

Grassfield v Jupt, Inc.
2023 NY Slip Op 32167(U)
June 26, 2023
Supreme Court, Kings County
Docket Number: Index No. 511380/2019
Judge: Debra Silber
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At an IAS Part Term, Part 9 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 26th day of June, 2023.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

PAUL GRASSFIELD AND JENNIFER STEARNS,

Plaintiffs,

-against-

JUPT, INC.,

Defendant.

-----X

DECISION / ORDER

Index No.: 511380/2019
Mot. Seq. # 4 & 5

The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion and Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

62-86 87-116
120-122 123-154
156-159 160-162

In this action seeking declaratory and injunctive relief on the basis that plaintiffs Paul Grassfield (Grassfield) and Jennifer Stearns (Stearns) (collectively, plaintiffs) are protected occupants under the Loft Law [Multiple Dwelling Law (MDL) art 7-C] (Loft Law), plaintiffs move (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 3212, granting summary judgment in their favor on their complaints under Index Nos. 511380/19 (first action) and 505182/20 (second action).¹

¹The action under Index No. 505182/20 was consolidated into the action under Index No. 511380/19 (collectively, consolidated actions or this action) by order dated July 28, 2020 (*see* NYSCEF Doc No. 86).

Defendant Jupt, Inc. (defendant) separately moves (in mot. seq. five) for an order granting summary judgment in its favor on its affirmative defenses and counterclaims in the consolidated actions pursuant to CPLR 3212 and dismissing plaintiffs' affirmative defenses to its counterclaims pursuant to CPLR 3211 (b).

Background

Defendant, a cooperative corporation, is the owner of the property known as 427-435 South 5th Street, in Brooklyn (property), which comprises two contiguous buildings located at 429 South 5th Street (subject building) and 435 South 5th Street (collectively, buildings).² The buildings pre-date the City's certificate of occupancy requirement, and their permitted use is commercial only. Defendant was incorporated on February 8, 1985, for the purpose of acquiring the property. Its initial shareholders, Paul Mauren, Jeanne Flanagan, Judy Pfaff, Jon Snow, Todd Miner, Ursula van Rydingsvard, and plaintiff Grassfield (collectively, shareholders) are artists, who purchased the property in July 1985 and took occupancy "for studio purposes only" (commercial use) after acquisition (*see* NYSCEF Doc No. 90, no-action letter application at 1-2, and NYSCEF Doc No. 89, Grassfield's proprietary lease, ¶ 14 [a], at 8). Grassfield, the only remaining owner-occupant, owns 15 shares of defendant's corporate stock and occupies the fourth floor (unit 4) of the subject building as his residence. Stearns is Grassfield's wife and co-occupant.

On December 21, 2000, defendant corporation, by its shareholders, as the sponsors of a conversion to cooperative ownership, filed an application for a no-action letter with

² The property also includes an unimproved area, located at 427 South 5th Street, used as a parking lot for the shareholders' vehicles.

the New York State Attorney General's Office, pursuant to Department of Law Regulations [13 NYCRR] § 18.9, to register as a cooperative corporation without the need for filing an offering plan for the property, as is ordinarily required by General Business Law (GBL) § 352-e. On April 19, 2001, the Attorney General's Office issued a no-action letter stating that, based upon defendant's application, it would not take any enforcement action against defendant for not filing an offering plan or registering the conversion to comply with GBL § 352-e, et seq. (*see* NYSCEF Doc No. 91, no-action letter).

On March 21, 2011, when the Loft Law was expanded to include parts of Brooklyn, defendant registered the buildings as interim multiple dwellings (IMD) with the New York City Loft Board (Loft Board) pursuant to MDL § 281(5) (2011 IMD registration application), listing plaintiffs as occupants of unit 4 and Stearns as an officer of defendant's board of directors (*see* NYSCEF Doc No. 74, 2011 IMD registration application). Sometime thereafter, defendant's board of directors voted to begin the process of obtaining certificates of occupancy to legalize the buildings for residential use. On August 21, 2013, defendant filed an alteration application with the New York City Department of Buildings (DOB) to obtain a work permit for legalization. To date, residential certificates of occupancy have not been issued for the buildings.

In his proprietary lease (lease),³ Grassfield agreed that he would share the legalization costs according to his proportionate share of defendant's stock and that his obligation to pay such costs would be deemed additional rent (*see* NYSCEF Doc No. 89,

³ The lease is dated September 26, 1998 but states it is effective as of July 2, 1985.

lease, ¶ 14 [i], at 10). Grassfield further agreed to pay reasonable attorneys' fees and costs as additional rent if he defaulted under the lease and defendant incurred "any expense (whether paid or not) in performing acts which [Grassfield] is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by [Grassfield]" (*see* NYSCEF Doc No. 89, lease, ¶ 28, at 20).

First Action

On or about May 6, 2019, defendant served Grassfield with a 10-day notice to cure (first notice) for failing to pay his share of the legalization costs for the months of September and October 2018 (September and October 2018 assessments). The notice advised that failure to make payment would result in termination of the lease and non-judicial foreclosure, cancellation and/or auctioning of Grassfield's shares of stock.

On May 22, 2019, plaintiffs commenced the first action by the filing of a summons and complaint, seeking a judgment declaring that defendant violated the Fair Debt Collections Practices Act (FDCPA) by demanding rent from plaintiffs since the buildings lack residential certificates of occupancy, which bars defendant from collecting rent pursuant to MDL § 302; a permanent injunction enjoining defendant from demanding any rent or from terminating the lease or foreclosing on Grassfield's shares based upon nonpayment of rent; and an award of attorneys' fees and costs in their favor pursuant to Real Property Law (RPL) § 234 and the FDCPA. Additionally, plaintiffs simultaneously moved for a preliminary injunction to enjoin defendant from taking any additional action based upon nonpayment of rent pending determination of the first action.

On July 3, 2019, defendant filed an answer with 11 affirmative defenses and 2 counterclaims seeking a judgment declaring that Grassfield, as a shareholder of defendant, is obligated to pay his proportionate share of the legalization costs, and an award of attorneys' fees and costs in accordance with paragraph 28 of the proprietary lease.

On October 24, 2019, the court issued a decision and order (October 2019 order), denying plaintiffs' request for a preliminary injunction but extending the cure period to November 25, 2019, to enable plaintiffs to pay the September and October 2018 assessments without interest or late fees.⁴

Appeal of October 2019 Order

Plaintiffs subsequently appealed that branch of the October 2019 order that denied their request for a preliminary injunction and filed an order to show cause with the Second Department Appellate Division (Appellate Division) seeking a stay of enforcement of the October 2019 order pending appeal.

The Appellate Division denied plaintiffs' request for a stay, by decision and order dated January 9, 2020; and later affirmed the October 2019 order, with costs to defendant, by decision and order dated September 21, 2022 (2022 appellate decision). In affirming the October 2019 order, the Appellate Division found that plaintiffs were essentially owner-occupants not entitled to protection under the MDL.

While their appeal was pending, plaintiffs satisfied the October 2019 order by paying the September and October 2018 assessments.

Second Action

⁴ Defendant waived the late fees; and the court denied defendant's request for interest.

On or about February 17, 2020, defendant served Grassfield with a 10-day notice to cure (second notice) for failure to pay his share of the legal fees incurred in April 2019 as a result of Grassfield's nonpayment of maintenance and assessments; the legal fees incurred in defending the first action from May 2019 through December 2019 (collectively, 2019 legal fees); and the legal fees incurred in January 2020 from defending the first action (January 2020 legal fees). The notice advised that failure to make payment would result in termination of the lease and non-judicial foreclosure, cancellation and/or auctioning of Grassfield's shares of stock.

In March 2020, plaintiffs commenced the second action, seeking a declaratory judgment that the second notice to cure is void and unenforceable, in that the amount demanded was previously paid in whole or in part, and on the basis that attorneys' fees are not recoverable as additional rent, absent a judicial determination of their lease default and the reasonableness of the fees; a permanent injunction enjoining defendant from demanding attorneys' fees or from terminating the lease or foreclosing on Grassfield's shares based upon nonpayment of attorneys' fees; and an award of attorneys' fees and costs in their favor in connection with this action pursuant to RPL § 234 and FDCPA. Plaintiffs also simultaneously moved for a preliminary injunction to enjoin defendant from taking any further action pending determination of the consolidated actions.

On or about December 2, 2020, defendant filed an answer with 7 affirmative defenses and a counterclaim for attorneys' fees and costs in accordance with paragraph 28 of the proprietary lease.

After oral argument of plaintiffs' motion for a preliminary injunction, the court issued an order dated July 28, 2020 (July 2020 order), consolidating the second action into the first action on consent and stating that "counsel fees awarded pursuant to ¶ 28 of the proprietary lease for both [actions] shall not be determined until the conclusion of the action" and that, in the interim, "defendant may not take any action to collect any legal fees relating to this now consolidated action." The order further noted that defendant withdrew the second notice to cure on the record, without prejudice (*see* NYSCEF Doc No. 86, July 2020 order).

Plaintiffs' Summary Judgment Motion

On September 13, 2022, a week before the 2022 appellate decision was issued, plaintiffs filed the instant motion seeking summary judgment on their complaint in the first action, on the grounds that defendant is barred from collecting rent pursuant to MDL § 302, since the buildings lack residential certificates of occupancy and, thus, are out of compliance with the legalization requirements of the Loft Law and MDL § 301. Plaintiffs further seek summary judgment on their complaint in the second action based upon defendant's withdrawal of the second notice to cure. With the submission of Grassfield's affidavit and their attorney's affirmation, plaintiffs argue that contrary to the 2022 appellate decision, they are entitled to the protections of the MDL, since the plain reading of MDL § 302 unambiguously bars a landlord from recovering rent for any portion of a building occupied for residential purposes without a certificate of occupancy and is not predicated on the parties' relationship and/or occupancy status. As such, plaintiffs aver that the protections under the MDL are available to both residential occupants and owner-

occupants. Plaintiffs contend that, because the 2022 appellate decision, which found otherwise, was merely a decision concerning a preliminary injunction, the court's finding did not become the law of the case and cannot be considered an adjudication of the first action on the merits.

Next, plaintiffs assert that Stearns has an independent right as a statutory tenant of unit 4, since Stearns resided therein, as Grassfield's tenant, before they were married and before he took occupancy. Plaintiffs contend that defendant previously acknowledged Stearns as a protected occupant in the 2011 IMD registration application and, thus, is estopped from now claiming that she has no protection under the MDL.

Additionally, plaintiffs argue that they are entitled to attorneys' fees and costs based upon defendant's frivolous conduct and harassment by the service of the unlawful first and second notices demanding rent that it is not entitled to recover in violation of the FDCPA, and the MDL, and based upon RPL § 234, which provides a reciprocal right to recover attorneys' fees and costs, since the lease permits recovery of such fees to defendant.

Defendant's Opposition and Motion for Summary Judgment

Defendant opposes the motion on the basis that Grassfield is an owner-occupant for purposes of the Loft Law and, thus, cannot avail himself of the protections afforded to a residential occupant. As to Stearns, defendant argues that Stearns lacks standing to maintain this action since she is not a protected tenant, in that she does not have an independent statutory right to occupy unit 4 and cannot be considered a tenant of her husband. Instead, defendant argues that Stearns' (residential) occupancy is solely by virtue of her marriage to Grassfield pursuant to paragraph 14 (e) of the lease, which permits a

spouse as a co-occupant. Notwithstanding this, defendant avers that it has been trying to obtain residential certificates of occupancy for the buildings, but that Stearns has filed applications alleging she is entitled to an IMD-protected occupancy and for harassment with the Loft Board, which has delayed the legalization process.

Defendant also separately moves for summary judgment on its counterclaims and seeks dismissal of the consolidated actions on the basis that, as an owner-occupant, Grassfield is obligated to pay his share of the legalization costs as agreed to in the proprietary lease and as directed by the October 2019 order, which was affirmed by the Appellate Division. Additionally, defendant contends that it is entitled to an award of attorneys' fees and costs pursuant to paragraph 28 of the proprietary lease, as the prevailing party in the consolidated actions.

Discussion

Standing

Contrary to defendant's contentions, Stearns has standing to commence and maintain this declaratory judgment action, under CPLR 3001, as an alleged protected occupant under the MDL. Pursuant to CPLR 3001, "the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Summary Judgment

It is well settled that summary judgment may only be granted when it is clear that no triable issues of fact exist (*see Zuckerman v City of New York*, 49 NY2d 557 [1980];

Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; and *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The movant has the burden to make a prima facie showing of entitlement to summary judgment as a matter of law, by submitting admissible evidence demonstrating that there are no material facts that require a trial (*see Giuffrida v Citibank*, 100 NY2d 72 [2003]). Failure to make this showing requires denial of the motion, regardless of the opposing papers' adequacy (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). If a prima facie showing is made, the burden shifts to the opposing party to produce admissible evidence demonstrating the existence of a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d at 324).

Protected Occupancy under the MDL

The defendant has established entitlement to summary judgment in the first action on the basis that plaintiffs are not protected occupants under the MDL and, thus, Grassfield, as an owner-occupant, is obligated to pay his share of the legalization costs pursuant to the proprietary lease. In opposition, plaintiffs have failed to raise a material issue of fact to preclude summary judgment in defendant's favor.

Although plaintiffs are correct that the Appellate Division's finding, in the 2022 appellate decision, that plaintiffs are essentially owner-occupants not entitled to protection under the MDL, did not become the law of the case and was not an adjudication on the merits, the 2022 appellate decision is, nevertheless, controlling authority on this issue (*see Grassfield v Jupt, Inc.*, 208 AD3d 1219 [2d Dept 2022]; *see also First Edition Composite, Inc. v Wilkson*, 177 AD2d 297 [1st Dept 1991] [the protection afforded a "residential occupant" under the MDL was not meant to encompass owner-occupants]; *Tri-Land Props.*

v 115 W. 28th St. Corp., 267 AD2d 142 [1st Dept 1999] [an owner-occupant is not a “residential occupant” or protected tenant under the MDL]).

Here, it is undisputed that Grassfield is an owner-occupant, since he owns 15 shares of the defendant’s corporate stock and occupies unit 4. It is further undisputed that Stearns is Grassfield’s wife and co-occupant. Therefore, she is essentially an owner-occupant, since her residential occupancy is solely by virtue of her relationship to Grassfield.

Contrary to plaintiffs’ contentions, they have not established or raised a triable issue of fact as to whether Stearns has an independent statutory right to residentially occupy unit # 4. An affidavit from Stearns was not submitted in support of plaintiffs’ motion to advance her claim that she resided in unit 4 before her marriage to Grassfield and before he took occupancy. Notwithstanding this, Grassfield’s affidavit contradicts this claim. In his affidavit, Grassfield states that he and Stearns have jointly occupied unit 4 as their “primary family home” since 1992 (*see* NYSCEF Doc No. 64, Grassfield affidavit at 4). Moreover, by Stearns’ attorney affirmations submitted in support of her applications for protected occupancy and harassment, Stearns alleges she has lived in unit 4 since 1993 (*see* NYSCEF Doc Nos. 78-80).

Similarly unavailing is plaintiffs’ argument that the 2011 IMD registration application establishes Stearns’ right as a protected occupant, since the application was filed pursuant to MDL § 281 (5), which applies to occupancy “for residential purposes as the residence or home of any two or more families living independently from one another” and, thus, also fails to support Stearns’ claim that she resided in unit 4 as a single person and not a family (*see* NYSCEF Doc No. 74, IMD registration application).

Based upon the foregoing, those branches of plaintiffs' motion seeking summary judgment on the first and second causes of action in their complaint in the first action is denied; and that branch of defendant's motion seeking summary judgment on its first counterclaim in the first action is granted.

As defendant withdrew the second notice to cure, those branches of plaintiffs' motion seeking summary judgment on the first through fourth causes of action in their complaint in the second action are denied as moot.

Attorneys' Fees and Costs

The remainder of the claims in the consolidated actions, namely plaintiffs' third cause of action in the first action, defendant's second counterclaim in the first action, plaintiffs' fifth cause of action in the second action and defendant's first counterclaim in the second action, all relate to attorneys' fees and costs.

Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect such fees from the other party unless an award is authorized by agreement between the parties, statute or court rule (*see Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]). To be considered a prevailing party entitled to attorneys' fees, a party must be successful with respect to the central relief sought (*see Nestor v McDowell*, 81 NY2d 410 [1993]; *Fatsis v 360 Clinton Ave. Tenants Corp.*, 272 AD2d 571 [2d Dept 2000]; *Amato v Dayton Beach Park No. 1 Corp.*, 201 AD3d 684 [2d Dept 2022]).

Here, it is undisputed that the lease between the parties authorizes an award of attorneys' fees. Therefore, in light of this decision, defendant, who prevailed on the central

relief sought in its first counterclaim in the first action regarding plaintiffs' occupancy status under the MDL, is entitled to attorneys' fees and costs in connection with the first action pursuant to paragraph 28 of the proprietary lease.

With regard to the second action, plaintiffs' argument that defendant's withdrawal of the second notice to cure makes them the prevailing party in that action is without merit. It is apparent from the July 2020 order, which notes the withdrawal, that defendant's actions were predicated on the consolidation of the actions and the court's determination that the issue of attorneys' fees, which was the subject of the second notice to cure, would be addressed at the conclusion of the consolidated actions. Given this, as well as the court's determination regarding the first action and the lease between the parties that provides for attorneys' fees, both as additional rent as it relates to legalization costs and in connection with any covered litigation, defendant is also the prevailing party on its counterclaims for attorneys' fees in the consolidated actions.

As such, those branches of plaintiffs' motion seeking summary judgment on their third cause of action in the first action and fifth cause of action in the second action are denied; and those branches of defendant's motion seeking summary judgment in its second counterclaim in the first action and first counterclaim in the second action are granted.

This matter shall be referred to a Special Referee, who will hear and determine the reasonable amount of attorneys' fees and costs to be awarded to defendant. An order of reference is being issued simultaneously herewith.

Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion (mot. seq. four) is denied in its entirety; and it is further

ORDERED that defendant's motion (mot. seq. five) is granted to the extent that defendant is awarded summary judgment in its favor on its first and second counterclaims in the first action and first counterclaim in the second action, pursuant to CPLR 3212; plaintiffs' affirmative defenses to these counterclaims are dismissed, pursuant to CPLR 3211 (b); and it is further

ORDERED, DECLARED and ADJUDGED that Grassfield, as a shareholder of defendant, is obligated to pay his proportionate share of the costs of the legalization of the buildings, including but not limited to, the legal and architectural fees incurred to obtain residential certificates of occupancy; and it is further

ORDERED that defendant is entitled to reasonable attorneys' fees and costs pursuant to the proprietary lease, plus interest at 9% per annum, pursuant to CPLR 5001 and 5004. Except upon the filing of a stipulation between the parties as permitted by CPLR 4317, this matter is referred to a Special Referee to hear and determine the reasonable amount of attorneys' fees and costs to be awarded to defendant; and it is further

ORDERED that the defendant's counsel is to provide the Special Referee with copies of its specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services; and it is further

ORDERED that counsel for defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 482), who is directed to place this matter on the calendar of the Special Referee's Part (Part 82) for the earliest convenient date; and it is further

ORDERED that failure to comply with the immediately preceding paragraph will result in the dismissal of defendant's attorneys' fees counterclaims unless good cause is shown.

This constitutes the decision, order, and judgment of the court.

E N T E R,



Hon. Debra Silber, J.S.C.