Mei Ling Chow v English
2022 NY Slip Op 33833(U)
November 14, 2022
Civil Court of the City of New York, Bronx County
Docket Number: L&T Index No. 001238/22
Judge: Diane E. Lutwak
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CIVIL COURT OF THE CITY OF NEW YORK
BRONX COUNTY: HOUSING PART C
---X L&T Index # 001238/22
MEI LING CHOW,

Petitioner-Landlord,

-against-

DECISION & ORDER

SARAH ENGLISH, "JOHN DOE",

Respondents-Tenants.
---X
Hon. Diane E. Lutwak:

Recitation, as required by Rule 2219(A) of the New York State Civil Practice Law and Rules (CPLR), of the papers considered in the review of Respondent's Motion to Dismiss Petition:

Papers	NYSCEF Doc #
Notice of Motion	4
Attorney's Affirmation in Support	5
Respondent's Affidavit in Support	6
Exhibits A-N in Support	7-20
Petitioner's Affidavit in Opposition	21
Attorney's Affirmation in Reply	22
Exhibits A-D in Reply	24-27

After argument, upon the foregoing papers and for the reasons stated below, Respondent's motion under CPLR Rule 3211(a)(7) is granted and this proceeding is dismissed, without prejudice.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

This is a nonpayment eviction proceeding in which the Petition, prepared on a "Blumberg" form T 206D ("I-86") and verified by the unrepresented Petitioner on July 13, 2022, alleges that Respondents Sarah English and "John Doe" are tenants who entered into possession under a "written rental agreement between respondent and landlord (landlord's predecessor) made on or about March 15, 2014". Petition at ¶ 2. The Petition seeks rent arrears of $39,100, comprised of $1700/month for the 23 months of May 2019 - February 2020, March 2021 - September 2021 and January 2022 - June 2022, Petition at ¶ 4, and states that the apartment is not subject to rent regulation because it is in a 4-family building, Petition at ¶ 7. The Petition refers to an attached "14 Day Notice Rent Demand to Tenant", which reflects Petitioner's receipt of "ERAP" (COVID-19 Emergency Rent Assistance Program) funds of

$1700/month for the 15 months of March 2020 - February 2021 and October - December 2021 and demands payment of rent arrears of $39,100.

Respondent Sarah English[1] by counsel served and filed a Verified Answer to the Petition raising 22 affirmative defenses and 4 counterclaims. After an initial appearance on August 18, 2022 the case was adjourned twice, with a briefing schedule for Respondent to file a motion to dismiss. The motion was filed, briefed and, after argument, marked submitted, decision reserved on October 28, 2022. Both sides raise numerous arguments in their papers, all of which will not be re-stated herein; instead, the key points are summarized as follows.

RESPONDENT'S MOTION

Respondent moves to dismiss the petition on the following grounds: (1) under CPLR R 3211(a)(2) based on jurisdictional defects in the Petition, Notices of Petition and Rent Demand; (2) under CPLR R 3211(a)(5) based on the legal doctrines of *res judicata* and collateral estoppel; (3) under CPLR R 3211(a)(7) for failure to state a cause of action; and (4) under NYS Real Property Actions and Proceedings Law (RPAPL) § 741 for failure to state the facts upon which the proceeding is based. In her attorney's supporting affirmation, Respondent argues that the Petition should be dismissed because of non-amendable defects in the Notices of Petition; failure to provide the "proper colored page notice to respondent" required by Administrative Order 268/20; misstatement of the regulatory status; failure to accurately state the relationship between the parties and other facts upon which the proceeding is based; and because Petitioner "cannot maintain a nonpayment proceeding against a month-to-month tenant".

In her supporting affidavit, Respondent states she has lived in her apartment for over 11 years, pre-dating Petitioner's ownership of the building; Petitioner has never offered her a lease, "or a month-to-month agreement" and instead refused rent and told her she wanted her to move out; the only funds Petitioner has accepted from or on behalf of her were a $1700 payment made in court in a prior holdover proceeding and $25,000 in ERAP funds; Petitioner brought three prior holdover proceedings against her, all of which were either dismissed or discontinued; and Petitioner served her with two separate Notices of Petition in this proceeding, one telling her she had 10 days to answer and the other telling her she had 5 days to answer and other misleading, confusing, incomplete and incorrect information.

PETITIONER'S OPPOSITION

In opposition, Petitioner, representing herself, explains that she has owned the building since May 7, 2019 and that she used form pleadings that she filled out according to the court's

[1] As Sarah English is the only Respondent to appear, references hereinafter to "Respondent" refer solely to her unless otherwise stated.

instructions to commence this proceeding. She argues that Respondent's attorneys "have been unreasonable, bullying a pro se, no law knowledge, ESL landlord" and points out that the number of defects alleged by Respondent – 113 – is more than the number of sentences in the forms she filled out, under oath for penalty of perjury, and that Respondent also has made mistakes in her papers. Petitioner asserts that Respondent signed a lease agreement with the former owner in March 2014, paid rent to the former owner, and became a month-to-month tenant after that lease expired. Petitioner argues that the landlord-tenant relationship between Respondent and the former owner remained in place when she bought the building and, accordingly, Respondent must pay rent to her. Petitioner further argues that the State's payment of ERAP funds on Respondent's behalf based upon the expired lease supports her claim that Respondent is her tenant.

RESPONDENT'S REPLY

On reply, Respondent's counsel reiterates the history of the three prior holdover proceedings, describes Petitioner's unsuccessful efforts earlier this year to re-argue Housing Court Judge Tao's decision in L&T # 31187/19 and emphasizes that "Petitioner had never extended a rental agreement to Respondent or offered her a lease" and that the only monies paid were one month's use and occupancy (U&O) in court pending a determination on respondent's motion in one of the prior cases and ERAP funds. Respondent's counsel argues that there is no landlord-tenant relationship between the parties as there has never been a rental agreement between them; Petitioner cannot bring a nonpayment proceeding for U&O; neither the payment of one month's U&O in the prior holdover proceeding, nor the ERAP payment, created a landlord-tenant relationship between the parties; and, accordingly, the case should be dismissed. Alternatively, Respondent's counsel argues that the proceeding should be dismissed as the apartment is "*de facto* Rent Stabilized" due to the creation of two illegal apartments in the basement, in addition to the four legal apartments on the first and second floors, evidenced by Department of Buildings documents.

DISCUSSION

A cause of action for nonpayment of rent is based on a contract, namely an agreement to pay rent. *13 E 9th St LLC v Seelig* (63 Misc3d 1218[A], 114 NYS3d 817 [Civ Ct NY Co 2019]). To state and maintain a cause of action for nonpayment of rent, the petition must state the facts upon which the proceeding is based. RPAPL § 741(4). Those facts include a default in rent payment "pursuant to the agreement under which the premises are held" after a 14-day written demand, as required by RPAPL § 711(2). In *Underhill Ave Realty, LLC v Ramos* (49 Misc3d 155[A], 29 NYS3d 850 [App Term 2nd Dep't 2015]), a case, like this one, where there was no rental agreement in effect between the parties during the period in question, the appellate court explained:

> It is elementary that a nonpayment proceeding must be predicated on an agreement to pay rent (*see Matter of Jaroslow*, 23 NY2d 991, 993, 246 N.E.2d 757, 298 N.Y.S.2d 999 [1969]; *Strand Hill Assoc. v Gassenbauer*, 41 Misc 3d 53, 975 N.Y.S.2d 526 [App Term, 2d, 11th & 13th Jud Dists 2013]; *265 Realty, LLC v Trec*, 39 Misc 3d 150[A], 975 N.Y.S.2d 370, 2013 NY Slip Op 50974[U] [App Term, 2d, 11th & 13th Jud Dists 2013]; *615 Nostrand Ave. Corp. v Roach*, 15 Misc 3d 1, 832 N.Y.S.2d 379 [App Term, 2d, 11th & 13th Jud Dists 2006]; *Licht v Moses, 11 Misc 3d 76, 813 N.Y.S.2d 849 [App Term, 2d & 11th Jud Dists 2006]*).

The Appellate Term went on to find that the lower court properly had dismissed the nonpayment petition and noted that the dismissal was without prejudice to the landlord's right to file a different kind of case to recover U&O for the period in question.

Here, Petitioner asserts in the Petition that Respondent's last lease commenced on March 15, 2014, over eight years ago. It is undisputed that that lease, between Respondent and the prior owner of the building, has long since expired. It is also undisputed that Petitioner, since becoming the owner of the building, has not offered Respondent a lease or otherwise created a rental agreement with her. Respondent's payment of one month's U&O during a prior holdover proceeding did not create a rental agreement between the parties. Nor does Respondent's successful application for ERAP funds based on her old lease with the prior owner, which the State paid to Petitioner, create a rental agreement or tenancy between Petitioner and Respondent. *See, e.g., W 49th St, LLC v O'Neil* (76 Misc3d 459, 461, 173 NYS3d 189, 191 [Civ Ct NY Co 2022]).

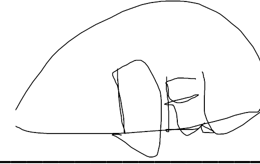
It is clear here that there is no rental agreement between the parties upon which this nonpayment proceeding may be maintained. Such a rental agreement is a key element of a petitioner-landlord's *prima facie* case in a proceeding under RPAPL § 711[2] for nonpayment of rent. *See, e.g., Haberman v Singer* (3 AD3d 188, 771 NYS2d 505 [1st Dep't 2004]); *71 W 68th St, LLC v Roach* (57 Misc3d 144[A], 72 NYS3d 518 [App Term 1st Dep't 2017]); *East Harlem Pilot Block Bldg IV HDFC Inc v Diaz* (46 Misc3d 150[A], 9 NYS3d 592 [App Term 1st Dep't 2015]).

On a motion to dismiss under CPLR R 3211(a)(7) for failure to state a cause of action, the court is required to afford a liberal construction to the pleading, accept the facts alleged as true and ascertain whether the petition alleges facts which fit within any "cognizable legal theory." *Leon v Martinez* (84 NY2d 83, 638 NE2d 511, 614 NYS2d 972 [1984]). Here, Respondent's motion to dismiss for failure to state a cause of action must be granted because the Petition fails to assert facts which fit within any "cognizable legal theory" under which Petitioner is entitled to seek rent arrears from Respondent in this nonpayment proceeding.

CONCLUSION

Based on the foregoing, Respondent's motion is granted and it is hereby ORDERED that this proceeding for nonpayment of rent is dismissed pursuant to CPLR R 3211(a)(7) for failure to state a cause of action, without prejudice to any claims Petitioner may have for use and

occupancy, and Respondent's defenses thereto. The court does not reach any of the other arguments made by either party. This constitutes the Decision and Order of the Court, which is being uploaded on NYSCEF, sent by email to Petitioner *pro se* and Respondent's counsel and sent by first-class mail to Petitioner.



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Diane E. Lutwak, HCJ

APPROVED
DLUTWAK , 11/14/2022, 6:49:00 AM

Dated: Bronx, New York
November 14, 2022

Petitioner, *Pro Se*

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