

Tsai v JCHHB, Inc.

2024 NY Slip Op 31672(U)

May 10, 2024

Supreme Court, New York County

Docket Number: Index No. 154173/2023

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR **PART** **34M**

Justice

-----X

PEI-DE TSAI,

Plaintiff,

- v -

JCHHB, INC., JEREMY BERNSTEIN,

Defendant.

-----X

INDEX NO. 154173/2023

MOTION DATE 12/15/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for

JUDGMENT - SUMMARY

In May 2023, as a shareholder of the cooperative corporation that owns the building at 565 Broadway, New York, New York and as proprietary lessee of apartment 6W (hereinafter, “the premises”), plaintiff-landlord Pei-De Tsai commenced this action against defendants-tenants JCHHB, Inc. and Jeremy Bernstein. Plaintiff alleges that defendants entered into possession of the premises in December 2018 pursuant to a standard lease; that after its expiration, defendants continued in possession of the premises on a month-to-month basis on the same terms as the lease; and that, starting in May 2022, defendants failed to pay rent. Plaintiff asserts four causes of action against defendants for breach of contract, use and occupancy, ejection, and declaratory judgment finding that defendants’ right to occupy the premises terminated in July 2023, and she is entitled to retake possession of the premises immediately a. (NYSCEF doc. no. 23, amended complaint.) Defendants answered and asserted counterclaims for breach of contract and/or breach of the warranty of habitability, retaliation, and costs and attorney’s fees.

By Decision and Order dated July 24, 2023 (the “July 2023 Decision”), the Court awarded plaintiff use and occupancy pendente lite at \$5,000 per month pending a final judgment in the action. (NYSCEF doc. no. 26 at 1-2, Decision and Order 7/24/23.)¹ In doing so, it also rejected defendants’ arguments that plaintiff was not entitled to such an award because (1) plaintiff had granted them a rent abatement for certain months during the COVID-19 pandemic, or (2) plaintiff had previously interfered with their use and enjoyment of the premises. (*Id.*) Neither party disputes the fact that defendants did not raise the building’s certificate of occupancy in opposition to the prior motion. In this motion sequence (003), plaintiff moves for summary judgment under CPLR 3212 on her third and fourth causes of action for, respectively, ejection and a declaratory judgment; she also moves for summary judgment dismissing all but two of defendants’ affirmative defenses and their second counterclaim alleging plaintiff commenced this action in retaliation for various complaints they made as to the conditions of the

¹ The Decision and Order was not entered until October 23, 2023.

premises. (NYSCEF doc. no. 39, notice of motion.) Defendants oppose the motion and cross move for summary judgment under CPLR 3212. Defendants contend that plaintiff rented the subject premises in violation of the building's Certificate of Occupancy and Multiple Dwelling Law ("MDL") Sections 301 and 302, meaning plaintiff may not maintain an action to collect rent and/or use and occupancy from them. Consequently, defendants seek summary judgment on each of plaintiff's four causes of action. (NYSCEF doc. no. 52 at ¶ 2 [A], [B], and [E], notice of cross motion.) Further, pursuant to CPLR 2221 (d) defendants move for leave to reargue the Court's July 2023 Decision that awarded plaintiff use and occupancy pendente lite. (*Id.*)

The salient facts for this motion sequence are undisputed. Pursuant to a "Standard Form of Cooperative Apartment Sublease," defendants agreed to pay \$5,000 per month in rent and took possession of the premises on January 1, 2019. (NYSCEF doc. no. 42, lease.) After the lease term ended in December 2020, defendants remained in possession as month-to-month tenants. Defendants do not dispute that they stopped paying rent beginning in May 2022. On March 14, 2023, plaintiff sent a 90-day Notice of Intent Not to Renew Tenancy (the "Notice of Nonrenewal") pursuant to Real Property Law § 226-c. The Notice of Nonrenewal set June 30, 2023, as the expiration of the lease. (NYSEC doc. no. 43, notice of nonrenewal.) Defendants did not vacate and, to this date, remain in possession of the apartment. (NYSCEF doc. no. 41 at ¶¶ 10, 11, Tsai affidavit.) Neither party disputes that the co-opt's building has a non-residential Certificate of Occupancy that limits the usage of the 1st through 9th floors for "Offices and Light Manufacturing." (NYSCEF doc. no. 56, certificate.)²

DISCUSSION

Under CPLR 3212, summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. "Where there is any doubt as to the existence of triable issues, summary judgment should not be granted." (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563, 565 [1st Dept 2010].)

Plaintiff contends that she is entitled to summary judgment on her claim for ejectment since she has established prima facie that she is the owner of the premises, she has a present right to possession of said premises after providing defendants with the Notice of Nonrenewal, and defendants have unlawfully retained possession of her property. (*See 247 E 32 LLC v Gasparich*, 95 AD3d 790, 791 [1st Dept 2012].) However, as defendants argue, MDL § 301 (1) and § 302

² The original lease provides, "You acknowledge that the Apartment Corporation is in the process of pursuing a certificate of occupancy for the Building. At this time there is no certificate of occupancy for either the Building or the Apartment and the Building has interim multiple dwelling status, and You have agreed to sublease the Apartment on that basis." (NYSCEF doc. no. 42 at ¶ 50.) Additionally, in that same paragraph, the lease states, "You further agree that the absence of a certificate of occupancy shall not constitute a grounds [sic] for either a failure to pay rent or a delay in the payment of rent." (*Id.*) While counsel for plaintiff mentions this paragraph in his affidavit in reply, he does not cite case law that demonstrates a landlord may contract around the MDL §§ 301 and 302 or that the protections afforded to tenants are waivable.

preclude plaintiff from recovering rent and maintaining this action. In relevant part § 301 (1) provides, “No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department [of buildings] that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law;” § 302 (b) provides that if any dwelling or structure is occupied for human habitation without said certificate of occupancy, “No 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.” (MDL §§ 301 [1] and 302 [1] [a].) In *Chazon LLC v Maugenest* (19 NY3d 410, 415 [2012]), the Court of Appeals applied these sections in the context of a “landlord who remains out of compliance” with § 301 via § 284—or the Loft Law—and a “tenant [who] has paid no rent for nine years.” Under these circumstances, the Court of Appeals found that §§ 302’s command was clear: the landlord was not entitled to recover rent while failing to comply with § 301 (1) and they could not maintain the action for possession of the premise. (*Id.*) In applying MDL § 302 in this manner and leaving a non-rent-paying tenant in possession of the disputed apartment, the Court was under no misconception that “the statutes leave these parties in their present stalemate until compliance has been achieved;” instead, it noted that said result, while it may be “undesirable” and impractical, was nonetheless the only result consistent with the text of the statute. (*Id.* at 416.) The same considerations apply here: while defendants have not paid rent since May 2022, plaintiff’s co-opt is not covered by a residential certificate of occupancy and thus remains out of compliance with MDL § 301.

In opposition, plaintiff contends that *Chazon* is not applicable here because its holding is specific to landlords who have not complied with the Loft Law. This argument is unpersuasive for two related reasons. First, while true that the landlord in *Chazon* had not complied with the Loft Law, the Court of Appeals described the context in which the Loft Law was passed and how the Legislature intended it to create a process by which former commercial buildings could be converted to residential units, thereby complying with § 301. It explained that “until the certificate of occupancy is obtained, the rents in interim multiple dwellings are regulated, and the tenants are protected against eviction while the landlords, as long as they are in compliance with the Loft Law, are relieved from the prohibition against collecting rent or seeking eviction for nonpayment.” (*Id.* at 414 [internal citations omitted].) Consequently, in failing to comply with the procedures established under § 284 and the Loft Law, the landlord in *Chazon* was also not complying with § 301, meaning the tenant was entitled to the protections afforded by § 302. The second reason is that the First Department, in *Matter of GVS Props. LLC v Vargas*, appears to have concluded similarly, when it wrote that plaintiff’s argument—that *Chazon* is limited to Loft Law cases—was “belied by the Court [of Appeals]’s citation to Multiple Dwelling Law § 302 (1) (b).” (172 AD3d 466, 466 [1st Dept 2019]; *see also Matter of 49 Bleecker Inc. v Gatién*, 157 AD3d 619, 619 [1st Dept 2018] [reversing Appellate Term’s denial of a tenant’s summary judgment motion to dismiss landlord’s nonpayment proceeding and instead found landlord was precluded from charging rent under § 302 without a certificate of occupancy].)

Plaintiff raises two other arguments as to why the Court need not reach the above conclusion. The first is that the doctrine of collateral estoppel precludes defendants’ above arguments because they had a fair opportunity to litigate on this issue on the previous motion yet failed to do so; the second is that defendants’ motion for reargument pursuant to CPLR 2221 (d) was not made within thirty days of plaintiff’s service of a copy of the previous order and written

notice of its entry and, therefore, the motion was untimely. The problem with these arguments is that, in awarding use and occupancy in pendente lite, the Court's July 2023 Decision made clear that it was not making a final judgment on the merits of the action: "Awarding use and occupancy during the pendency of an action both preserves the status quo until a final judgment is rendered and 'accommodates the competing interests of the parties in affording necessary and fair protection to both.'" (NYSCEF doc. no. 26 at 1.) Under this reading, the Court's July 2023 Decision did not decide ultimate issues of fact; and since the current motion is for summary judgment on the merits of plaintiff's cause of action, the Court is presented with entirely separate and distinct issues from those on the previous motion. (*See Vera v Low Mktg. Corp.*, 145 AD3d 509, 510 [1st Dept 2016] ["The doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues of ultimate fact where the issues have been conclusively determined against one party in a proceeding where that party had a fully and fair opportunity to litigate the issue."]; *Maybaum v Maybaum*, 89 AD3d 692, 695 [2d Dept 2011] ["Collateral estoppel effect will only be given to matters actually litigated and determined in a prior action [or proceeding]"]; quoting *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985].) These cases demonstrate that defendants are not precluded from asserting their certificate of occupancy-based arguments. As such, since it has now become clear, on the merits of her claim, that plaintiff is not entitled to maintain an action in which she seeks the non-payment of rent for a period of time in which the building did not have a residential certificate of occupancy, she is not entitled to use and occupancy for that time either. Put differently, since the Court's previous temporary order conflicts with its adjudication of the merits of plaintiff's claims, the previous order must be vacated.

Because defendants have demonstrated dismissal is warranted under MDL § 302, the Court need not address their arguments related to whether dismissal is warranted because plaintiff commenced this action in retaliation for complaining about certain defects with the property. Moreover, plaintiff has not demonstrated entitlement to summary judgment on defendants' second counterclaim: even under her single citation—*Bruce v College Props.*, 10 AD3d 538, 539 [1st Dept 2004])—plaintiff has not established defendants' counter claim is entirely "devoid of merit" since defendants have alleged that they made complaints to plaintiff in January 2023 regarding the premises lack of adequate heating (NYSCEF doc. no. 25 at ¶ 66.) Lastly, Real Property Law § 234 provides:

"Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant...there shall be implied in such a lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant...in the successful defense of any action...commenced by the landlord against the tenant arising out of the lease." (RPL § 234.)

In paragraph 20 (A) (iv), the parties' lease states that defendants must reimburse plaintiff for fees and expenses including "any legal fees and disbursements for legal actions or proceedings brought by the Owner against You because of a default by You." Further, plaintiff asserts a cause of action for attorneys' fees under this paragraph in her complaint. (NYSCEF doc. no. 23 at ¶ 50-53, plaintiff's fifth cause of action.) As the terms and conditions of the

expired lease continued into the month-to-month tenancy, so do those related to the imposition of attorneys fees. Accordingly, the Court finds that defendants are entitled to their reasonable attorneys' fees to be determined by hearing.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of plaintiff Pei-De Tsai's motion for summary judgment pursuant to CPLR 3212 on her causes of action for ejectment and a declaratory judgment is denied; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment under the same provision on defendants JCHHB, Inc. and Jeremy Bernstein's second counterclaim for retaliation is denied; and it is further

ORDERED that defendants' cross motion pursuant to CPLR 3212 for summary judgment on their tenth affirmative defense that plaintiff rented the subject premises in violation of the building's Certificate of Occupancy is granted and plaintiff's causes of action for breach of contract, use and occupancy, ejectment, and declaratory judgment are dismissed; and it is further

ORDERED that defendants' motion for summary judgment pursuant to CPLR 3212 on its eleventh affirmative defense is denied as moot; and it is further

ORDERED that the Court's July 2023 Decision and Order is vacated; and it is further

ORDERED that the parties shall appear at for a discovery conference with the Court on May 28, 2024, at 9:30 a.m. at 60 Centre Street, New York, New York; and it is further

ORDERED that the Clerk of the Court shall schedule a hearing on attorneys' fees for June 13, 2024, at 2:30 p.m. at 60 Centre Street, New York, New York; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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DAKOTA D. RAMSEUR, J.S.C.

5/10/2024

DATE

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APPLICATION:

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