

140 Mulberry LLC v Mulberry St. Cigar Corp.

2023 NY Slip Op 30466(U)

February 14, 2023

Supreme Court, New York County

Docket Number: Index No. 654414/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

140 MULBERRY LLC,

Plaintiff,

- v -

MULBERRY STREET CIGAR CORP.,

Defendant.

-----X

INDEX NO. 654414/2021

MOTION DATE 01/19/2023

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, and 134

were read on this motion for A STAY OF ENFORCEMENT OF ORDER.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument held this day, it is ordered that the defendant’s motion to stay the effect of this court’s decision and order, dated November 30, 2022 (NYSCEF Doc. No. 65) (the “Underlying Order”), is denied, per the following memorandum.

The Underlying Order:

The basic background of this action is summarized in the Underlying Order, to which the reader is respectfully referred.¹ The Underlying Order granted landlord’s motion for summary judgment on its causes of action for rent arrears and use and occupancy following termination, finding that no factual dispute existed regarding tenant’s occupation of the premises without paying any rent. Nor did any dispute exist regarding tenant’s holdover (*see*, Underlying Order at 4).

¹ Defined terms used in the Underlying Order will be applied here.

The Underlying Order also found that landlord established *prima facie* entitlement on its claim for ejectment, seeing as no dispute existed regarding tenant's ongoing possession of the premises and landlord's ownership of the building and premises (Underlying Order at 4-5). In making that finding, the Underlying Order carefully considered tenant's position that the premises should be viewed as a protected residential residence under the Rent Stabilization Code and other statutes, which, if so, would have adversely affected landlord's right to seek ejectment – a right ultimately recognized at the conclusion of the Underlying Order (*id.*, at 5, 7). The Underlying Order took express note of the sworn concession of tenant's principal – Joseph Tuzzino – that his primary residence is a different residence (located in Brooklyn); not in the premises that are the subject of this action (located in Manhattan) (*see, id.*, at 5; Affidavit of Joseph Tuzzino, sworn to February 16, 2022 [NYSCEF Doc. No. 35] ¶ 6). As the Underlying Order correctly observed, that sworn concession of non-primary-residence rings the death knell for tenant's position that Rent Stabilization Code or Housing Maintenance Code protections attach to the premises, as clearly declared by Appellate Division, First Department, authority, and the Code language itself (*see, Underlying Order* at 5-6).

Tenant's Motion Asks this Court to Ignore Appellate Precedent:

Tenant's motion is based on one point, and one point alone (as the record of today's argument bears out): that, during the June 21, 2022, oral argument on landlord's motion for summary judgment (which preceded the November 2022 issuance of the Underlying Order) the undersigned was of the belief, at that moment in time, that a factual issue requiring denial of summary judgment existed as to whether the premises were a primary residence, and protected by applicable Rent Stabilization and Housing Maintenance Codes, or not (*see, Transcript*

[NYSCEF Doc. No. 128]).² However, upon further, post-argument, reflection, the undersigned became dispositively aware of Mr. Tuzzino's express concession that his "primary residence is in Brooklyn" (NYSCEF Doc. No. 35 ¶ 6). Once this court became fully aware of that concession, it was bound to apply well-established Appellate Division, First Department, doctrine, as cited and quoted in the Underlying Order:

"Tenants who maintain primary residences elsewhere while retaining rent-stabilized apartments for convenience or personal gain are not victims of the housing crisis, and therefore not within the class of those the rent stabilization laws were designed to protect" (*Park Towers S. Co., LLC v Universal Attractions*, 274 AD2d 312, 313 [1st Dept 2000]).

(Underlying Order at 5.)

Tenant's counsel,³ when asked to address her argument to the substantive import of the foregoing appellate policy, and why this court should displace it in favor of an unsigned, unentered, consideration of the court at a prior point in time, could do no more than reiterate her desire that the court should re-issue a decision and order reflecting the court's prior remarks. No attempt was made to convince this court that the ultimate findings and holding of the Underlying Order, standing on their own merit, are, somehow, incorrect, or that any genuine material fact remains to be tried in the face of Mr. Tuzzino's express admission that the premises underlying this action are not his primary residence. To grant tenant's counsel's motion would be to ignore appellate precedent and policy regarding the inapplicability of rent emergency laws to non-primary-residences.

Tenant's counsel has styled her within motion as one seeking a stay of the Underlying Order (NYSCEF Doc. No. 129). Whether so styled, or whether styled as a "Motion affecting

² Although the subject oral argument took place in June 2022, tenant's counsel did not procure, let alone file, the transcript of that argument until January 18, 2023 (*see*, NYSCEF Doc. No. 128).

³ Maria Patelis, Esq. (Strazzullo Law & Assocs. PLLC).

prior order” under CPLR article 22,⁴ nothing presented by tenant’s counsel suffices to undermine, or even respond to, this court’s substantive conclusion memorialized in its formal Decision and Order, dated and signed by this court on November 30, 2022, and officially entered into the docket of this action on December 1, 2022, as NYSCEF Doc. No. 65 (the “Underlying Order”). The Underlying Order – and not pre-existing record remarks – is the only governing mandate at this time, per CPLR 2219, which provides that “[a]n order determining a motion made upon supporting papers shall be signed with the judge’s signature or initials by the judge who made it, . . . and the place and date of signature, [and] recite the papers used on the motion” The duly entered Underlying Order bears all those statutory indicia; not prior remarks forming the sole predicate for tenant’s within motion.

Accordingly, it is

ORDERED that defendant’s motion, by order to show cause dated January 20, 2023 (NYSCEF Doc. No. 129), to stay the Decision and Order of this court, signed and dated November 30, 2022, and filed December 1, 2022 (NYSCEF Doc. No. 65), and for related relief, is denied; and it is further

ORDERED that the interim stays found in the aforesaid order to show cause are hereby lifted.

⁴ Viewing the motion as one for reargument under CPLR article 22, it would be time-barred, as the Underlying Order was entered December 1, 2022, but tenant’s motion seeking to vacate the Underlying Order on submission of the June 2022 transcript was not made until January 18, 2023 – beyond the 30-day deadline prescribed in CPLR 2221.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

2/14/2023

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE