Greenwald v 379 Baltic St., LLC
2021 NY Slip Op 30757(U)
March 11, 2021
Supreme Court, Kings County
Docket Number: 505679/18
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of March, 2021

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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JOSHUA GREENWALD,

Plaintiff,

- against -

Index No. 505679/18

379 BALTIC STREET, LLC,

Defendant.

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The following efiled papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	65-67
Opposing Affidavits (Affirmations)	75-76
Reply Affidavits (Affirmations)	80

Upon the foregoing papers, defendant 379 Baltic Street, LLC moves for an order, pursuant to CPLR 3211 and 3212, granting summary judgment dismissing the complaint.

Defendant is the owner of a residential apartment building at 379 Baltic Street in Brooklyn. On or about July 1, 2014, Fatima Ali took occupancy of "Unit SA2" in the building pursuant to a one-year market rate lease. Following the expiration of the

lease term, Ali occupied the apartment on a month-to-month basis until she vacated the premises in or about June 2017. At some point during Ali's tenancy, plaintiff moved into the apartment as a roommate. According to the complaint, the apartment was disposed to flooding and heating problems during the period of plaintiff's occupancy. Plaintiff alleges that the flooding caused substantial damage to his personal property and that his complaints to defendant concerning the flooding, property damage and poor heat conditions, as well as his request for restitution, were fruitless.

After Ali vacated the apartment, plaintiff remained in occupancy without a lease or permission of defendant. A holdover proceeding was commenced by defendant against plaintiff in Civil Court, which resulted in a stipulation dated December 19, 2017 whereby the parties agreed that plaintiff would vacate the apartment by April 30, 2018, that a warrant of eviction and judgment of possession would be stayed until such date, that plaintiff would have the right to seek a further stay and that plaintiff reserved his right to bring an action challenging the regulatory status of the building.

The instant action was commenced on March 21, 2018. In his complaint, plaintiff sets forth causes of action for: 1) a judgment declaring that defendant's building is subject to the Rent Stabilization Law and Loft Law; 2) an injunction directing defendant to register the building with the Loft Board and furnish plaintiff with a lease in accordance with the Loft Law; 3) an award of the amount overcharged

in rent; 4) treble damages on the rent overcharge; 5) damages for breach of the warranty of habitability; 6) damages for breach of the covenant of quiet enjoyment; 7) abatement of rent under Multiple Dwelling Law [MDL] §§ 301 and 302; and 8) attorneys' fees pursuant to Real Property Law [RPL] § 234. On May 11, 2018, plaintiff moved by order to show cause for a further stay of eviction pending the final determination of this action.[1] By order dated June 15, 2018 (Francois Rivera, J.), plaintiff's motion was denied and the stay of eviction was lifted and vacated. Plaintiff was thereafter physically dispossessed.

Defendant brought a prior motion for summary judgment on grounds that the subject building was not subject to the Rent Stabilization or Loft Laws, plaintiff was never a tenant of the subject apartment and thus had no standing to bring warrant of habitability and quiet enjoyment claims and that MDL §§ 301 and 302 do not provide for a rebate of rent already paid. By order dated May 17, 2019, the motion was denied by Justice Rivera without prejudice to renew following completion of discovery. Plaintiff filed a note of issue on February 24, 2020.

In the instant motion for summary judgment, defendant reiterates its arguments that the premises was not subject to the Rent Stabilization or Loft Laws, plaintiff was never a tenant of the subject unit and thus has no standing to bring claims grounded

[1]The April 30, 2018 stay date in the stipulation was extended by the Civil Court to May 31, 2018.

upon the covenants in the lease and that MDL §§ 301 and 302 do not provide for a rebate of rent already paid.

"A defendant moving for summary judgment has the initial burden of coming forward with admissible evidence, such as affidavits by persons having knowledge of the facts, reciting the material facts and showing that the cause of action has no merit" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opponent to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial (*id.*; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With exceptions not applicable here, the Rent Stabilization Law and Code do not apply to housing accommodations in buildings completed or substantially rehabilitated as family units on or after January 1, 1974 (Rent Stabilization Code [9 NYCRR] § 2520.11 [e]). The Rent Control Law does not apply to housing accommodations which were completed on or after February 1, 1947 (Administrative Code § 26-402 [e] [2] [h]). According to the building's certificate of occupancy and the affidavit of defendant's owner and managing member, Lorenzo Locicero, the subject premises was newly constructed on a vacant lot in 2002, a fact which is not

disputed by plaintiff. As such, neither the Rent Stabilization Law nor the Rent Control Law apply. Plaintiff's counsel appears to so concede in her opposing affirmation (NYSCEF Doc No 75, ¶ 21).

The Loft Law (MDL article 7-C) confers rent stabilized status upon "interim multiple dwellings" as defined by MDL § 281. The version of MDL § 281 in effect at the time of plaintiff's occupancy provided, in relevant part, that:

> 1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred one of this chapter; and (iii) on December first, nineteen hundred eighty-one was occupied for residential purposes since April first, nineteen hundred eighty as the residence or home of any three or more families living independently of one another.
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> 5. Notwithstanding the provisions of paragraphs (i), (iii) and (iv) of subdivision two of this section, but subject to paragraphs (i) and (ii) of subdivision one of this section and paragraph (ii) of subdivision two of this section, the term "interim multiple dwelling" shall include buildings, structures or portions thereof that are located in a city of more than one million persons which were occupied for residential purposes as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January first, two thousand eight, and ending December thirty-first, two thousand nine, ***provided that the***

> ***unit: is not located in a basement or cellar*** . . . (emphasis added).[2]

According to the certificate of occupancy, the subject building contained eight residential dwelling spaces, with the unit or units in the cellar designated as commercial or retail space. It is not in dispute that the subject apartment was located in the cellar of the building, which is confirmed in the opposing affirmation of plaintiff's counsel (NYSCEF Doc No 75, ¶ 12 ["The subject premises is a basement unit on the bottom floor of the subject building"]). As the unit was located in the cellar, it is not considered an "interim multiple dwelling" under MDL § 281. Moreover, while the unit may be designated as commercial space under the certificate of occupancy, there are no factual allegations in the complaint, nor is there evidence in the record establishing, that the unit was at any time actually "occupied for manufacturing, commercial, or warehouse purposes" as required to constitute an interim multiple dwelling under MDL § 281.

Defendant has thus established that the subject unit is not subject to Rent Stabilization, Rent Control or the Loft Laws. Plaintiff has not submitted admissible evidence to raise an issue of fact.

As a result, the first, second, third and fourth causes of action are dismissed.

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[2]The amended provisions cited by plaintiff in opposition did not take effect until June 25, 2019 and applied only to "applications pending approval or on appeal on and after such date" (L 2019, ch 41, § 11).

Plaintiff's fifth cause of action for breach of warranty of habitability and sixth cause of action for breach of the covenant of quiet enjoyment are similarly unavailing. It is not in dispute that Ali was the only tenant named on the lease to the subject unit. Plaintiff thus has no cause of action based on breach of the warranty of habitability since he was never the tenant of record nor was he contractually obligated to pay rent *(see Wright v Catcendix Corp.*, 248 AD2d 186 [1st Dept 1998]; *2110 Arthur Assets LLC v Vista Mgt. Corp.*, 57 Misc 3d 1201[A], 2017 NY Slip Op 51177[U] [Civ Ct, Bronx County; *Bandler v Battery Park Mgt Co*, 10 Misc 3d 133[A], 2005 NY Slip Op 52063[U] [App Term, 1st Dept 2005][former roommate of tenant had no cause of action against defendant landlord for statutory harassment or breach of the implied warranty of habitability since there was neither a contractual agreement nor landlord-tenant relationship between the roommate and the landlord]).

The lease signed by Ali contains an express covenant that "so long as the Tenant pays rent and 'additional rent' reserved hereby and performs and observes the covenants and provisions hereof, the tenant shall quietly enjoy the demised premises, subject however to the terms of this lease..." A covenant that the lessee is entitled to quiet enjoyment of the demised property is also implied into all leases (*see Fifth Avenue Bldg. Co. v Kernochan*, 221 NY 370, 376 [1917]). Insofar as plaintiff was not a party to the lease and was under no personal obligation to pay rent, plaintiff has no

standing to assert any claim for the breach of any covenants in the lease, express or implied.

In his opposition papers, plaintiff argues that a landlord-tenant relationship was created since plaintiff made rent payments on occasion, defendant had knowledge that plaintiff resided in the apartment and plaintiff was entitled to reside in the apartment under the "Roommate Law" (RPL § 235-a). However, "[i]t is well settled that a mere occupant acquires no interest in the premises" (*Starrett City, Inc. v Smith*, 25 Misc 3d 42, 46 [App Term, 2d Dept 2009]; see RPL § 235-f [6]). A mere occupant's "payment of rent, in and of itself, does not create a tenancy where none was contemplated" (*Starrett City, Inc.*, 25 Misc 3d at 45). Further, RPL § 235-f simply permits one occupant to reside in the subject apartment in addition to the lawful tenant and family and makes any provision in the lease prohibiting such occupancy unenforceable. There is nothing in the statute which may be interpreted to extend a landlord-tenant relationship to such additional occupant. Further, the communications between plaintiff and defendant do not evidence any belief or acknowledgment by defendant that plaintiff was a "tenant," rather than a mere roommate of Ali.

MDL § 302 provides, in relevant part:

> 1. a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one [mandating that "(n)o multiple dwelling shall be occupied in whole or in part until the issuance of a certificate (of occupancy)"]. . .

> b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent.

Because plaintiff no longer resides in the premises and is not obligated to pay rent, his seventh cause of action under MDL §§ 301 and 302 are moot. To the extent plaintiff seeks recovery of any rent he may have paid to defendant while he occupied the unit, MDL § 302 "may not be used as a sword to recoup rents already paid" *(Ovalles v Mayer Garage Corp.*, 8 Misc 3d 137[A], 2005 NY Slip Op 51261[U], *1 [App Term, 1st Dept 2005], citing *Baer v Gotham Craftsman Limited*, 154 Misc2d 490, 492–493 [App Term, 1st Dept 1992]).

As a result, plaintiff's seventh cause of action is dismissed.

Plaintiff's eighth and final cause of action to recover attorneys' fees is under RPL § 234 is likewise dismissed. RPL § 234 provides:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by

> way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. A landlord may not recover attorneys' fees upon a default judgment. Any waiver of this section shall be void as against public policy.

By its clear terms, the statue is only applicable to named tenants in a lease. Because it is established that plaintiff was not a party to the lease and not a tenant, he has no claim for attorneys fees under RPL § 234 (*see Nesbitt v New York City Conciliation & Appeals Bd.*, 121 Misc 2d 336, 338 [1983] [RPL § 234 not applicable to parties outside of a landlord-tenant relationship].

Accordingly, defendant's motion for summary judgment is granted and the complaint is hereby dismissed in its entirety.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.