

Roxborough Apts. Corp. v Hussein

2021 NY Slip Op 34072(U)

May 4, 2021

Civil Court of the City of New York, New York County

Docket Number: Index No. L&T 071574/18

Judge: Anne Katz

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**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART R**

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ROXBOROUGH APARTMENTS CORP.,

L&T Index No: 71574/18

Petitioner-Landlord
-against-

DECISION/ORDER

MAHER HUSSEIN,

Respondent-Tenant.
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RECITATION AS REQUIRED BY CPLR §2219(A) OF PAPERS CONSIDERED IN THE REVIEW OF PETITIONER’S MOTION GRANTING PETITIONER LEAVE TO AMEND THE PETITION THROUGH THE DATE OF TRIAL AND AMEND THE AMOUNT OF MONTHLY RENT SOUGHT, RESPONDENT’S CROSS-MOTION DISMISSING THE PETITIONER, SEVERING THE COUNTERCLAIMS, GRANTING PARTIAL SUMMARY JUDGMENT, AWARDED PARTIAL SUMMARY JUDGMENT ON AN OVERCHARGE CLAIM, DETERMINING SUCH OVERCHARGE WAS WILFUL AND AWARDED A MONEY JUDGMENT WITH TREBLE DAMAGES ALSO WITH COSTS, DISBURSEMENTS AND LEGAL FEES

PAPERS:	NUMBERED
Petitioner’s Notice of Motion, Affirmation, Affidavit & Exhibits	1-16; A
Respondent’s Cross-Motion, Affirmation, & Exhibits	1-5;A-N
Respondent’s Memorandum of Law	1-11
Petitioner’s Reply & Exhibits	1-23; A

RECITATION AS REQUIRED BY CPLR §2219(A) OF PAPERS CONSIDERED IN THE REVIEW OF PETITIONER’S MOTION GRANTING PETITIONER LEAVE TO AMEND THE PETITION THROUGH THE DATE OF TRIAL AND AMEND THE AMOUNT OF MONTHLY RENT SOUGHT, RESPONDENT’S MOTION GRANTING LEAVE TO FILE RESPONDENT’S AFFIDAVIT IN SUPPORT OF ITS DECEMBER 22, 2020 CROSS-MOTION SEEKING SUMMARY JUDGMENT ON ITS COUNTERCLAIM FOR RENT OVERCHARGE AND FOR COSTS, DISBURSEMENTS AND COUNSEL FEES

PAPERS:	NUMBERED
Respondent’s Notice of Motion , Affirmation and Affidavit	1-10

This Court consolidates Petitioner’s Notice of Motion, Respondent’s Cross-Motion and Respondent’s Notice of Motion to file a affidavit in support of it Cross-Motion.

HON. ANNE KATZ:

Petitioner commenced this nonpayment proceeding by Notice of Petition and Petition dated August 28, 2018. Petitioner seeks to gain possession of 251 West 92nd Street, Apartment 2E1, New York, New York 10025 (“premises”). The petition alleges that the premises are subject to the Rent Stabilization Law of 1969, as amended. According to the petition, respondent remains in possession under a lease, wherein respondent is obligated to pay the monthly rent of \$2,975.00. According to the petition, respondent owed the sum of \$26,775 through the date of the petition, has defaulted in the payment of rent and holds over on possession of the premises without the permission of petitioner.

Procedural History

In response to the Petition, respondent, by counsel, submitted a Verified Answer with Counterclaims which alleged as follows:

First Affirmative Defense

Petitioner failed to properly serve a rent demand pursuant to RPAPL §§711 and 735.

Second Affirmative Defense

The rent demand failed to specifically set forth the rental arrears attributable to each month claimed to be in arrears.

Third Affirmative Defense and First Counterclaim

Petitioner breached its warranty of habitability owed to respondent.

Fourth Affirmative Defense and Second Counterclaim

The rent charged by petitioner constitutes an overcharge.

Third Counterclaim

Petitioner has failed to fulfil its legal obligation to supply the premises with a working dishwasher in violation of the Rent Stabilization Code.

The proceeding was initially returnable on September 21, 2018 in Part G. The proceeding was transferred to Part R for trial on April 29, 2019. A trial commenced on November 13, 2020.

At trial petitioner submitted the Deed (P1), MDR (P2), DHCR rent registration (P3), lease (P4), No “5” (P5) and the Court took Judicial Notice of the 2016 proceeding of Roxborough v. Hussein, index Number 78826/16 (P6). Petitioner called Robert Joyce as a witness. Mr. Joyce testified he is a CPA and in charge of keeping the books and preparing tax returns for petitioner. Mr. Joyce testified that respondent resides in apartment 2E1 and his monthly rent is \$2,875.00 and the amount remains the same until today. Mr. Joyce testified the amount of rent demanded in the Five Day Notice, \$2,975.00 was not correct. According to the testimony of Mr. Joyce, respondent made no

rent payments in 2017, \$4,775.00 in rent payments in 2018, \$26,262.50 in rent payment in 2019 and \$8,650.00 in rent payments in 2020. After all the payments were applied to respondent's account, respondent was left with a balance of \$63,812.50 as all rental arrears through November, 2020.

At the end of Mr. Joyce's testimony, petitioner made an oral application to amend the petition to reflect the correct amount of rent and rental arrears in accordance with the testimony of Mr. Joyce. Petitioner's oral application to amend the petitioner forms the basis of the instant motion.

Petitioner's Argument

Petitioner argues that it should be granted leave to amend the petition to reflect the monthly rent from \$2,975.00 to \$2,875.00. Petitioner also argues that it should be granted leave to amend the 8petitioner to reflect all outstanding rental arrears to date. According to petitioner, leave should be granted because *CPLR §3025(b)* states that leave to amend shall be freely given upon such terms as may be just as long as the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid or merit. *Gitlin v. Chirinkin*, 60 AD3d 901 (2nd Dept 2009); *Mezzacappa Bros., Inc., v. The City of New York*, 29 AD3d 494 (1st Dept 2006). Petitioner also alleges that pursuant to *New York City Civil Court Act Section 909 and CPLR 3025(c)*, "the court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances". Petitioner argues that respondent will not be prejudiced by it seeking a lower monthly rent that what was alleged in the petition and moreover, respondent has a rent overcharge counterclaim which it can present to the Court. Lastly petitioner argues that the proposed amendments are not palpably insufficient, do not prejudice or surprise the respondent and are not patently devoid of merit. Petitioner also argues that the Appellate Term has ruled that a motion to amend a petition to include all rent through trial is properly granted. *576 E. 187th St. Bronx LLC v. Hizam Deli Grocery Corp.*, 59 Misc3d 1215(A), 2018 NY Slip Op 50554(U), *3 (Civ Court Bronx County 2018).

According to Mr. Joyce's testimony, the last lease signed between petitioner and respondent commenced February 1, 2013 and expired January 31, 2014 with a monthly rent of \$2,875.00. Petitioner alleges it offered respondent a new lease with a monthly rent of \$2,985.00 however, the lease was never executed by respondent. Petitioner argues that after the expiration of the lease, respondent paid "\$2875.00 or more" in monthly rent and he therefore became a month to month tenant on the same terms and conditions as the expired lease. *Lakeside Plaza v. Impala Press*, 237 AD2d 334, 654 NYS2d 811 (1997). Petitioner alleges it set the improper rent based upon a prior two attorney, "So Ordered" Stipulation of Settlement between the parties in a previous nonpayment proceeding where respondent agreed to pay \$33,000.00 as all rent due through July 2017 based upon a monthly legal rent of \$2,975.00.

Petitioner also argues that while the sum demanded in the predicate notice is not exact (as it was based upon a monthly rent which was \$100.00 higher than the last rent in the expired lease), such notice needs only to be a "good faith approximation" of the rent due in order to prevent litigation. *545 W. Co. v. Schachter*, 16 Misc3d 431 (Civ Ct. New York County 2007); *Rota Holding Corp. No. 2 v. Shea*, 21 Misc3d 1127(A) (Civ Court New York County 2008).

Lastly petitioner argues that a nonpayment proceeding may be maintained against a month-to-month tenant. *Tricarichi v. Moran*, 38 Misc3d 31 (App Term 2nd Dept. 2012) In *Tricarichi, supra.*, the Appellate Term stated the RPL §232-c did not abolish a landlord’s right to elect to hold a month-to-month tenant for a new term solely by virtue of his holding over and therefore refused to dismiss the nonpayment proceeding merely because the tenant was a month-to-month tenant.

Respondent’s Argument

Respondent argues that the petition must be dismissed as a matter of law since it is well settled in the First Department that a nonpayment proceeding is not maintainable against a month-to-month tenant. *Krantz & Phillips, LLP v. Sedaghati*, 2003 WL 2227778, 2003 Slip Op. 50032(U)(App. Term 1st Dept. 2003). According to respondent, a nonpayment proceeding may not be maintained against a month-to-month tenant because there is not a meeting of the minds. *1400 Broadway Assoc. v. Lee & Co. of NY*, 161 Misc2d 497, 614 NYS2d 704 (NY Civ 1994). Moreover, respondent argues that the nonpayment proceeding may not be maintained because with a month-to-month tenancy, there is no agreed upon rent amount for any month ensuing after the tenant ceased paying rent. See *1400 Broadway Assoc., supra.* Additionally, respondent argues that in a nonpayment proceeding, a landlord-tenant relationship must be shown to exist between the parties for a landlord to sue for arrears and, absent a lease agreement, petitioner is precluded from using a nonpayment proceeding to collect rent. *Eshaghian v. Adames, et al.* 28 Misc3d 1215 (A) (NY Civil Court 2010).

Conclusion of Law and Application to Proceeding

A cause of action for nonpayment of rent sounds in contract. *Solow v. Wellner*, 86 NYS2d 82, 589-90 (1995). As an essential element of petitioner’s *prima facie* case, it must prove there is a contract or agreement to pay rent between the parties. Pursuant to RPAPL §711(2), a landlord is only permitted to commence a nonpayment proceeding if the tenant has defaulted in the payment of rent pursuant to an agreement under which the premises are held. *East Harlem Pilot Block Bldg. IV HDFC Inc. v. Diaz*, 46 Misc3d 150 (A) (AT 1st Dept 2015). *615 Nostrand Ave. Corp. v. Roach*, 15 Misc3d 1, 832 NYS2d 379 (AT 2nd and 11th dis. 2006); *Underhill Avenue Realty v. Ramos*, 49 Misc3d, 29 NYS3d 850 (AT 2nd, 11 and 13th Dist. 2015). To establish the existence of an enforceable agreement, petitioner must also establish a meeting of the minds on all essential terms. *554-558 W. 1818 St LLC v. Cochrane*, 61 Misc3d 1203(A), 110 NYS3d 793 (2018). In other words, to create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. See *Cochrane, supra.* Absent such meeting of the minds there is no agreement which exists and any proceeding predicated on default of such an agreement is without a legal basis. See *Cochrane, supra.*

This Court finds that petitioner failed to prove that there was a current lease in effect between petitioner and respondent. The only written agreement submitted by petitioner was a lease which expired in January, 2014 (P4). Petitioner’s motion also attached a “So Ordered” Stipulation from July, 2017 in which respondent agreed to pay outstanding arrears calculated at the rate of \$2,975.00 per month. Although petitioner submitted the stipulation in its motion, during trial, petitioner’s witness, Mr. Joyce testified that the monthly rent for the premises was \$2,875.00 and not the \$2,975.00 as provided for in the stipulation.

This Court finds that petitioner may not maintain this proceeding. It is clear from the testimony and documents submitted at trial that there was no agreement between the petitioner and respondent as to the monthly rent for the premises. If this Court permitted petitioner to maintain this nonpayment proceeding, the unjust effect would be to allow petitioner to unilaterally bind respondent to pay a monthly rent to which respondent did not agree. *Henry & Lee supra*. Furthermore, the consequence of such a finding would vitiate the intent of RPL §232-c. *Hallock v. State*, 64 NY2d 224, 228, 485 NYS2d 510, 511, 474 NE2d 1178, 1179 (1984). This case can be distinguished from *GDA Realty Corp v. Puello*, 2015 NY Misc. LEXIS 5373 (Civ Court NY County 2015), cited by petitioner. In *GDA Realty Corp.*, supra., the Hon. Jack Stoller held that petitioner could maintain a nonpayment proceeding, against a month-to-month tenant, based upon the specific facts of the proceeding. In this proceeding, the testimonial and documentary evidence adduced at trial showed there was no lease or agreement in effect between the parties and in fact there was confusion as to the proper amount of monthly rent to be paid by respondent. Accordingly, there was no meeting of the minds as to the monthly rent in order to permit petitioner to maintain this proceeding.

Petitioner also argues that while the sum demanded in the predicate notice is not exact (as it was based upon a monthly rent which was \$100.00 higher than the last rent in the expired lease), such notice needs only to be a “good faith approximation “ of the rent due in order to prevent litigation. *545 W. Co. v. Schachter*, 16 Misc3d 431 (Civ Ct. New York County 2007); *Rota Holding Corp. No. 2 v. Shea*, 21 Misc3d 1127(A) (Civ Court New York County 2008). The facts in this case make it clear that there was no meeting of the minds between petitioner, its agents and/or respondent on the legal rent to pay and therefore this nonpayment proceeding, which requires a contractual basis, may not be maintained.

Conclusion

Petitioner’s inability to prove there was a written agreement and/or a meeting of the minds as to the monthly rent for the premises is an indispensable element of its prima facie cases. Based upon the caselaw adhered to in the First Department, respondent’s cross-motion to dismiss the petition is granted. Respondent’s cross-motion to sever respondent’s counterclaims for determination, granting respondent summary judgment on its overcharge counterclaim, finding petitioner willfully overcharged respondent, determining the amount of the overcharge claim using the default formula and awarding treble damages is granted only to the extent of preserving them for a plenary action. Respondent’s cross-motion for attorneys’ fees, costs and disbursements is denied. In accordance with the decision above, there was no current lease in existence to base an award. Respondent’s motion to file an affidavit to support its motion for summary judgment is denied as moot. Respondent’s counterclaims are severed and preserved for a plenary action.

Respondent's cross motion to dismiss the petition is granted and Petitioner's motion to amend the petition is denied as moot. Respondent's counterclaims are severed, without prejudice, to a plenary proceeding.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 4, 2021



HON. ANNE KATZ, J.H.C.