

West 152nd Assoc., L.P. v Gassama

2023 NY Slip Op 34168(U)

November 28, 2023

Supreme Court, New York County

Docket Number: Index No. 160987/2021

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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WEST 152ND ASSOCIATES, L.P.,
Plaintiff,

- v -

MALANG GASSAMA, JOHN DOE, JANE DOE
Defendant.

-----X

INDEX NO. 160987/2021
MOTION DATE N/A
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff’s motion for summary judgment is granted in part. Defendant’s cross-motion is denied.

Background

In this landlord-tenant action for ejectment, plaintiff (the landlord) contends that defendant Gassama (“defendant”) has not paid rent since June 2017 and wants to continue living in the apartment. It observes that Mr. Gassama filed a rent overcharge complaint with DHCR in September 2017, a complaint that was eventually denied after a lengthy litigation. Plaintiff maintains that Mr. Gassama has refused to execute a renewal lease and that constitutes a basis to terminate his tenancy.

Plaintiff insists that defendant’s tenancy began on November 15, 2013 at a monthly rent of \$1,550. It acknowledges that in September 2017, it discovered that the apartment was subject to rent stabilization and rolled back the monthly rent to the original rent (there had been

subsequent renewal leases with price increases). Plaintiff also claims it credited defendant for all excess payments along *with nine percent interest* and applied this amount to defendant's then existing arrears (it says this reduced the amount owed from \$6,100 to \$2,680).

Plaintiff insists that it offered defendant a rent stabilized lease but argues that defendant has refused to sign the lease or pay any rent. It observes that defendant successfully defended two non-payment cases on the ground that there was no current lease.

Plaintiff argues that defendant previously insisted that his initial rent of \$1,550 was itself an overcharge but contends that this argument was rejected before the Division of Housing and Community Renewal ("DHCR"). In fact, the DHCR (in a petition for administrative review ["PAR"]) denied defendant's overcharge complaint and found "insufficient evidence of a fraudulent scheme to deregulate the apartment" (NYSCEF Doc. No. 37 at 5). In fact, DHCR noted that the plaintiff could have charged rent higher than what was initially charged to defendant (*id.*).

Plaintiff points out that defendant brought an unsuccessful Article 78 petition challenging this PAR decision and has yet to perfect an appeal of his Article 78 proceeding.

In this action, plaintiff seeks to eject defendant as he has refused to vacate the premises or sign a renewal lease. Plaintiff observes that this Court issued an order directing defendant to pay use and occupancy *pendente lite* during the course of this litigation but that defendant stopped paying use and occupancy in August 2023 (this motion was filed on October 1, 2023).

It also seeks to recover unpaid use and occupancy and observes that defendant has not made consistent payments since May 2017. Plaintiff claims that defendant's only payments came from an ERAP payment in June 2022 for just over \$20,000 and the two use and occupancy

payments in June and July 2023 following this Court's *pendente lite* order. It also seeks reasonable legal fees incurred in connection with this litigation.

Defendant cross-moves¹ to stay this action pending his appeal before the Appellate Division, First Department of his Article 78 proceeding. He also seeks summary judgment dismissing plaintiff's ejectment claim because the proper venue for this proceeding pursuant to RPAPL § 711(1) is a summary proceeding in Housing Court. He claims that ejectment is not "lawfully" before this Court.

Defendant also argues that he has a meritorious defense of rent overcharge and disagrees with the decisions of the Rent Administrator, the DCHR and the Supreme Court all of whom have denied his rent overcharge allegations.

With respect to the unpaid use and occupancy, defendant insists that he has paid more than the two months after the Court's order. He insists he has paid a total of \$4,609.72. Defendant also alleges that plaintiff is not entitled to use and occupancy going back to 2017 and asserts that a judge in Civil Court found that there was no lease. He also argues that plaintiff violated the warranty of habitability as there are defective conditions in the apartment.

In reply, plaintiff argues that defendant is not entitled to a stay pending his appeal in a separate proceeding. It insists that to the extent defendant argues that venue is improper, he waived that argument long ago. Plaintiff also argues that it is well established that a landlord can bring an ejectment action in Supreme Court.

Stay Pending Appeal

The Court denies the branch of the cross-motion that seeks a stay pending defendant's appeal of his separate Article 78 proceeding. CPLR 2201 provides that "Except where otherwise

¹ This cross-motion was untimely. However, the Court adjourned the motion to permit plaintiff time to reply and to oppose the cross-motion.

prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

Here, there is no dispute that despite the entry of a decision of this Court requiring defendant to pay rent *pendente lite*, he stopped making payments after July 2023. Plaintiff admits in reply that HRA made a few partial payments since the filing of the instant motion totaling \$1,350 (that amount plus the June and July 2023 use and occupancy payments equals the total amount defendant says he has paid [\$4,609.72]). That is, after this Court directed defendant to pay use and occupancy, he only made two full payments. Although another agency made partial payments, defendant does not argue that he satisfied his obligation to make the full payments for August, September, or October 2023. Under such circumstances, the Court denies the application for a stay.

This Court declines to create a situation in which defendant receives an indeterminate and indefinite stay while not paying the amount directed by this Court and retaining the use and occupancy of the apartment. While the Court recognizes that defendant insists that he has been unemployed since May 2023 and is now receiving benefits from HRA in the amount of \$450 per month, defendant did not make a motion to modify the Court’s order in light of his financial circumstances. Instead, he decided to defy a Court order. Plus, the rent ledger shows that, except for the payments described above, defendant has not made consistent payments for many, many years.

Ejectment

Defendant also makes a curious argument that plaintiff is somehow forbidden from bringing an ejectment proceeding. Plaintiff correctly points out that any arguments about

improper venue are untimely. Besides being untimely, defendant's arguments on this issue are completely without merit.

“Although resort to a summary proceeding to regain possession of real property has become the rule rather than the exception (RPAPL art. 7; 2 Warren's Weed, New York Real Property, Ejectment § 1.01), the common-law action for ejectment still survives in New York and is more properly referred to as an action to recover possession of real property (RPAPL art. 6). The common-law principles governing the ejectment action are unchanged, unless explicitly modified by statute. No statute abrogates the common-law rule that notice is unnecessary to maintain an ejectment action against a tenant who wrongfully holds over after expiration of a fixed and definite term” (*Alleyne v Townsley*, 110 AD2d 674, 675, 487 NYS2d 600 [2d Dept 1985]). Accordingly, the Court finds that this matter was brought properly in Supreme Court (*id. see also 81 Bowery Realty Corp. v Qui Hui Chen*, 20 Misc 3d 1103(A) [Sup Ct, NY County 2008]).

Defendant cites no binding caselaw or statute for the proposition that a landlord is barred from bringing an ejectment action and instead is restricted to bringing this type of claim in Housing Court. In fact, there are cases where even a rent-stabilized tenant has been removed under an ejectment cause of action brought in Supreme Court (*see East 82 v O'Gormely*, 295 AD2d 173, 743 NYS2d 473 [1st Dept 2002] [affirming the denial of a motion to dismiss an ejectment action involving rent stabilized tenants]).

Plaintiff's Case

In order to prevail on a cause of action for ejectment, plaintiff must demonstrate 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” (*RPAI Pelham*

Manor, LLC v Two Twenty Four Enterprises, LLC, 144 AD3d 1125, 1126 [2d Dept 2016]).

Plaintiff clearly met its burden by showing that it is the owner of the property and that defendant remains in possession and has refused to sign a renewal lease.

Defendant failed to raise a material issue of fact in opposition. As plaintiff points out, defendant could remedy this issue by simply signing a renewal lease. Defendant has decided to pursue his rent overcharge case instead of signing a renewal lease (although plaintiff observes that signing a new lease would not operate as a waiver of his appeal). Defendant does not have a right to stay in the apartment without paying rent and without entering into a lease especially where, as here, plaintiff has consistently offered a rent stabilized renewal lease.

To the extent that defendant claims that rent overcharge is a defense to this claim, that argument is without merit as it has been rejected by every agency or court who has looked at defendant's assertions. Setting aside whether defendant is technically barred under the doctrine of collateral estoppel from raising this argument (as his appeal is still pending), the Court sees no reason to depart from the findings of the DHCR or the Supreme Court (which denied his Article 78 petition).

The Court also finds that plaintiff is entitled to summary judgment on his second cause of action for use and occupancy. Defendant does not deny that he has only made sporadic payments over the years. To the extent that defendant argues that plaintiff's calculation of the outstanding use and occupancy is incorrect, that claim is without merit. Plaintiff established that since the filing of the instant motion it received \$1,350 in HRA payments and it deducted that amount from the total it seeks. Defendant's vague and conclusory arguments that plaintiff is not entitled to recover certain fees or non-rent charges is not sufficient to defeat this portion of

plaintiff's motion. Defendant was required to specify which charges he thinks are not recoverable in the ledger and the basis for those claims. A general assertion will not suffice.

Defendant also makes a bizarre argument that plaintiff cannot recover use and occupancy because a judge in Civil Court found that there was no valid lease. As plaintiff correctly observes, the prior summary proceeding was unsuccessful precisely because defendant refused to sign a renewal lease. Plaintiff could not recover unpaid rent because there was no meeting of the minds as to the monthly rent (*see* NYSCEF Doc. No. 53 at 3 [Civil Court decision]). Defendant argues that this case can only be brought in housing court as a summary proceeding but also that plaintiff would never win such a case because there is no current valid lease. Under that theory, he would be permitted to remain in the apartment indefinitely without paying any rent and leave plaintiff with no recourse. The Court declines to embrace such a warped view of the law.

In opposition to the motion, defendant also makes claims about the warranty of habitability. These arguments also relate to defendant's first and second counterclaims which concern the conditions in the apartment. However, defendant did not raise an issue of fact with respect to these claims. In his affidavit in opposition, defendant mentions various conditions such as mold, a collapsing ceiling, and rotting wood. But he did not include any allegations that he told plaintiff about any of these conditions.

"While a landlord may not require prior written notice of a defective condition before a tenant may invoke the warranty [of habitability defense], this does not mean that notice is not required" (*Moskowitz v Jorden*, 27 AD3d 305, 306, 812 NYS2d 48 [1st Dept 2006]).

Defendant's affidavit is completely devoid of any details about when or if he told plaintiff about these conditions, how long these conditions have existed or any supporting evidence (such as

photos) to demonstrate the severity of the issues. Offering incomplete arguments in opposition to a summary judgment motion is not sufficient.

Moreover, in response to defendant's claims, plaintiff contends in reply that it has repaired conditions when defendant has made complaints and attaches work order invoices purporting to show that it made repairs (NYSCEF Doc. No. 66).

However, the Court denies the branch of the motion where plaintiff seeks legal fees. The basis for legal fees, according to plaintiff, is various lease renewals from 2014, 2015 and 2016 (NYSCEF Doc. No. 31). Defendant characterizes these agreements as fraudulent.

Although the Court makes no finding that these agreements are "fraudulent" the Court is unable to find that they provide a basis for legal fees because they characterize the relationship between plaintiff and defendant as a license agreement. Clearly, the agreement was for a tenancy—that is, defendant rented an apartment and was not a licensee. And, after these agreements were executed, plaintiff admits that it subsequently discovered that defendant was entitled to status as a rent-stabilized tenant and it offered a rent-stabilized lease.

The Court fails to see how legal fees could arise from an agreement that is facially invalid and no longer governs the relationship between the parties. After all, plaintiff seeks use and occupancy in its second cause of action, not unpaid license fees. The entire nature of the dispute arises from the fact that defendant should have been treated as a rent-stabilized tenant and not as a licensee. Given that this is essentially an issue of law, the Court severs and dismisses this cause of action under the "for such other and further relief" clause of defendant's cross-motion.

Summary

Most of the facts on this motion are undisputed. Defendant has not paid consistently rent for many, many years and he refuses to sign a renewal rent-stabilized lease. Defendant, as was

his right, pursued a rent overcharge claim but that effort has been unsuccessful at every level. There is no reason, at this point, to delay this case any further and grant a stay. Plaintiff is entitled to possession of the unit as defendant refuses to sign a lease and plaintiff is also entitled to recover for the use and occupancy of the apartment. Defendant is not entitled to live in the apartment rent-free.

The fact is that plaintiff readily admits that the unit is subject to rent stabilization and, according to the DHCR, plaintiff credited defendant for that overcharge. The DCHR emphasized that “The rent in that lease was below the deregulation threshold and the owner always charged a rent less than it was otherwise legally entitled to. The owner also corrected any subsequent improper fees or charges collected by crediting same plus interest to the tenant’s rent account prior to issuance of the [Rent Administrator’s] order” (NYSCEF Doc No. 37 at 6). Plaintiff even charged defendant less than it could have under the applicable rent-stabilization rules. In other words, plaintiff made a mistake and corrected it while defendant refused to pay any rent for the vast majority of the time he has resided in the unit.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted in all respects except for its claim for legal fees, defendant’s affirmative defenses and counterclaims are severed and dismissed and the Clerk is directed to enter judgment in favor of plaintiff and against defendant Malang Gassama in the amount of \$94,597.62 plus statutory interest from December 7, 2021 (a reasonable midpoint as the commencement of this action); and it is further


ORDERED that plaintiff’s cause of action for legal fees is severed and dismissed; and it is further

ORDERED that defendant’s cross-motion is denied; and it is further

ORDERED that the motion of plaintiff for summary judgment on the first cause of action for ejectment is granted; and it is further

ADJUDGED that plaintiff is entitled to possession of 614 West 152nd Street Apt. Bsmt. 1 New York, New York 10031 as against defendants, and the Sheriff of the City of New York, County of New York or the Marshal upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly; and it is further

ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 614 West 152nd Street Apt. Bsmt. 1 New York, New York 10031 including entry thereto, as against defendants.

<u>11/28/2023</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE