Yari v Syed
2021 NY Slip Op 32061(U)
August 2, 2021
Supreme Court, Nassau County
Docket Number: 600429/2021
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.

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JAMES YARI and NIKI YARI,

Plaintiffs, **Index No.: 600429/2021**

-against-

DELWAR HOSSAIN SYED a/k/a SYED H. DELWAR, TASLIMA SYED, ERSHAD SEYD, FIONA SYED, **Motion Seq. Nos.: 001 & 002**

Defendants. **Short Form Order**

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The following papers were read on these motions:

Notice of Motion, Affirmation in Support, Exhibits..... 1
Notice of Cross Motion, Affidavit and Affirmation in Support of Cross Motion and in Opposition to Motion, Exhibits..... 2
Affidavit and Affirmation in Opposition to Cross Motion and in Further Support of Motion, Exhibits.....3
Affidavit in Reply as to Cross Motion..... 4

Defendants Delwar Hossain Syed a/k/a Syed H. Delwar, Taslima Syed and Fiona Syed move for an Order pursuant to CPLR §3211[a][1] and [7] dismissing plaintiffs' complaint. Plaintiffs James Yari and Niki Yari cross move for an Order pursuant to CPLR §3212 granting plaintiffs summary judgment as to liability and setting the matter down for a trial on the issue of damages. The motion and cross motion are decided as hereinafter provided.

Factual and Procedural Background

This action that stems from a residential tenancy regarding an apartment within a two (2) family home located at 51 and 53 Coolidge Avenue, Roslyn Heights, New York ("the building"). 53 Coolidge Avenue is the address for the apartment on the first floor of the building. 51 Coolidge Avenue is the address for the apartment on the second floor, the apartment at issue herein ("the premises" or "51 Coolidge Avenue"). Plaintiffs are the owners of the building and allege that all of the named defendants are tenants of 51 Coolidge Avenue. Moving defendants Delwar Hossain Syed, Taslima Syed and Fiona Syed assert that named defendant Ershad Syed is not known to the them, and that he is not a tenant or occupant of 51 Coolidge Avenue. For purposes of simplicity, the moving defendants shall hereinafter be referred to as "defendants".

In their complaint, filed on February 11, 2021, plaintiffs assert claims for breach of contract, ejectment, property damage, harassment and money damages. In essence, plaintiffs seek

to recover rent arrears, to remove defendants from the premises, and to recover for claimed property damage and legal fees.

Plaintiffs allege that they are the owners of the building, and that defendants occupy the premises pursuant to a written lease with a term of eighteen (18) months, beginning on November 1, 2019 and ending on May 1, 2021, for a yearly rent of $25,200.00, payable in monthly payments of $2,100. Plaintiffs allege in the complaint that defendants have failed to pay the monthly rent since September, 2020, and that the arrears as of the time of filing the complaint totaled $12,600. Plaintiffs assert that as of the time of the filing of their cross motion, the rental arrears totaled $16,800. They allege further, on information and belief, that defendants have caused property damage in the amount of $15,000. Plaintiff also claim that defendants have called and made false reports against plaintiffs to various municipal agencies.

Defendants now move, pre-answer, to dismiss the complaint pursuant to CPLR §3211[a][1] and [7], arguing that the complaint must be dismissed on various grounds. They assert that plaintiffs fail to state a claim because they do not allege compliance with statutory conditions precedent necessary for bringing a claim for collection of rent, including, but not limited to compliance with the Town of North Hempstead Rental Registration Law. Defendants also contend that plaintiffs cannot maintain an ejectment action because defendants are in lawful possession of the premises and the term of the lease has not expired. Defendants also contend the Covid 19 Emergency Eviction and Foreclosure Prevention Act of 2020 applies to this action and that plaintiffs have failed to comply with the statute. Defendants also assert that plaintiffs have failed to provide adequate heat, and failed to make repairs to a broken stove and defective and dangerous stairs.

Plaintiffs cross move for summary judgment pursuant to CPLR §3212 as to liability. Plaintiffs claim that they are in compliance with all statutory requirements, have a valid rental permit for the premises, and have satisfied all statutory notice requirements. They assert that they have offered to make repairs but defendants have refused to provide access to the premises. Plaintiffs further argue that it is undisputed that plaintiffs have failed to pay rent as required under the lease, and that plaintiffs are entitled to judgment on liability, as a matter of law.

Discussion and Ruling

When deciding a motion to dismiss pursuant to CPLR §3211[a][7], the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiff the benefit of every favorable inference (see *Marcantonio v Picozzi III*,70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211[a][7] (see CPLR § 3211[c]; *Sokol*,

supra, 74 AD3d at 1181). "In assessing a motion to dismiss under CPLR §3211 [a][7] . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v. Martinez*, 84 NY2d 893 [1984]. When an affidavit is presented for the court's review "the criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]).

Plaintiffs' first cause of action is for breach of contract. Plaintiffs allege that defendants breached the lease by failing to pay the monthly rent and seek recovery of the rental arrears. For the reasons set forth below, plaintiff's first cause of action must be dismissed.

The Rental Registration Law of the Town of North Hempstead (the "Town"), provides, in relevant part, as follows:

> §2-115. Collection of rent.
>
> The following shall be conditions precedent to the collection of rent for the use and occupancy of any dwelling unit:
>
> A. The issuance of a rental occupancy permit for the premises, as required by §2-103;
>
> B. The filing of a valid rental registration form for the tenancy as required by §2-113; . . . .

Thus, the Town Code makes the requirement of filing a valid registration form and the issuance of a rental occupancy permit a condition precedent to the collection of rent. When a statute creates a condition precedent, compliance therewith must be pleaded and proved by the plaintiff. (See, generally, *Bean v Flint*, 204 NY 153, 158 [1912]; and *Park Capital Corp. v Cooper*, 1994 WL 16859002 [Civ Ct, New York County 1994]. See also Connors, Practice Commentaries to CPLR, McKinney's Cons. Laws of New York, 3015:2 ("If it is a statutory condition precedent, it is still the burden of the one bringing the cause of action to both plead and prove"); and Siegel, N.Y. Prac. (6th ed.) § 215. Pleading Certain Specific Matters; CPLR 3015 (When [a condition precedent] is imposed by a statute . . . the plaintiff retains the burden both of pleading and of proving the condition's fulfillment.)

Here, plaintiffs fail to allege in their complaint that they have been issued a rental occupancy permit for the premises, as required by Town Code §2-103, or that they have filed a valid registration form for the tenancy, as required by Town Code §2-113.

In opposition to the defendant's motion, plaintiffs assert that they do have a valid rental permit for the premises. They submit a copy of a permit no. 20200037 RR, for 51-53 Coolidge Avenue, Roslyn Heights. The permit refers to "Unit 1". In reply, defendants state that the permit provided by plaintiffs does not pertain to defendants' unit. They assert that their second floor apartment is identified as "Unit 2" not "Unit 1". They submit a copy of a previous permit, bearing no. 20141218 RR from 2016 which they claim was provided to them by the prior owner of the building. The previous permit provides "Unit 1 Description: 1st Floor Apt; Unit 2 Description: 2nd

Floor Apt." In their reply papers, plaintiffs do not dispute defendants' assertions regarding the permits.

Based upon the foregoing, this Court finds that plaintiff has failed to plead (or prove) compliance with the conditions precedent as required by the Rental Registration Law of the Town of North Hempstead. The affidavit of plaintiff James Yari submitted in opposition has failed to remedy the deficiencies in plaintiffs' first cause of action. Accordingly, plaintiffs' first cause of action must be dismissed.

Plaintiffs' second cause of action seeks ejectment. For the reasons set forth below, plaintiffs' second cause of action must also be dismissed.

Real Property Actions and Proceedings Law ("RPAPL") §711 provides, in relevant part:

> No tenant or lawful occupant of a dwelling or housing accommodation shall be removed from *possession except in a special proceeding*. A special proceeding may be maintained under this article upon the following grounds:
>
> 1. The tenant continues in possession of any portion of the premises *after the expiration of his term*, without the permission of the landlord . . . [or]
>
> 2. The tenant has defaulted in the payment of rent, pursuant to the agreement under which the premises are held, *and a written demand of the rent has been made with at least fourteen days' notice* requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served upon him as prescribed in [RPAPL §735].
>
> * * * [Emphasis added]

RPAPL §735 provides that the written notice required by RPAPL §711[2] must essentially be served in the same manner as service of process. Here, plaintiffs argue that RPAPL §711 is not applicable, because this is a breach of contract action, and not a special proceeding under the RPAPL.

The Court disagrees with plaintiffs. Notwithstanding how plaintiffs have framed their complaint and causes of action, they are seeking to remove tenants of a dwelling from possession. RPAPL §711 mandates that plaintiffs can only do so by a special proceeding, not an action as commenced by plaintiffs herein.

Plaintiffs argue, alternatively, that they nevertheless have served a written demand in compliance with the statute. Again, the Court disagrees, and finds that neither RPAPL §711[1] or [2] are satisfied here. At the time of the commencement of this action, the term of defendants' lease had not yet expired. Thus RPAPL §711[1] is inapplicable.

As to the written demand required by §711[a][2], plaintiffs submit a screenshot of a text message dated July 20, 2020, which they assert was sent to defendants, stating: "Dear Mr. Syed, I hope all is well. By now, everyone is back to work and after all these months I expect to receive one month of payment by beginning of August. Please be prompt and pay me in the first week of August. Thank you Sir." The same screenshot shows a responsive text, dated August 1, 2020: "Mr. James, Please be advised that I had applied for assistance under the NYS COVID Rent Relief Program to cover the four months rent from April 2020 til July 2020. I had dropped off an envelope in your mailbox earlier today which contained a rent check for the month of August 2020. Delwar H. Syed."

Plaintiffs' text message, even assuming it is in admissible form, fails to satisfy the requirements of RPAPL §711[2]. First, clearly it was not served as prescribed in RPAPL §735. Second, the message is dated July 20, 2020 and demands payment of a month's rent by the first week of August. The responsive text, dated August 1, 2020, indicates that a rent check for August, 2020 was delivered. Plaintiffs do not deny receiving that payment. Indeed, in his affidavit presented to the Court, James Yari asserts that defendants have failed to pay their rental obligations from *September, 2020* to date. The complaint herein was filed in February 2021, and asserts a claim for rent arrears from September, 2020 to date. The July 20, 2020 "demand" was rendered moot by the ensuing payment.

This Court also finds that plaintiff's ejectment cause of action is precluded by the Covid 19 Emergency Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA"), which has been extended until August 31, 2021. CEEFPA, in Part A, §1, sets forth the following definitions, for purposes of the statute:

> 1. "Eviction proceeding" means a summary proceeding to recover possession of real property under [RPAPL Article 7] relating to a residential dwelling unit *or any other judicial or administrative proceeding* to recover possession of real property relating to a residential dwelling unit.
>
> 2. "Landlord" includes a landlord, owner of a residential property and any other person with a legal right to *pursue eviction, possessory action or a money judgment for rent, including arrears*, owed or that becomes due during the covered period, as defined in section 1 of chapter 127 of the laws of 2020.
>
> 3. "Tenant" includes a residential tenant, lawful occupant of a dwelling unit, or any other person responsible for paying rent, use and occupancy, or any other financial obligation under a residential lease or tenancy agreement.

CEEFPA requires, at Part A, § 3, that a landlord serve a "Hardship Declaration" notice in the form prescribed, with every written demand for rent made pursuant to RPAPL §711, with any other written notice required by the lease or tenancy agreement, law or rule to be provided prior to the commencement of an eviction proceeding.

CEEFPA provides further, at Part A, § 5, that "[n]o court shall accept for filing any petition or other filing to commence an eviction proceeding" unless the plaintiff files an affidavit of service demonstrating that the mandatory hardship declaration notice has been served in the prescribed manner and an affidavit attesting that the plaintiff has not received a hardship declaration from the tenant.

The Court finds that plaintiffs' cause of action seeking ejectment renders this action an "eviction proceeding" within the meaning of CEEFPA. Accordingly, a hardship declaration notice was required to be served upon defendants, and the other requirements of the CEEFPA were required to be adhered to. Other Courts have similarly so held. (See *Jacob Cram Coop., Inc. v Ziolkowski*, 2021 N.Y. Slip Op. 30174[U], 4 [Sup Ct, New York County 2021]; *NYCTL 2016-A Tr. v Neighborhood Youth & Family Services, Inc*., 71 Misc 3d 479, 484 [Sup Ct, Bronx County 2021]).

It is undisputed that plaintiffs have not complied with CEEFPA.[1] Based upon the foregoing, the Court finds that plaintiffs' cause of action must be dismissed.

Plaintiffs' third cause of action alleges that defendants have damaged the premises, specifically, the bathroom sink, the bathtub and windows. Accepting the allegations as true, and providing plaintiffs the benefit of every possible favorable inference, the Court finds that this cause of action is adequately pled to withstand dismissal at this early stage of the litigation.

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In their fourth cause of action, plaintiffs seek recovery for harassment, alleging that defendants have called and made false reports against plaintiffs to various municipal agencies. However, New York does not recognize a common-law cause of action to recover damages for harassment (*Daulat v Helms Bros., Inc.*, 18 AD3d 802, 803 [2d Dept 2005]; *see Broadway Cent. Prop. v. 682 Tenant Corp.,* 298 AD2d 253, 254 [1st Dept 2002].Y.S.2d 225; *Goldstein v. Tabb,* 177 AD2d 470, 471 [2d Dept 1991]). The cause of action for harassment must be dismissed.

Plaintiffs' fifth cause of action is for "money damages", including rental arrears, property damage and legal fees for the prosecution of this action. The claim for property damage is duplicative of plaintiffs' third cause of action. As discussed above, the claim for rental arrears, also set forth in plaintiffs' first cause of action for breach of contract, is untenable.

The Court finds that plaintiffs' claim for legal fees is also untenable and must be dismissed. In support of their legal fees claim, plaintiffs rely on paragraph 20(D) of the lease. However, that provision expressly limits the recovery of legal fees to fees incurred in reletting the premises. The provision does not provide for recovery of attorneys' fees incurred in connection with getting

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[1] Indeed, in their complaint, plaintiffs essentially acknowledge that their ejectment action was brought to get around CEEFPA's requirements and effect. They allege that "CEEFPA was designed to prevent evictions and foreclosures . . . . If defendants interpose a 'Hardship Declaration' . . . , Plaintiffs will be unable to bring a timely eviction proceeding . . . . Plaintiffs seek ejectment as a measure to enforce their property rights to have Defendants legally removed from the Premises." (Verified Complaint, at paragraphs 17 through 19).

possession of the premises or in connection with any legal action necessitated by the tenant's default. Accordingly, plaintiffs' fifth cause of action must be dismissed.

The Court now turns to plaintiffs' motion for summary judgment. A motion for summary judgment may not be made before issue is joined (CPLR §3212[a]) and the requirement is strictly adhered to. (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985] (citations omitted)). Defendants have not yet served an answer herein, having chosen to first file a pre-answer motion to dismiss. Therefore, plaintiffs' motion is premature.

Based upon all of the foregoing, the motion and cross motion are decided as follows:

Defendants' motion to dismiss plaintiffs' complaint is **GRANTED** in part and **DENIED** in part, as follows: plaintiffs' first, second, fourth and fifth causes of action are **DISMISSED**. Plaintiffs' third cause of action alleging property damage survives.

Plaintiffs' cross motion for summary judgment is **DENIED**, without prejudice to renewal upon the completion of discovery.

It is further **ORDERED** that defendants shall file an answer within twenty (20) days of the date of entry of this Order; and it is further

ORDERED that a Preliminary Conference shall be held on August 24, 2021, virtually. Prior to the scheduled conference date, counsel shall confer and complete a proposed Preliminary Conference Stipulation and Order, which is available on the Court's website together with instructions on how to complete it and how to return it to the Court, at http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml.

Any other relief sought herein but not specifically ruled upon is **DENIED.**

This constitutes the Decision and Order of the Court.

Dated: August 2, 2021
Mineola, NY

Helen Voutsinas
Justice of the Supreme Court

ENTERED
Aug 09 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE