

Zahedi v 64 Brooklyn Realty Corp.
2022 NY Slip Op 33954(U)
November 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 516747/2019
Judge: Debra Silber
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At an IAS Part Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

CAVEH ZAHEDI,

Plaintiff,

-against-

64 BROOKLYN REALTY CORP., and
MARION HOOGERWERF,

Defendants.

-----X

DECISION / ORDER

Index No.: 516747/2019
Mot. Seq. # 3

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

49-58
60-72
73

In this action stemming from alleged rent overcharges, plaintiff moves (in motion sequence #3) for an order, pursuant to CPLR 3212 (a), granting him summary judgment on the three causes of action in his amended complaint: for a declaratory judgment; an order determining the legal regulated rent for plaintiff's apartment; and an order referring the issues of damages for the rent overcharges and attorneys' fees to a court attorney referee.

BACKGROUND

Plaintiff is a tenant in an eight-family apartment building located at 64 4th Place, in Brooklyn (Building). The Building has been owned by defendant 64 Brooklyn Realty Corp. since 1994. However, according to the expired Multiple Dwelling Registration on file with

HPD, co-defendant Hoogerwerf is the Building's owner, not the corporation. The records in ACRIS (the public database of the NYC Department of Finance) indicate that the corporation is the last owner of record. The NYS Department of State, Division of Corporations on-line public corporations database indicates that the corporation was dissolved by proclamation for non-payment of corporate taxes in 1998. The facts in this paragraph are asserted in the amended complaint [Doc 5]. The court has confirmed these facts on the applicable websites.

Plaintiff first took possession of apartment 3L in the Building pursuant to an unregulated market rate lease [NYSCEF Doc 6] with a term from June 12, 2018 to June 11, 2019, at a monthly rent of \$2,600.00. The Owner is listed as "Marion Hoogerwerf." According to the New York State Division of Housing and Community Renewal's (DHCR) certified rent registration history [Doc 7], (from May 21, 2019) prior to plaintiffs' tenancy, in 1984, apartment 3L was registered as a rent stabilized apartment with a legal regulated rent of \$206.32, and was registered again in 1986, but without a rent amount. For each and every year after that, the report says "reg[istration] not found for subject premises."

Plaintiff commenced this action on July 30, 2019. The complaint was amended before it was served, [Doc 5] with the lease and rent registration as exhibits [Docs 6 and 7]. Defendant Hoogerwerf, only on her own behalf, filed a verified answer to the complaint on December 31, 2019 [Doc 10]. Therein, defendant Hoogerwerf (hereafter "defendant") denies most of the allegations in the complaint, and states that the plaintiff's lease has expired, and that plaintiff is a month-to-month tenant [Paragraph 3]. For a first affirmative defense, defendant alleges that she took title to the premises as the result of a foreclosure

sale. She avers that there was only one tenant at the time, and that the rest of the apartments were vacant. She further avers that “The building was substantially rehabilitated within the meaning of the Rent Stabilization Code § 2520.11 and §2520.11(e) and is exempt from coverage under the Rent Stabilization Law in that at least 75% of the building wide and housing accommodation systems were replaced and, to the extent that issue is taken with the percentage required, there were statutory exceptions where a particular component of the building or system was recently installed or upgraded (or was structurally sound) by the prior owner and did not require replacement. As to at least one particular component, there was historical merit requiring preservation.” The second affirmative defense is a claim of improper service. Plaintiff then rejected the answer for being late, which was followed shortly thereafter by a motion from defendant to dismiss due to improper service [MS #1]. This resulted in plaintiff’s cross motion [MS #2], filed as soon as the courts opened to filing after the closure due to the Covid-19 Pandemic, for a default judgment order against defendant 64 Brooklyn Realty Corp. The court granted the defendant’s motion to the extent that the court directed plaintiff to accept the defendant’s answer as it was not late [Doc 40]. In a separate order, also electronically filed on May 22, 2020 [Doc 41], the cross motion was granted, and a default order was issued against the corporate defendant, “inquest to abide the trial.” Presumably in the two subsequent years discovery took place. A preliminary conference order was electronically filed on March 23, 2022 by the Intake Clerk, pursuant to the court’s procedures during the pandemic to not hold in-person preliminary conferences. This summary judgment motion, sequence number 3, was filed by plaintiff on June 22, 2022, two years after the court’s decisions on the first two

motions. Before this motion was submitted, the compliance conference, set for August 16, 2022, came and went and the parties did not upload a proposed order. On September 9, 2022, the court issued a “Central Compliance Part Conference Order on Default” [Doc 59] which states that the Note of Issue must be filed by October 20, 2023. This motion was then argued and submitted on October 14, 2022.

In support of his motion, he submits: an affidavit of facts; an affirmation of counsel; an affidavit from plaintiff; copies of plaintiff’s canceled rent checks; copies of e-mails between the attorneys about discovery; the pleadings; DHCR Fact Sheet #38; and a memorandum of law.

Plaintiff’s counsel’s affirmation and plaintiff’s affidavit reiterate the facts described by the court above and provide no new facts. Counsel avers that the defendant has failed to respond to plaintiff’s discovery demands. This appears to be why this motion is devoid of any evidence. Counsel concludes “There is no issue of fact: Plaintiff’s tenancy is subject to rent regulation and Defendants have violated the RSL and RSC by treating Plaintiff’s tenancy as exempt from regulation. Because Defendants have fraudulently deregulated Plaintiff’s tenancy, the Court must reset the rent pursuant to RSC § 2522.6[b][2].”

DHCR Fact Sheet #38 [Doc 57], states in the introduction, “The DHCR will find that a building has been substantially rehabilitated within the meaning of Tenant Protection Regulations Section 2500.9(e) or Rent Stabilization Code Section 2520.11(e), and is therefore exempt from coverage under the Emergency Tenant Protection Act (ETPA) or the Rent Stabilization Law (RSL), respectively, for rent stabilized properties where the owner demonstrates, based upon the totality of the circumstances, that the following

criteria have been met: (1) At least 75% of building-wide and individual housing accommodation systems must have been replaced. Exceptions regarding the extent of the rehabilitation work required to be effectuated building-wide or as to individual housing accommodations, may be granted where the owner demonstrates that a particular component of the building or system has recently been installed or upgraded, or is structurally sound and does not require replacement, or that the preservation of a particular component is desirable or required by law due to its aesthetic or historic merit.” The defendant’s answer to the complaint mirrors this language in her first affirmative defense.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and once the movant makes a prima facie case, the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Here, plaintiff fails to make a prima facie case for summary judgment. The mere fact that the property was registered with DHCR as rent stabilized in 1986, which is the only evidence submitted, is not enough. While the court is not required to review the opposition papers when the moving party fails to make a prima facie case, it must be noted that at oral argument, defendant’s counsel indicated that the defendant bought the property at a foreclosure auction, and that it had previously been vacated due to a fire. Apparently one tenant returned after the building was restored. Information regarding whether the other seven apartments were eligible to be exempt from rent stabilization as a result of the work performed is not provided. Defendant’s attorney also claimed at oral argument that before the fire, the building was converted to an apartment corporation pursuant to an offering plan, which was declared effective, and some apartments were sold in 1987. If that did

occur, the apartments would have become exempt from rent stabilization as they became vacant or were purchased.

“[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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178

AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]).

The court finds that this motion is premature, and that plaintiff fails to make a prima facie case for the relief requested. Therefore, it is denied, with leave to renew once discovery is complete.

This constitutes the decision, order, and judgment of the court.

E N T E R,



Hon. Debra Silber, J.S.C.