

Esposito v Larig

2022 NY Slip Op 34996(U)

November 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 517226/16

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of November, 2022.

PRESENT:

HON. CAROLYN E. WADE,
Justice.

-----X
TINA ESPOSITO,

Plaintiff,

-against-

Index No. 517226/16

SOPHRONIA LARIG a/k/a SOPHIA LARIG and
EYAL DAN,

MS# 4.5

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	61-63, 79-81 _____
Opposing Affidavits (Affirmations) _____	101 _____
Affidavits/ Affirmations in Reply _____	103 _____
Other Papers: _____	_____

Upon the foregoing papers, and after oral argument, defendants Sophronia Larig a/k/a Sophia Larig and Eyal Dan move (in motion [mot.] sequence [seq.] number [no.] 4) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the second, third, fourth and fifth causes of action in the complaint of plaintiff Tina Esposito; and granting summary judgment on defendants' counterclaim for attorneys' fees, and scheduling a hearing to determine same. Plaintiff cross-moves (in mot. seq. no. 5) for an order a) holding defendants in contempt for failing to comply with a decision and order

issued by the Appellate Division, Second Department in this matter and awarding plaintiff fees and costs associated with the instant motion; b) granting plaintiff summary judgment on her complaint or; c) in the alternative, granting plaintiff leave to amend the complaint pursuant to CPLR 3205 (b); and d) upon granting plaintiff leave to amend the complaint, deeming the proposed amended complaint served upon defendants.

Factual Background

Plaintiff owns the subject premises, a residential apartment building located at 11 First Place in Brooklyn. Defendants took occupancy of an apartment on the first floor of the building pursuant to a one-year market rate lease with plaintiff for the term August 1, 2005 through July 31, 2006 at a monthly rent of \$3,000.00. Defendants remained in occupancy of the apartment following expiration of the lease without entering into any further renewal leases. In January 2008, plaintiff commenced a series of holdover proceedings in the Housing Part of the Civil Court of the City of New York, Kings County (Housing Court) to recover possession of the apartment, which were all dismissed on various grounds. In a holdover proceeding commenced in 2011, plaintiff alleged that the apartment was exempt from the Rent Stabilization Law (RSL) and Code (RSC) due to high-rent vacancy deregulation. The Housing Court dismissed the petition, determining, among other things, that the apartment was subject to rent stabilization and defendants were entitled to a rent-stabilized lease. The Housing Court's determination that the apartment was rent-stabilized was affirmed by the Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts.

The instant action was commenced on September 29, 2016. In her first cause of action, plaintiff sought a judgment declaring the legal rent for the subject apartment, which plaintiff alleged was \$3,000 based upon the application of a formula provided in the RSC using documented rents for comparable housing accommodations. The second and fourth causes of action seek an award of use and occupancy. The third cause of action seeks ejectment of defendants from the premises. The fifth cause of action seeks an award of attorneys' fees.

On November 23, 2016, defendants moved for an order dismissing the complaint or, alternatively, referring this matter to the Division of Housing and Community Renewal (DHCR) for a determination of the legal rent of the subject apartment. Plaintiff cross-moved for a default judgment on her second through fifth causes of action and for an inquest on damages or, alternatively, an order directing defendants to pay retroactive and prospective use and occupancy pending conclusion of this action. On August 2, 2017, this court issued an order granting plaintiff's cross-motion for a default judgment and inquest; and granting defendants' motion to the extent that plaintiff's first cause of action was referred to the DHCR for a determination of legal rent.

Following appeal, the Appellate Division, Second Department issued a decision and order on July 10, 2019 (*Esposito v Larig*, 174 AD3d 574 [2d Dept 2019]) which reversed the August 2, 2017 order insofar as appealed and cross-appealed from, on the law and in the exercise of discretion; denied that branch of plaintiff's cross-motion which was for leave to enter a default judgment against the defendants on the second through fifth causes of action; granted that branch of the plaintiff's cross-motion which was for an

award of prospective use and occupancy pendente lite and, in effect, for the posting of an undertaking by the defendants for past use and occupancy; and remitted the matter to this court for “a determination of the appropriate monthly rent to be applied pendente lite, as well as for the determination of the amount of a reasonable undertaking to be posted by the defendants as security for their potential liability for past use and occupancy of the subject apartment” (*Esposito*, 174 AD3d at 576).

On July 22, 2019, plaintiff moved for an order scheduling a hearing to determine the amount of use and occupancy that defendants have been ordered by the Appellate Division to pay plaintiff pending conclusion of this action and to determine the amount of an undertaking for past use and occupancy. By order dated February 7, 2020, the court referred these issues of the amount of prospective use and occupancy and the amount of the undertaking to a Special Referee to hear and determine. On March 19, 2021, the DHCR issued an order setting the legal regulated rent as of defendants’ initial occupancy at \$2,490.00 per month, which represents the amount defendants were charged in their lease less the guideline vacancy increase allowance at that time. The DHCR ordered the rent frozen at \$2,490.00 per month until a new lease is executed between the parties (which rent may then be increased by any lawful authorized increases going forward), and further directed plaintiff to offer defendants a rent-stabilized lease and register the apartment with the DHCR. In March 2021, plaintiff offered defendants a rent-stabilized renewal lease, which was rejected by defendants as improper. Plaintiff subsequently offered defendants an initial rent-stabilized lease in September 2021, which was also rejected by defendants for reasons which included the failure to account for the \$3,000.00

security deposit paid by defendants when they first took occupancy of the apartment.

On April 29, 2022, after the instant motion for summary judgment was filed by defendants, the Special Referee issued a determination setting the amount of the undertaking to be posted by defendants at \$346,110.00 and ordering that a bond for said amount be posted by June 2, 2022. The sum of \$346,110.00 was thereafter deposited into the escrow account of defendants' counsel.¹

A defendant moving for summary judgment has the initial burden of proffering evidence in admissible form demonstrating, as a matter of law, that the plaintiff's cause of action has no merit (*see GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In their motion for summary judgment, defendants contend that plaintiff's failure to serve proper notices under the Rent Stabilization Code (RSC) bars her third cause of action for ejectment and that plaintiff's second and fourth causes of action for use and occupancy were unsustainable at the time this action was commenced since, among other reasons, the legal rent was not established, and the apartment was not registered with the DHCR.

Those parts of defendants' motion for summary judgment dismissing the second and fourth causes of action are denied. Defendants previously moved to dismiss these

¹ While the escrow deposit, rather than the positing of an undertaking, does not strictly comply with the Special Referee's determination, plaintiff indicates that she has no objection to this alternative surety (Plaintiff's Affirmation in Reply, NYSCEF Doc No 103, at 6 n 9).

causes of action or, alternatively, refer the matter to the DHCR for a determination of legal rent. Although the court, in its August 2, 2017 order, stayed determination of the second through fifth causes of action pending a determination of the legal rent, the Appellate Division reversed the order on appeal and effectively decided that plaintiff was entitled to an award of prospective use and occupancy and an undertaking by defendants to secure any award for past use and occupancy. The Appellate Division reasoned that inasmuch as defendants “fully intend to continue renting the subject apartment pursuant to a rent-stabilized lease, they should not only be prepared to pay for their ongoing use and occupancy of the apartment during the pendency of this action, but also to account for their past use and occupancy” (*Esposito*, 174 Ad3d at 576 [citation omitted]). Insofar as the merits of the second and fourth causes of action for use and occupancy have been established by the Appellate Division’s decision and order, which is law of the case, defendants cannot show entitlement to dismissal of these claims as a matter of law.

That part of defendants’ motion for summary judgment dismissing plaintiff’s third action for ejectment is predicated on the failure of plaintiff to serve proper notice under RSC § 2524.2. However, this regulation explicitly excepts the notice requirement where the ground for eviction is nonpayment of rent. The notice requirement of RSC § 2524.2 applies only to the grounds for eviction set forth in RSC §§ 2524.3 and 2524.4. Further, because defendants alleged that they did not pay rent or use and occupancy following the expiration of the initial lease term on July 31, 2006,² a month-to-month tenancy was not

² Joint Stipulation of Facts, NYSCEF Doc No 73.

established; thus, a notice of termination was not required prior to the commencement of this ejectment action stemming from a holdover (*see Alleyne v Townsley*, 110 AD2d 674, 675 [2d Dept 1985]). Accordingly, those parts of defendants' motion for summary judgment, dismissing the third cause of action for ejectment and fifth cause of action for attorneys' fees, and for summary judgment on their counterclaim for attorneys' fees, are each denied.³

Turning to plaintiff's cross-motion, "[t]o prevail on a motion to punish for civil contempt, the movant must establish by clear and convincing evidence: '(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct'" (*Heffer v Krebs*, 196 AD3d 684, 685 [2d Dept 2021], quoting *Spencer v Spencer*, 159 AD3d 174, 177 [2d Dept 2018]; *see Bongiorno v Di Frisco*, 196 AD3d 452, 454 [2d Dept 2021]; *Toranzo v Toranzo*, 185 AD3d 621, 623 [2d Dept 2020]). The movant has the burden of proving contempt by clear and convincing evidence (*see Heffer*, 196 AD3d at 685; *Bongiorno*, 196 AD3d at 455; *Toranzo*, 185 AD3d at 623). Since the goal of civil contempt is to vindicate the rights of a private party, the element of prejudice is essential (*see U.S. Bank N.A. v Sirota*, 189 AD3d 927,

³ Under the terms of the initial lease, the successful party in a legal action of proceeding between plaintiff and defendants for nonpayment of rent or recovery of possession of the apartment may recover reasonable legal fees and costs for the other party (parties). In light of the sustainability of plaintiff's second through fourth causes of action, defendants have not established, as a matter of law, that plaintiff is not entitled to an award of legal fees (*see generally* Real Property Law § 234).

930 [2d Dept 2020]). The movant can show prejudice where the actions of the alleged contemnor “were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party” (*Bongiorno*, 196 AD3d at 454-455, quoting *Matter of Figueroa-Rolon v Torres*, 121 AD3d 684, 685 [2d Dept 2014]; see *U.S. Bank N.A.*, 189 AD3d at 930; *Matter of Executive Life Ins. Co. of N.Y.*, 122 AD3d 629 [2d Dept 2014]). A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court (see *Heffer*, 196 AD3d at 685; *Bongiorno*, 196 AD3d at 454).

Considering that the legal rent was not yet established at the time the Appellate Division decision and order was issued; that the decision and order of the Appellate Division remitted the matter to this court for further proceedings concerning rent and an undertaking for past use and occupancy; and that defendants substantially complied with the Special Referee’s order directing an undertaking; the court, in the exercise of its discretion, denies that part of plaintiff’s cross-motion seeking to hold defendants in contempt for failure to comply with the Appellate Division decision and order regarding payment of use and occupancy. Nonetheless, since the Appellate Division effectively determined that plaintiff established entitlement to prospective use and occupancy pending conclusion of this litigation, that part of plaintiff’s cross-motion for summary judgment is granted to such extent.

Accordingly, it is

ORDERED that defendants’ motion (mot. seq. no. 4) for summary judgment dismissing plaintiff’s second, third, fourth and fifth causes of action, and for summary judgment on its counterclaim for attorneys’ fees is denied; and it is further

ORDERED that branch of plaintiff's cross-motion (mot. seq. no 5) seeking to hold defendants in contempt is denied without prejudice; and it is further

ORDERED that, so long as defendants remain in occupancy of the subject apartment, they shall pay plaintiff \$2,490.00 per month pending completion of this litigation or until the execution of a rent-stabilized lease setting forth a legal or preferential monthly rent; and it is further

ORDERED that plaintiff shall offer defendants a rent-stabilized lease in proper form with all requisite forms and riders within 30 days of the entry of this order; and it is further

ORDERED that such rent-stabilized lease shall be completed and signed by defendants within 60 days of service thereof by plaintiff; and it is further

ORDERED that the parties shall cooperate in good faith to resolve any issues or points of contention regarding the \$3,000.00 security deposit remitted by defendants for the initial lease; and it is further

ORDERED that the remainder of plaintiff's cross-motion is denied in all other respects.

Any relief not expressly granted herein, has been considered, and is denied.

The foregoing constitutes the decision and order of the court.

ENTER,

J.S.C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT