

444 State St. PBA LLC v Oseid

2023 NY Slip Op 31201(U)

April 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 508109/2020

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 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 11th day of April 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

----- X
444 STATE STREET PBA LLC,

Plaintiff,

- against -

Index No. 508109/2020

JOHN OSEID,

Defendant.

----- X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____

64-97, 102-110
115

Upon the foregoing papers in this ejectment action, plaintiff 444 State Street PBA LLC (plaintiff or Owner) moves (M.S. 4) for an order, pursuant to CPLR 3212: (1) granting it summary judgment against defendant John Oseid (Oseid) on plaintiff’s cause of action for ejectment, and (2) dismissing Oseid’s counterclaims.

Oseid cross-moves (M.S. 5) for an order, pursuant to CPLR 3212, granting him summary judgment on his second and third affirmative defenses (alleging that Owner’s Notice to Cure and Notice to Terminate are legally defective), dismissing the amended

complaint on those grounds and “granting such other and further relief as this Court deems just and proper”.

Background

On May 27, 2020, plaintiff, the Owner of the eight-unit residential apartment building at 444 State Street in Brooklyn (Building), commenced this action against Oseid, the residential tenant of Unit 4F in the Building. Plaintiff seeks Oseid’s ejection from the attic space in Unit 4F because the Department of Buildings (DOB) denied Owner’s application to amend the Certificate of Occupancy (CO) to legalize the stairway and adjoining attic space in Unit 4F and issued violation notices to Plaintiff citing Oseid’s illegal use and occupancy of the stairway and attic space. Therefore, on March 11, 2020, Plaintiff sent Oseid a Notice to Cure and requested that he discontinue his illegal use and occupancy of the stairway and attic space. Plaintiff subsequently sent Oseid a Termination Notice on March 26, 2020, terminating Oseid’s tenancy of the stairway and attic space within Unit 4F.

Oseid’s Answer, Affirmative Defenses and Counterclaims

Oseid answered the complaint, denied the material allegations therein and admitted that the Building is occupied “contrary” to the CO. He alleges that he has resided in Unit 4F since February 1, 2002, and that he was the initial tenant in Unit 4F. Oseid denies that there is “attic” space in Unit 4F. Oseid alleges that his apartment is a duplex unit wherein the first floor is a kitchen, living room and bathroom and a staircase, originating in the foyer, leads to the second floor where there is an additional full bathroom and the

apartment's two bedrooms. Oseid alleges that he has not altered Unit 4F and that the apartment is configured and used in the exact same manner as when he commenced occupancy over eighteen years ago.

Oseid further alleges that DOB first issued a violation with regards to the building's occupancy being contrary to the CO on April 29, 2012, but he was not advised that the Unit violated the CO until plaintiff issued its Notice to Cure eight years later. Oseid claims that the DOB has not issued a vacate order, and that if the upper floor was sealed off, the apartment would be reduced to a studio apartment.

Oseid further alleges that plaintiff received Real Property Tax Law § 421 (a) tax benefits which would have required the apartment to have been rent stabilized, yet his initial lease and first lease renewal were not stabilized leases and did not include the requisite rider informing him that the apartment was rent stabilized solely due to the landlord's receipt of § 421 (a) tax benefits. Oseid claims that he was overcharged under his initial lease because DHCR's initial schedule of rents reflects the initial rent for the subject apartment should have been \$1,000.00, and Oseid was charged \$1,850.00. The answer alleges that together that evinces a fraudulent scheme to deregulate the apartment.

Oseid's answer asserts affirmative defenses, including that Owner's Notice to Cure and Notice of Termination are defective. Oseid's answer also asserts counterclaims: (1) a judgment declaring that Unit 4F is and was subject to the Rent Stabilization Law and Code and determining the amount of the legal regulated rent; (2) a judgment declaring that Unit

4F remain subject to the Rent Stabilization Law for the duration of his tenancy; (3) fraudulently overcharging; (4) harassment; and (5) legal fees pursuant to RPL 234.

Owner replied to Oseid's counterclaims and subsequently amended its reply and asserted affirmative defenses, including trespass, unjust enrichment, estoppel and that the counterclaims are barred by documentary evidence, res judicata, collateral estoppel, and the statute of limitations.

Owner's Instant Motion For Summary Judgment

Owner moves for summary judgment on its cause of action for an order ejecting Oseid from the attic of Unit 4F and dismissing Oseid's counterclaims. In support, Owner submits an affidavit from Peter Pantelidis (Pantelidis), its principal. Pantelidis claims that the condition causing the DOB violations can be fixed within days if Oseid leaves the apartment for a short period of time so the work can be done.

Pantelidis attests that the CO reflects that Unit 4F is supposed to be a studio apartment. He submits photographs reflecting that Unit 4F is a duplex apartment. He submits a copy of a violation that the Building initially received from DOB on or about April 29, 2012, noting that the occupancy of Unit 4F did not comply with the Building's CO. Pantelidis also describes subsequent violations, including ones from July 3, 2019, and September 21, 2021, noting occupancy contrary to that allowed by the CO. Finally, Pantelidis attests that Oseid's \$2,290.44 rent has "been deemed legal by government authorities with oversight of the Building and Defendant's tenancy in the Building" and

submits a copy of the Annual Registration Summary for Unit 4F that was filed with DHCR from 2016.

Owner also submits an affidavit from Peter J. Mugavero, R.A. (Mugavero), a licensed New York architect, who Owner retained to legalize the stairway and attic space in Unit 4F. Mugavero attests that he submitted a plan examination application to DOB to legalize Unit 4F, which DOB denied with specific objections, including that the CO “does not indicate attic floor. Therefore, the proposed additional story and zoning floor area exceeds max floor area permitted in the current zoning district”. Based on DOB’s objections, Mugavero recommended that Unit 4F be converted back to the legal space indicated on the Building’s CO (a studio apartment) because “it is clear that DOB will not allow Owner to legalize the current configuration of the Apartment”.

Owner argues that Oseid’s counterclaims regarding his rent stabilized tenancy should be dismissed because Oseid waived his right to assert counterclaims in his 2003 lease agreement with Owner’s predecessor, Nadav LLC (however, there is no dispute that the tenancy was rent stabilized). Section 24 of the lease states that “Tenant gives up any right to bring a counterclaim or set-off in any action or proceeding by Landlord against Tenant on any matter directly or indirectly related to this Lease”. Owner further contends that Oseid’s counterclaims are subject to dismissal even if they are considered.

Owner argues that Oseid’s first, second, and third counterclaims should be dismissed as moot because the DHCR already determined that the rents charged were legal. Furthermore, it claims that Oseid is precluded from litigating his counterclaims regarding

rent overcharging under the doctrine of res judicata because a judgment on the merits exists from a prior DHCR proceeding between the parties. Finally, Owner argues that Oseid's fourth counterclaim for harassment cannot be entertained in this forum and must be asserted in a proper complaint to DHCR.

Oseid's Opposition And Summary Judgment Cross Motion

Oseid opposes plaintiff's motion for summary judgment and cross-moves for summary judgment dismissing this action based on his second and third affirmative defenses, which assert that Owner's Notices to Cure and to Terminate are defective, and for "such other and further relief as this Court deems just and proper".

Defense counsel argues that Owner's architect's submission is inadmissible hearsay and "cannot be the basis to resolve all issues of material fact as to whether the legalization of Defendant's apartment is impossible". Counsel claims that issues of material fact exist, including whether Plaintiff has exhausted all remedies before DOB and or its claim that there is nothing further that can be done to legalize the subject apartment. Defense counsel asserts that the record does not resolve all issues of material fact with regards to whether it is infeasible for Owner to legalize the subject apartment and or if the ejection of Oseid from the majority of the rent-stabilized apartment will cure the building's violations.

Oseid also submits an affidavit asserting that "[w]hether my apartment can be legalized and or Plaintiff can secure a variance or waiver to allow its use is an issue of fact". Oseid further attests that the apartment was always a duplex and was marketed, shown, and leased to him as such. Oseid explains that Owner's Notices to Cure and

Terminate are defective because they demand that he surrender physical possession of only a portion of the space and that Owner never indicated how that would be accomplished. Oseid claims that this court should not grant Owner the same relief that the DOB deemed inappropriate.

Oseid fails to oppose or address that branch of Owner's summary judgment motion seeking to dismiss his counterclaims. However, Oseid asserts that he has been unknowingly paying illegal rent for years based on his duplex apartment's non-conformity with the CO, and only suspended those payments in response to this litigation.

Owner's Opposition And Reply

Owner submits a memorandum of law arguing that its Notices to Cure and Terminate are not defective because they comply with the terms of Oseid's 2003 lease. Owner also argues that a common law ejectment action does not require a predicate notice, as a matter of law. Owner further contends that there are no issues of fact to preclude judgment for ejectment and Defendant has submitted no evidence or proof that the Apartment's illegality could be remedied without the removal of Defendant.

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 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

A claimant establishes “its prima facie entitlement to judgment as a matter of law on [a] cause of action for ejectment by establishing that (1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate” (*Noamex, Inc. v Domsey Worldwide, Ltd.*, 192 AD3d 817, 819 [2021]).

Here, Owner demonstrated its prima facie entitlement to judgment as a matter of law on its cause of action for ejectment by establishing that it has an immediate right to possession of the attic to Unit 4F, and that the attic must be vacated so that Owner can renovate the Unit to be in compliance with the Building’s CO. Oseid, in opposition, failed to raise a triable issue of fact regarding Owner’s right to an order of ejectment. Owner also demonstrated that Oseid’s counterclaims should be dismissed because Oseid explicitly waived his right to assert counterclaims in his 2003 lease agreement, and otherwise failed to oppose that branch of Owner’s summary judgment motion.

However, Multiple Dwelling Law § 302 (1) (b) specifically provides that if a dwelling is occupied without a valid certificate of occupancy, as required by Multiple Dwelling Law § 301, “[n]o rent shall be recovered by the owner of such premises *for said period*, and no action or special proceeding shall be maintained therefor, or for possession of said premises for nonpayment of such rent” (emphasis added). The Multiple Dwelling Law proscription against recovery of rent for unlawful occupation, deemed penal in nature and strictly applied, constitutes a regulatory restraint on a landlord that may not be waived (*Yuko Nii v Quinn*, 195 Misc 2d 821, 822 [2d Dept App. Term 2003]).

While Owner has demonstrated its right to eject Oseid from the attic and take possession of Unit 4F, as a matter of equity, Oseid is statutorily entitled to the return of his monthly rent, especially since Owner was aware that Unit 4F did not conform to the Building’s CO when it acquired the Building (*Malden v Wykoff S.P., LLC*, 192 AD3d 1002, 1005 [2021] [holding that “(a)n owner of a de facto multiple dwelling who fails to obtain a proper certificate of occupancy or comply with the registration requirements of the Multiple Dwelling Law cannot recover rent or use and occupancy”]). No other measure of damages would be equitable under the circumstances presented here. Furthermore, Oseid is awarded legal fees and costs associated with this litigation, in an amount to be determined at a hearing before a referee. Accordingly, it is hereby

ORDERED that Owner’s motion (M.S. 4) for summary judgment on its cause of action for an order ejecting Oseid from the attic/second floor of Unit 4F on the grounds that the Building has multiple DOB and DHCR violations because the duplex configuration

of Unit 4F does not comport with the Building's CO is granted for the purpose of reverting Unit 4F into a studio apartment in compliance with the Building's CO; and it is further


ORDERED that Oseid is hereby ejected from the attic and Unit 4F and must vacate the attic and Unit 4F within 90 days after service of this decision and order with notice of entry thereof; OR 30 days after payment of the amount determined by a referee of all rent paid and legal fees due, whichever is later; and it is further

ORDERED that the branch of Owner's motion (M.S. 4) seeking dismissal of Oseid's counterclaims is granted without opposition and the counterclaims are hereby dismissed; and it is further

ORDERED that Oseid's summary judgment cross motion (M.S. 5) is granted to the extent that Oseid shall receive full reimbursement of all of the monthly rent that he paid to Owner from the commencement of its ownership of the Building (or paid into escrow during the pendency of this ejectment action) and that the parties shall appear for a framed-issue hearing before a Special Referee to determine the precise amount of the rent to be reimbursed to Oseid.

This constitutes the decision and order of the court

E N T E R,



J. S. C.