

MLG Dev. Corp. v Ginyard

2023 NY Slip Op 30316(U)

January 27, 2023

Civil Court of the City of New York, New York County

Docket Number: Index No. LT-305306-22/NY

Judge: Tracy Ferdinand

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.

NYSCEF DOC. NO. 28
Civil Court of the City of New York
County of New York
Part: Part D, Room: 524
Date: January 25, 2023

RECEIVED NYSCEF: 01/30/2023
Index #: LT-305306-22/NY
Motion Seq #: 1 & 2

Decision/Order

MLG Development Corp. as Net Lessee of the City of New York
Petitioner(s)
-against-
Shawn Ginyard
Respondent(s)

Present: Tracy Ferdinand
Judge

Recitation, as required by CPLR 2219(A), of the papers considered in the review of this Motion to:
Restore and Cross-Motion to serve an amended Answer and Dismiss

PAPERS	NUMBERED
Notice of Motion and Affidavits and Exhibits Annexed	<u> 1 </u> [NYSCEF 11-19]_____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits and Cross-Motion and Affirmation and Exhibits Annexed	<u> 2 </u> [NYSCEF 20-23]_____
Replying Affidavits and Exhibits	<u> 3, 4 </u> [NYSCEF 24-25 & 27]_
Stipulations	_____
Other _____	_____
_____	_____

Upon the foregoing cited papers, the Decision/Order in these Motions is as follows:

Respondent initially appeared unrepresented in this summary non-payment proceeding and interposed and answer asserting general denial. After respondent secured counsel, the proceeding was administratively stayed due to a pending ERAP application. The ERAP application was denied due to respondent having already been approved for 15 months of arrears on a prior application.

Petitioner now moves to vacate the ERAP stay and restore to the calendar and to amend the Petition to date. Respondent, by counsel, does not oppose vacating the ERAP stay but opposes amendment of the petition and cross-moves for leave to serve and file and amended answer and to dismiss the petition on several grounds including a defective rent demand and failure to comply with the requirements of MDL §302.

Petitioner opposes the request for leave to file an amended answer on the grounds that the defenses asserted lack merit.

Leave to amend is freely given absent prejudice or surprise *unless* it can be shown that the defense or counterclaim is “palpably insufficient or devoid of merit”. *MBIA Ins. Corp. v Greystone & Co., Inc.* 74 A.D.3d 499 [1st Dept 2010].

Petitioner’s arguments notwithstanding, neither of respondent’s defenses are meritless. While the petition, and any misstatements therein, are capable of amendment, the petition here clearly states that the premises are NOT a multiple dwelling. This is counter to petitioner’s own opposition which asserts that the premises ARE a multiple dwelling and that the building is properly registered, and petitioner has not yet moved to amend.

A predicate notice, however, is incapable of amendment and an improper demand may serve as a basis for dismissal. (*Chinatown Apts., Inc. v Chu Cho Lam*, 51 NY2d 786 [1980]).

“[A]’proper demand for rent must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period. (*Schwartz v Weiss-Newell*, 87 Misc 2d 558, 561, 386 NYS2d 191 [1976].)” 542 *Holding Corp. v Prince Fashions, Inc.*, 46 AD3d 309, 310 [1st Dept 2007].

Here the rent demand dated March 16, 2022, demands payment in the amount of \$784.00 per month for the months of April 2021 through March 2022, with a balance of \$647.40 from March 2021. Contrary to the petitioner’s position, and as is shown in

[* 1]

the rent history annexed to the moving papers as Exhibit "L" petitioner received and credited an ERAP payment of \$11,196.90 on October 13, 2021, well before the rent demand was prepared and served. The ERAP award letter annexed to the respondent's moving papers as Exhibit "H" show that the ERAP payment covered March 2020 through February 2021 and July through September 2021. July, August and September 2021 were paid by the ERAP. Earmarked payments must be applied as designated by the payor. (See, *Snide v Larrow*, 62 NY2d 633 [1984]; *ELG 1275 LLC v Reyes*, 53 Misc 3d 1209[A], 2016 NY Slip Op 51489[U] [Civ Ct, Bronx County 2016]).

Accordingly, and in light of the above, the rent demand can not be said to be proper regarding the time period or the amount.

Accordingly, respondent's cross-motion for leave to serve and file an Amended Answer is granted and the proposed amended Answer annexed to the papers is deemed served and filed and upon filing, respondent's motion to dismiss the petition is granted. This is without prejudice to respondent's counterclaim to attorney's fees which may be asserted in a subsequent proceeding.

Petitioner's motion to restore is denied.

This constitutes the Decision and Order of this Court.

Date: 1/27/2023

HON. TRACY FERDINAND
JUDGE, HOUSING COURT

Judge, Civil/Housing Court