

Glebow Realty Assoc. v Dietrich

2022 NY Slip Op 33288(U)

September 30, 2022

Supreme Court, New York County

Docket Number: Index No. 158123/2021

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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GLEBOW REALTY ASSOCIATES,

Plaintiff,

- v -

MARTINA DIETRICH, MARTINA DIETRICH
INC., MARTINA DIETRICH DBA MARTINA DIETRICH
COUTURE, XYZ CORP., JOHN DOE, JANE DOE

Defendant.

-----X

INDEX NO. 158123/2021

MOTION DATE 12/14/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

DISMISS

Upon the foregoing documents, and oral argument taking place on June 1, 2022, with Roger G. Silversmith, Esq. appearing on behalf of Plaintiff Glebow Realty Associates (“Plaintiff”) and David E. Frazer, Esq., appearing on behalf of Defendants Martina Dietrich (“Dietrich”), Martina Dietrich Inc., and Martina Dietrich D/B/A Martina Dietrich Couture (collectively “Defendants”), Defendants’ motion to dismiss is granted and Plaintiff’s cross motion is denied.

I. Procedural Background

In this action, which arises out of a lease entered into between Plaintiff and Defendants, Plaintiff alleges several causes of action: (1) declaratory judgment that the lease is commercial, the unit is not rent stabilized, the lease expired, that Defendants have no right to occupy the building, and that the residential use of the premises does not affect the commercial nature of the premises; (2) ejectment; (3) rent arrears and retroactive use and occupancy; (4) prospective use and occupancy; (5) unjust enrichment; (6) quantum meruit, and (7) attorneys’ fees (NYSCEF Doc.

2). Defendants moved to dismiss the Complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(5) (NYSCEF Doc. 19). Plaintiff cross moved seeking an order placing the rent arrears and use and occupancy funds into escrow (NYSCEF Doc. 35).

In response to the Complaint, Defendants filed a pre-answer motion to dismiss, asserting that collateral estoppel bars Plaintiff from claiming the lease is commercial in nature, that the premises are subject to rent stabilization, and that Plaintiff cannot collect rent since the apartment is residentially occupied in violation of the certificate of occupancy (NYSCEF doc. 30). Plaintiff cross moved for an order directing Defendants to deposit into escrow the sums due for past rent and use and occupancy (NYSCEF Doc. 35).

II. Factual Background

Plaintiff owns 166 Allen Street a/k/a 161 Orchard Street, New York, New York (the "Building"). This building is a tenement built before January 1, 1974 (NYSCEF Doc. 28). The certificate of occupancy states there are apartments on the third through fifth floors, and apartments and a store on the second floor (*id.*). Plaintiff alleges the certificate of occupancy for the premises occupied by Dietrich is for commercial occupancy only (NYSCEF Doc. 2 at ¶ 25)

Dietrich leased the second floor left front unit from Plaintiff on March 25, 2016 through May 31, 2019 (*id.* at ¶ 3). Dietrich provided sworn testimony that she resided in the premises throughout the entire lease term (NYSCEF Doc. 23). Allegedly, at the termination of the lease, Dietrich remained in possession of the premises without Plaintiff's permission (*id.* at ¶ 13)

On June 3, 2019, Plaintiff initiated a holdover proceeding against Dietrich in Part 52 of Civil Court (NYSCEF Doc. 22). In the holdover proceeding, Dietrich moved for summary judgment to dismiss the holdover petition on the basis that the tenancy is residential rather than commercial (NYSCEF Doc. 24). Hon. Judy H. Kim denied the motion for summary judgment on

November 6, 2019 after finding an issue of fact existed as to whether Plaintiff was aware that Dietrich's use of the premises was residential rather than commercial (NYSCEF Doc. 25). Hon. Sabrina B. Kraus (who at the time was sitting in Civil Court) issued an order on January 23, 2019, directing the parties to appear for a hearing to determine Plaintiff's knowledge as to Dietrich's use of the premises (NYSCEF Doc. 26). After the hearing, in a decision dated February 10, 2020, Judge Kraus found that the use of the premises was at least in part used residentially, and that Plaintiff acquiesced to the premises' residential use (NYSCEF Doc. 27). Therefore, the Court held that the holdover proceeding should be brought in the Housing Part, and since the holdover proceeding was not in Housing Part, the petition had to be dismissed (*id.*). Rather than file a new holdover proceeding in Housing Part, Plaintiff filed this action in Supreme Court (NYSCEF Docs. 1-2).

III. Discussion

A. Standard

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings

and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

B. Collateral Estoppel (First Cause of Action)

Collateral estoppel applies when “(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits” (*Conason v Megan Holding, LLC*, 25 NY3d [2015] [internal quotation marks and citation omitted], *rearg denied* 25 NY3d 1193 [2015]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1985]).

Collateral estoppel is an equitable doctrine, grounded in the facts and realities of a particular litigation, and is not to be applied rigidly. (*Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 684 [1st Dept 2007]; *Pustilnik v Battery Park City Authority*, 71 Misc.3d 1058, 1069 [Sup Ct, New York County 2021]). “The fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interests in consistent and accurate results.” (*Buechel* at 304). The litigant seeking the benefit of collateral estoppel must show that the decisive issue was necessarily decided in the prior action against a

party, or one in privity with a party, while the party to be precluded bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.*).

The findings of the Court in the holdover petition are presumed valid and unless reversed or annulled in a proper proceeding is not open to attack by parties or privies in any collateral action or proceeding (*Silvar v Commissioner of Labor of State*, 175 AD3d 95, 101 [1st Dept 2019]). In that proceeding, after an evidentiary hearing, the Court found that Dietrich's tenancy was residential in character, that Plaintiff knew Dietrich was residing in the premises, and that Plaintiff acquiesced to Dietrich residing in the premises (*see 66 Glebow Realty Associates v Dietrich*, 66 Misc3d 1221(A) [Civ Ct, New York County 2020]). Therefore, pursuant to the doctrine of collateral estoppel, the Plaintiff's first cause of action which seeks declaratory judgment stating that the Lease between Plaintiff and Dietrich was a commercial lease must be dismissed.

C. Rent Stabilization (First and Second Causes of Action)

Defendants next assert that the documentary evidence (the certificate of occupancy, the multiple dwelling registration, and the Civil Court's finding of Plaintiff's knowledge and acquiescence of Dietrich's residential use of the premises) requires a dismissal of the balance of Plaintiff's first cause of action.

It is undisputed that the Building is a pre-war building built before January 1974 which contains at least eleven residential units, thereby automatically qualifying those units for rent stabilization pursuant to Emergency Tenant Protection Act of 1974 (ETPA) § 5(4)(a) and Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504(a) (*see also* NYSCEF Docs 28-29). The mere fact that the apartment occupied by Dietrich was used as both a workspace and her residential premises does not exempt it from rent stabilization (*Zeitlin v New York City Conciliation and Appeals Bd.*, 46 NY2d 992, 995 [1979]; *Golfinos v 400 Co-Op Corp.*, 110 AD2d

522 [1st Dept 1985]). Indeed, the First Department has affirmed a Civil Court's decision holding that a landlord's acquiescence in a long-term mixed use of living/working space implicates the protections of the ETPA (*UBO Realty Corp v Molica*, 175 Misc2d 897[1st Dept 1999]). Plaintiff has not identified any provision that would exempt Dietrich's housing accommodation from the ETPA's protection (*Salvati v Eimicke*, 72 NY2d 784, 786 [1988] [the ETPA sweeps within rent stabilization "all housing accommodations which it does not expressly exempt, including previously unregulated accommodations"]]).

Dietrich occupied the premises residentially. Thus, the premises qualify for rent stabilization, and there is no evidence presented in opposition indicating the premises were ever deregulated or are excepted from rent-stabilization. Therefore, the Court finds that the documentary evidence definitively contradicts Plaintiff's factual allegations. The portion of the first cause of action seeking a declaratory judgment that the Dietrich's apartment is not regulated must be dismissed. Plaintiff's second cause of action seeking ejectment is also dismissed since the evidence establishes Dietrich resides in an accommodation subject to rent stabilization and she can therefore only be evicted after being served with the requisite notices and upon one of the applicable grounds set forth in Rent Stabilization Code [9 NYCRR] § 2524.3 (*Beverly Holding NY, LLC v Blackwood*, 63 Misc.3d 160(A) [2d Dept App. Term, 2d, 11th and 13th Jud Dists 2019]).

D. The Multiple Dwelling Law and Plaintiff's Claim for Rent, Use and Occupancy, Unjust Enrichment, and Quantum Meruit (Third, Fourth, Fifth, and Sixth Causes of Action)

Defendants next assert that because the premises are being occupied residentially but do not have a residential certificate of occupancy, there is a violation of the Multiple Dwelling Law ("MDL") which prohibits the collection of either rent or use and occupancy.

In pertinent part, MDL § 301(1) states that:

No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate of occupancy by the department [of Buildings] that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable provisions.

Moreover, MDL § 302(1) states that for:

any dwelling or structure...occupied in whole or in part for human habitation in violation of section three hundred one... 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.

Plaintiff admits in the allegations that the premises have a commercial certificate of occupancy despite Judge Kraus determining it was being occupied for residential purposes. Plaintiff admits that there is no certificate of occupancy allowing for residential occupation. Since Judge Kraus determined after an evidentiary hearing that the premises were being occupied, at least in part, for human habitation, with the knowledge and acquiescence of Plaintiff, Dietrich's occupation is clearly in violation of the MDL. Therefore, pursuant to MDL § 302(1), Plaintiff cannot collect either rent or use and occupancy from Dietrich. Plaintiff's cross motion must therefore be denied, and so too the causes of action seeking rent arrears and use and occupancy must be denied (*Chazon LLC v Maugenest*, 19 NY3d 410, 415-416 [2012]; *49 Bleecker Inc v Gatien*, 157 AD3d 619, 620 [1st Dept 2016] ["petitioner, as owner of respondents' dwelling, was precluded from charging respondents rent or other remuneration while the building lacked a certificate of occupancy for residential use"]).

E. Attorneys' Fees

As all of the causes of action have been dismissed, Plaintiff's seventh cause of action seeking attorneys' fees cannot survive on its own. Therefore, this cause of action is also dismissed.

Accordingly, it is hereby

ORDERED that Plaintiff's Complaint is dismissed in its entirety; and it is further

ORDERED that Plaintiff's cross motion is denied.

This constitutes the decision and order of the Court.

9/30/2022

DATE

Mary V. Rosado

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: