

Revlyn Apts., LLC v Messina

2023 NY Slip Op 31963(U)

February 6, 2023

Civil Court of the City of New York, Kings County

Docket Number: Index No. 301310/22

Judge: Sergio Jimenez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART E

-----X
REVLYN APARTMENTS, LLC,

Index No. 301310/22

Petitioner,

-against-

DECISION AND ORDER

RAMONA MESSINA, and JOHN and JANE DOE,

Respondents.
-----X

Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondents' CPLR §3212 motion seeking dismissal of the petition, a hearing on its counterclaims and any other relief as the court may find appropriate:

Papers Numbered

Notice of Motion with affidavits and exhibits.....1 (NYSCEF #8-14)
Affirmation in Opposition and exhibits.....2 (NYSCEF #15-20)
Affirmation in Reply.....3 (NYSCEF #22)

This non-payment proceeding was commenced in January 2022. The matter was first calendared on July 13, 2022. On that day, the parties entered into an agreement in which respondent's counsel would hold in their escrow account the amount sought in this non-payment proceeding, and the matter was adjourned to October 18, 2022. On October 18, 2022, the parties agreed to a briefing schedule and adjourned the matter to November 29, 2022. On November 29, 2022, the matter was adjourned to January 9, 2023. The parties, both represented by counsel, fully briefed the issue, and the court heard argument on January 9, 2023. Upon hearing argument, the court reserved decision.

Respondent's Motion for Summary Judgment

Summary judgment is a drastic remedy that prevents non-movant from their day in court (see CPLR §3212; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Any evidence must be presented in prima facie admissible form (see *Winegrad v. New York Univ. Med. Ctr.*, 64 Misc NY2d 851 [1985]). As summary judgment is a drastic remedy, “the facts must be viewed in the light most favorable to the non-moving party.” (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). “To grant summary judgment it must clearly appear that no material and triable issue of fact is presented.” (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; citing, *Di Menna & Sons v. City of New York*, 301 NY 118 [1950]). The court may overlook technical deficiencies in a motion for summary judgment in order to reach a disposition in the face of a lack of prejudice (*Rosenblatt v St. George Health and Racquetball Associates LLC*, 119 AD3d 45 [App Div 2d Dep’t, 2014]). Even when unopposed, the court may deny a motion for summary judgment, for failure to prove the lack of triable issues of fact (See *Exit Empire Realty v. Zilelian*, 137 AD3d 742 [App Div 2d Dept, 2014]). The moving party bears the prima facie burden of proof to obtain the relief sought. *Matter of Stop & Shop Cos. Inc. v. Assessor of the City of New Rochelle*, 32 Misc.3d 496 (Sup. Ct. Westchester Co, 2011).

To raise the defense of rent impairing violations, MDL §302-a(3)(c) requires “the resident must affirmatively plead and prove the material facts under subparagraph a, and must also deposit with the clerk of the court in which the action or proceeding is pending at the time of filing of the resident’s answer the amount of rent sought to be recovered in the action...” Respondent’s have met the requirements to seek summary judgment on their defense of rent impairing violations as

they have pled it in their answer, and respondent's counsel is holding the amount sought in this proceeding in their office's escrow account, per the stipulation between the parties.

Respondent argues they are entitled to summary judgment in this proceeding as the rent impairing violation¹ has been unabated for more than six months. Petitioner opposes arguing that respondent has not provided access for petitioner to correct the violation thus creating a dispute of facts. There is no dispute that the violation regarding the flushing apparatus remains unabated, per DHPD's current violation report, of which the court is authorized to take judicial notice. Respondent further argues when petitioner requested access, petitioner did not specify the reason for access but also did not allocate enough time for mailing to request access.

The issue before the court is if petitioner's defense of lack of access creates a triable issue. When an owner or their representative require access to perform repairs, they are required to provide written notice to the tenant at least a week in advance of the time requested for repairs to be completed (See 28 RCNY §25-101(a)(2)). Petitioner's Exhibit A, a letter dated October 2018, fails to specify the date requested for access. Petitioner's Exhibit B, a letter dated December 8, 2021, requests access on December 14, 2021, but fails to specify the reason for access. Petitioner's letters dated October 2018 and December 8, 2021 do not comply with 28 RCNY §25-101(a)(2) as neither specify the reason for access. Petitioner's Exhibit C, a letter dated December 20, 2021, specifies access for repairs and access on December 27, 2021. However, per petitioner's affidavit and exhibit, this letter was mailed to respondent on December 20, 2021. Petitioner's letter dated December 20, 2021 does not comply with 28 RCNY §25-101(a)(2) in giving a weeks' of advance notice as petitioner mailed this letter to respondent. Petitioner's exhibit pertaining to the DHCR Order Terminating Proceeding bears no relevance here as the request for access was for the

¹ Violation No. 10807932 and Violation No. 15308188


purpose of an inspection by DHCR. Lastly, petitioner's affidavit also states there have been other attempts for access without any further specificity. As all favorable inferences are to be given to a non-moving party, bald conclusory statements in affidavits may not be enough to overcome relief being sought in a motion (see generally *Davis v Henry*, 2023 NY Slip Op 00076 [App Div 2d Dep't, 2023]; *Citimortgage v Jimenez*, 195 AD3d 594 [[App Div, 2d Dep't, 2021]). While case law has focused on those within the context of CPLR §3211(a)(1) motions and requests for traverse, the same principle applies here. Merely stating that they requested access at other times does not constitute an adequate denial.

Petitioner's lack of access defense has not created a triable issue of fact. As such, respondent's motion for summary judgment is granted.

Conclusion

Respondents' motion for summary judgment is granted for the reasons set forth above. This proceeding is dismissed. The proceeding is adjourned to March 14, 2023 at 10:30am in Part E, Room 504 for a conference as to respondent's counterclaims. Petitioner may, but is not required to, file a reply to said counterclaims by March 6, 2023. This constitutes the Decision and Order of the Court.

Dated: February 6, 2023
Brooklyn, New York



Sergio Jimenez, JHC
Sergio Jimenez
Judge, Housing Court

To: Goldberg, Lustig & Steckler PLLC
Attn: David E. Brookstone, Esq.
188 Montague Street, Suite 500
Brooklyn, New York 11201
GLSAttorneys@gmail.com
Attorneys for Petitioners

TakeRoot Justice
Attn: Michael Leonard, Esq.
123 William Street, 16th Floor
New York, New York 10038
mleonard@takerootjustice.org
Attorneys for Respondent – Ramona Messina