismiss defendant’s first affirmative defense is granted.



7/14/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE