Newco Family, LLC v Taub
2022 NY Slip Op 31138(U)
March 28, 2022
Supreme Court, New York County
Docket Number: Index No. 157298/2021
Judge: Alexander Tisch
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH**, *Justice*	**PART** **18**
NEWCO FAMILY, LLC, Plaintiff,	**INDEX NO.** 157298/2021
- v -	**MOTION DATE** 10/14/2021
PATRICIA TAUB, ASHLEY JURMAN, JOHN DOES, JANE DOES Defendants.	**MOTION SEQ. NO.** 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 36, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, plaintiff moves for summary judgment on its claim for common law ejectment against defendant Kenyatti Adams s/h/a John Doe (defendant), and damages representing use and occupancy.[1]

"[T]he 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function

[1] The Court does not read the motion as seeking to dismiss defendant's defenses (see CPLR 3211 [b]) because it is not stated in its notice of motion, nor in the opening paragraphs of plaintiff's counsel's affirmation in support. The discussion of the defendant's answer and defenses appears to be in relation to its sufficiency to defeat summary judgment (see, e.g., NYSCEF Doc No. 20 at ¶ 32). However, as set forth below, if the movant makes a prima facie showing of entitlement to judgment as a matter of law, the opponent would have to come forward with sufficient evidence to demonstrate an issue of fact. The Court will consider the verified answer, along with all other evidence submitted, in that context.

of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]).

To establish its prima facie burden entitling it to judgment as a matter of law on the cause of action for common law ejectment, plaintiff must establish "that (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate" (RPAI Pelham Manor, LLC v Two Twenty Four Enterprises, LLC, 144 AD3d 1125, 1126 [2d Dept 2016]).

Here plaintiff met its burden demonstrating it was the owner of the subject premises (see NYSCEF Doc No. 22), and it is undisputed that defendant Adams is in possession of the subject unit. Plaintiff argues that it demonstrated its present and immediate right to possession because defendant is a mere squatter, and any right he had in the apartment was "extinguished" after serving a 10-day notice to quit (Feraru aff at ¶¶ 12, 28-29). However, such argument is made without any legal basis to support that conclusion. Consequently, the notice to quit may not have been a valid termination of his interest, if any, as discussed *infra*.

It is undisputed that plaintiff entered into two leases on November 1, 2018 with non-appearing defendant Patricia Taub, one of which is at issue here. The lease between plaintiff and Taub demised unit 2, consisting of the first three floors of the building located at 104 East 36th Street in New York, New York (the premises or unit), for a term of five years, commencing 2/1/2019 and expiring 1/31/2024 (see NYSCEF Doc No. 23) (the lease).

Paragraph 11 of the lease, entitled "objectionable conduct," states:

> "As a tenant in the Building, You will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the Apartment or the Building less fit to live in for You or other occupants. It also means anything which interferes with the right of others to properly and peacefully enjoy

> their Apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by You gives Owner the right to end this Lease" (id.).

Plaintiff's complaint and papers in support of this motion reference that paragraph and go on to allege that the lease was terminated on the grounds that Taub and the "subletting parties have and continue, upon information and belief, broken local, state and federal laws"; Taub "provided [plaintiff] false and fraudulent information concerning [the] subtenants, subleases, and sources of funding"; and because Taub and the "subletting parties have engaged in conduct that threatens the health and safety of all in the Subject Premises. [*sic*] and the general public" (see NYSCEF Doc No. 1, complaint at ¶ 15; NYSCEF Doc No. 20, Feraru aff at ¶ 12).[2] Plaintiff further alleges that plaintiff's counsel "expressly, immediately, terminated" the lease on either June 28, 2021 (Feraru aff at ¶ 12) or July 12, 2021 (complaint at ¶ 15) and that Taub did not object to the "verbal termination and has not responded to the written termination sent around or about 10 days after TAUB was verbally notified of the termination" (Feraru aff at ¶ 12, n 1). In its reply papers, plaintiff submits a copy of the written notification, which was sent to Taub via e-mail (NYSCEF Doc No. 67). Plaintiff fails to state whether such termination was done in compliance with any relevant lease provision or by statute.

Notably, the paragraph of the lease relied upon by plaintiff states that "[o]bjectionable conduct by [Taub] gives [plaintiff] the right to end this Lease" but it is not mandatory or automatic — the right has to be asserted. Paragraph 16 of the lease provides that engaging in an "objectionable manner" constitutes a "default" under the lease, and the owner "may serve" a

[2] Although the complaint is verified by counsel and therefore constitutes hearsay standing alone (see Mullins v DiLorenzo, 199 AD2d 218, 219 [1st Dept 1993]), the party affidavit by Mitch Spaiser states that he, as the managing member of plaintiff, adopts and incorporates each factual statement set forth in the complaint and Feraru affirmation (see NYSCEF Doc No. 18, Spaiser affidavit at ¶¶ 3-4), and will therefore be considered by the Court as evidence in support of the motion.

written notice to cure, or stop the conduct, and then another notice to terminate the lease if the tenant failed to cure. It is clear that plaintiff did not elect to take that route to cancel the Taub lease and the alleged termination is a result of a condition subsequent rather than a conditional limitation — which is appropriate for a common law ejectment action in this Court (see LLDP Realty Co., LLC v AGHR Enterprises LLC, 44 Misc 3d 716, 717-19 [Civ Ct, Kings County 2014] [because the term of the lease has not yet expired and the provision of the lease that was allegedly breached "provides petitioner the right of reentry upon breach of the lease, absent a right to cure, the lease creates a condition subsequent and petitioner is not entitled to summary relief under article 7 of the RPAPL"]).

Because if/when Taub engaged or engages in "objectionable" conduct,[3] the lease only permits the landlord the option to terminate the lease, it does not mean that the lease has been terminated; rather it "merely provided for an action in ejectment and for forfeiture of the lease and re-entry for breach of the covenants contained therein" (see Goldberg v Levine, 199 AD 292, 295 [1st Dept 1922]). The provision itself "afforded the landlord no right to declare an expiration of the lease or to resort to the proceedings provided by statute for the summary removal of the tenant upon expiration of the lease" (id. at 296). If it were true, plaintiff could validly commence a summary proceeding to evict. But it is well-settled that in this type of situation involving a lease provision, the breach of which creates a condition subsequent, plaintiff is "entitled to repossess himself of the leased premises, which could alone be accomplished through an action in ejectment to declare a forfeiture of the lease and to award possession of the leased premises to the landlord" (id.). In other words, it appears as though plaintiff needs a favorable determination of this action, asserting the common law ejectment claim to terminate and dispossess the

[3] No other lease provision has been cited, although the plaintiff asserted other grounds for canceling the Taub lease.

defendants. Because there is no favorable ruling on the cancelation of Taub's lease, the Court cannot see how plaintiff established its right to ejectment as to the subletting defendant.

Even assuming, arguendo, plaintiff's evidentiary showing was sufficient to meet its prima facie burden, the defendant submitted evidence in opposition to this motion raising many questions of fact, as well as questions of law that remain unaddressed in addition that noted above.

Defendant submitted the sublease between Taub, as putative landlord, and co-defendant Ashley Jurman signed on behalf of EDEN Hospitality Group LLC[4] demising unit 2, consisting of the first three floors for a term commencing November 1, 2020 and ending February 28, 2022 (see NYSCEF Doc No. 45, Adams affidavit at ¶¶ 11-12; NYSCEF Doc No. 49). Defendant claims he helped Jurman secure the lease by contributing financially with respect to the up-front payments required by said lease (Adams affidavit at ¶ 15). He also states that he entered into an agreement with Jurman to reside there; paid $ 5,000.00 per month; moved in on April 7, 2021 and has resided there since (id. at ¶¶ 23, 28, 30 36). Defendant also contends that plaintiff's managing member, Spaiser, "was fully aware that Taub had subleased the Premises to Jurman given that he was in communications with Jurman and at the Premises" (id. at ¶ 18). Based on these facts, the Court finds that summary judgment must be denied as it is unclear what the effect of the Taub cancelation (if any) has on the sublease i.e., whether the sublease is also automatically canceled or must somehow be terminated.[5]

---

[4] The defendant submitted evidence related to Jurman from a matter in New York City Civil Court, EDEN Hospitality Group LLC and Ashley Jurman v Geylin Diaz a/k/a Jeylin Diaz, Index no. LT-300268-21/NY, which may be considered as relevant evidence by the Court here of a particular fact or fact(s) (see generally Matter of Matter of Liquidation of Union Indem. Ins. Co. of New York, 89 NY2d 94, 103 [1996]).

[5] Given that the Jurman sublease has now naturally expired, a summary proceeding pursuant to RPAPL Article 7 would be appropriately maintained (see Matter of Calvi v Knutson, 195 AD2d 828, 830-31 [3d Dept 1993] ["[I]n order to maintain a summary proceeding on this basis the landlord must allege and prove that the tenancy *has expired* prior to the time the proceeding is commenced (RPAPL 711 [1]). Expiration has been construed to mean

Finally, in light of the foregoing, defendant's status remains entirely unclear. Plaintiff contends that he is a squatter such that a 10-day notice to quit is sufficient to set forth a prima facie case for ejectment (see RPL 713). However, defendant claims he resided in the premises since April of 2021, which may give him certain rights as a tenant under RPL 711, which states that a "tenant" "shall include an occupant . . . who has been in possession for thirty consecutive days or longer" (see generally P & A Bros., Inc. v City of New York Dept. of Parks & Recreation, 184 AD2d 267, 268-69 [1st Dept 1992] ["While it is true that tenants as defined in RPAPL 711 may be evicted only through lawful procedure, others, such as licensees and squatters, who are covered by RPAPL 713 are not so protected"]). Some form of notice is still required for a common law ejectment action (see Gerolemou v Soliz, 184 Misc 2d 579, 580 [App Term 2d Dept 2000] ["neither a summary holdover proceeding nor an ejectment action will lie in the absence of the giving of such notice"]; Kosa v Legg, 12 Misc 3d 369, 383 [Sup Ct, Kings County 2006] [holding that "the common law requirement of a 6 month notice to quit before a tenant may be removed through an ejectment action, applies to month to month tenancies"]; Donnelly v Neumann, 170 AD3d 597, 598 [1st Dept 2019] [30-days' notice to terminate tenancy at will, per RPL § 228, required for ejectment action]).

It is abundantly clear that questions of fact are raised with respect to the appropriate termination notice served upon defendant. That, among other issues raised herein, require denial of plaintiff's summary judgment motion (see Kosa, 12 Misc 3d at 383 ["As plaintiff did not give the defendant 6 months notice to quit, but only served a 30 day notice of termination pursuant to RPL 232–a, plaintiff is not entitled to summary judgment. As plaintiff did not give the 6 month

---

expiration by lapse of time, i.e., by natural conclusion of the lease term or by operation of a conditional limitation contained in the lease document which works an automatic termination of the tenancy upon the happening of a specified event"]).

notice required by common law, the complaint must be dismissed"]; cf. Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 AD3d 408, 410 [2d Dept 2009] [summary judgment granted where defendant "stipulated that it does not have any right to occupy the premises based upon a lease or a license and the evidence was sufficient to establish [defendant's] occupancy of the premises to the exclusion of the plaintiffs"]).

Accordingly, it is hereby ORDERED that the motion is denied; and it is further

ORDERED the parties shall appear for a preliminary conference virtually via Microsoft Teams on Wednesday, **May 4, 2022**.[6]

This constitutes the decision and order of the Court.

3/28/2022			
DATE		ALEXANDER TISCH, J.S.C.	

CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
	[ ] GRANTED [X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE

[6] Calendar invitation containing Teams link with preliminary conference form to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov).