46 Walker Realty LLC v KIINI LLC
2024 NY Slip Op 31923(U)
May 30, 2024
Civil Court of the City of New York, New York County
Docket Number: Index No. LT-300449-24/NY
Judge: Alberto M. Gonzalez
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART G
---X
46 WALKER REALTY LLC,

PETITIONER/LANDLORD

L&T 300449-24/NY

-against-

DECISION/ORDER

KIINI LLC, IPEK IRGIT,

RESPONDENT/TENANT

"JOHN DOE" AND "JANE DOE"

RESPONDENT/
UNDERTENANTS

---X
Hon. Alberto Gonzalez:

Recitation as required by CPLR Rule 2219(A), of the papers considered in the review of Petitioner's summary judgment motion pursuant to CPLR § 3212 and a default judgment pursuant to CPLR § 3215 and dismissing Respondents' affirmative defenses and counterclaims, and Respondent's motion for an order pursuant to CPLR § 3212 dismissing this proceeding in its entirety upon summary judgment.

Papers	NYSCEF DOC #
[Petitioner's] Notice of Motion;	14
[Petitioner's] Affidavit or Affirmation in Support of Motion;	15

[Petitioner's] Exhibits A-I;	16-24
[Petitioner's] Memorandum of Law;	25
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PROCEDURAL HISTORY

The instant holdover proceeding was initiated by the filing of a notice of petition and petition, on January 6, 2024. The petition annexes to it a "Ninety (90) Day Notice of Termination Pursuant to RPL 226-C And 232-A" (herein Notice of Termination). *NYSCEF # 1, 2, 3.* The Notice of Termination states in part:

"PLEASE TAKE NOTICE, that you are currently occupying the Apartment under monthly hiring and you are notified that the Landlord elects to terminate your occupancy of the Apartment, now held by you under monthly hiring, as of DECEMBER 31, 2023 ("Termination Date"). Unless you vacate and surrender possession of the Apartment by the Termination Date, the Landlord will commence a summary proceeding to remove you from the Apartment for the holding over after the Termination Date. PLEASE TAKE FURTHER NOTICE, that since you have occupied the Apartment for more than two years, the Landlord is required under Real Property Law ("RPL") § 226-c and § 232-a to provide you with this ninety (90) day notice (the "Notice"). PLEASE TAKE FURTHER NOTICE that the facts which the termination of your occupancy is based upon include, but are not limited to, that your continued occupancy of the Apartment has been on a month-to-month basis and the Landlord elected not to extend or continue your occupancy and has elected to terminate the month-to-month occupancy pursuant to this Notice." *NYSCEF # 1*, Pg. 6-7.

Thereafter, the petition was first made returnable on January 29, 2024 at 10:30am. On January 29, 2024, the Respondents appeared by counsel, and the parties agreed to adjourn the proceeding to March 26, 2024 for Respondents to file an answer or motion by February 26, 2024. *NYSCEF # 7.*

On February 26, 2024, Respondent filed an answer by their attorney[1]. *NYSCEF # 8.* Respondent alleges that they have lived in the subject premises since 2016, as a result of a purported "free market lease[2]," dated March 13, 2016 signed by Ipek Irgit. *NYSCEF # 24.* On March 26, 2024, the parties again adjourned the proceeding to May 21, 2024 for motion practice. *NYSCEF # 10, 11, 12.* On April 20, 2024 Kucker, Marino, Winiarsky & Bittens LLC, filed a notice of appearance as co-counsel for Petitioner. *NYSCEF #* 13.

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[1] Respondent Ipek Irgit is represented by counsel. Respondent Kiini LLC is not represented.
[2] Kiini LLC is a tenant to the March 13, 2016 lease.

Petitioner filed their motion for summary judgment on May 1, 2024. Petitioner asserts that Petitioner has established its *Prima Facie* by proving all the elements of the petition, in this month-to-month holdover. Petitioner specifically states that the building is not subject to rent stabilization because the apartment has never contained more than four (4) dwelling units, that on both May 6, 1969 (the effective date of the Rent Stabilization Law of 1969) and January 1, 1974 (the effective date of the Emergency Tenant Protection Act of 1974) the building was a commercial building, and the building cannot be subject to Rent Stabilization as a result of Article 7C of the Loft Law because deregulation is provided when based on owner occupancy, and further the Loft Board already issued an order finding the subject premises are not subject to Rent Stabilization, pursuant to Loft Board Order 2605 (herein referred to as "Order 2605"). *NYSCEF* # 25, Pg. 2-3.

Specifically, Petitioner alleges that in 1983, the building began the process from commercial to residential use on the 2nd through 5th floors and was registered as an Interim Multiple Dwelling ("IMD") with the NYC Loft Board, and in 1996 the owner obtained a Certificate of Occupancy converting the 2nd through 5th floors to residential use. *NYSCEF* # 25, Pg. 3-4. Thereafter, an application for a Final Rent Order for the building to be removed from the Loft Board's jurisdiction was granted in January 2001, which states the premises are not subject to rent regulation. *NYSCEF* # 25, Pg. 4. Petitioner further argues that William Goins, a former tenant of the subject premises, filed an application with the Loft Board to vacate the Loft Board's order and to find that unit subject to rent stabilization. *NYSCEF* # 25, Pg. 5. Mr. Goins application was denied on August 12, 2013 by the Loft Board's Executive Director, and Mr. Goins filed an administrative appeal, which was denied on December 13, 2013. *NYSCEF* # 25, Pg. 5. Mr. Goins then filed an Article 78 petition with New York County Supreme Court, which

held: "Order 2605 was a final agency decision that reached a definitive conclusion concerning the rent regulation status of petitioner's unit…An agency decision is final for limitations purposes when it determines the rights of a petitioner, not when subsequent actions are taken on the basis of that determination of rights." *NYSCEF* # 25, Pg. 5.

Petitioner argues that it has established its *prima facie* by establishing all elements of the Petition – establishing it is the owner and landlord of the premises, establishing that Respondent entered into a lease for the premises, which after several renewals, expired, and that Petitioner properly terminated Respondents' tenancy. *NYSCEF* # 25, Pg. 6.

Further, Petitioner seeks to strike Respondent's defenses and counterclaims, specifically Respondents' First Objection in Point of Law (Petitioner fails to state a cause of action), Respondents' Second Affirmative Defense (the apartment is subject to rent stabilization).

Finally Respondent seeks a default judgment of possession as against all non-appearing parties.

Respondent also moved for summary judgment, asserting that the Respondent is not estopped from Order 2605 given that she did not have the opportunity to participate in the proceedings. *NYSCEF* # 27, Pg. 3.

Respondent cites to *Matter of Bleecker St. Invs. LLC vs. Zabari*, to state that collateral estoppel does not apply to bar the Respondent from challenging the apartment's status. *NYSCEF* # 27, Pg. 4. Respondent also writes that exemption from rent regulation cannot occur through estoppel but only "application of law." *NYSCEF* # 27, Pg. 4.

Further Respondent alleges that the Loft Law does not provide for any exemption for owner occupancy, except in a non-coop/condiminum building, which is temporary. *NYSCEF* # 27, Pg. 3.

Respondent also writes that at the time the building left the building's jurisdiction the premises were not occupied by an owner of the building for years. *NYSCEF* # 27, Pg. 3. Specifically, Respondent's counsel writes that its office, after a FOIL request, made the following conclusion: "LBO 2605 thus confirmed the undisputed fact that at the time that it was issued, the Premises was no longer occupied by an owner of the Building. It is this fact that is critical to the outcome of this proceeding, as discussed further below. Despite this fact, the Loft Board and Mr. Bangs incorrectly concluded that the Premises was exempt from rent regulation. As shall be discussed below, that conclusion was unsupported by MDL § 286 (8) and the Loft Board's regulations, which only provide for exemption for owner-occupied condominium and cooperative units, which the Premises was not. Moreover, the fact that the Premises has previously been owner-occupied has no bearing on the rent regulatory status of the unit, as any exemption under the Loft Law for owner-occupancy is only temporary and ceased upon leasing/renting the Premises to Mr. Goins." *NYSCEF* # 27, Pg. 6-7. Respondent's counsel further writes, that "[v]arious submissions by Walker Street Equities' former attorney, and sworn statements from the other principal WSE, readily admitted that Mr. Goins rented the Premises in 1998 and continued to occupy the unit as a tenant until 2013. There is, therefore, no factual dispute that at the time that LBO 2605 was issued, the Premises was not occupied by an owner of the Building." *NYSCEF* # 27, Pg. 8.

Petitioner's reply to Respondent's motion, states that the findings of the administrative agencies, such as the Loft Board, are res judicata. *NYSCEF* # 49, Pg. 3. Petitioner further argues that Respondent's is time-barred, as the events herein occurred two decades ago and after the start of Respondent's tenancy. *NYSCEF* # 49, Pg. 5. Petitioner's counsel also seeks to distinguish, *Matter of Blecker St. Inv'rs, LLC vs. Zabari*, in that the tenant in possession had a full and fair

opportunity to be heard. *NYSCEF* # 49, Pg. 5. Further, because Respondent's motion was not labeled a cross-motion, no opposition exists to Petitioner's motion[3]. *NYSCEF* # 49, Pg. 8.

Respondent argues that "Respondent was not a party to LBO No. 2605, and could not have been in "privity" with anybody who was, as she did not come to become the tenant of the Premises until 15 years after it was issued[,]" as such collateral estoppel does not apply. *NYSCEF* # 46, Pg. 5.

Discussion

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *See Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 508 N.Y.S.2d (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *151 E.19th Street, LLC v. Silverberg*, 14 Misc.3d 139A, 836 N.Y.S.2d 501 (Table) (App. Term. 1st Dep't. 2007). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *508 Columbus Props. LLC v. Square to Spare LLC*, 2022 NY Slip Op 34224 (U) (Sup. Ct. N.Y. Cty. 2002) (citing to *Jacobsen v. New York City Health and Hosps. Corp.*, 22 NY3d 824, 833, 988 N.Y.S.2d 86, 11 N.E.3d 159 [2014]).

"On such a motion, the Court's function is to find, rather than to decide, issues of fact. (Southbridge Towers, Inc. v. Renda, 21 Misc.3d 1138 [A], 2008 NY Slip Op 52418[U] [Civ Ct,

[3] The court notes that both parties entered into stipulations of adjournment, with briefing schedules. The most recent of which was dated April 15, 2024, and provides that a summary judgment motion could be filed by April 26, 2024. NYSCEF # 12. It should be noted that both sides filed their motions for summary judgment on May 1, 2024, after the date provided by the stipulation, as such the court declines to deny Respondent's motion on that ground, since both sides breached the stipulation and filed the motion on May 1, 2024.

NY County 2008], citing Epstein v.Scally, 99 AD2d 713 [1st Dept 1984]." *1103 Franklin Avenue HDFC vs. Gould*, 63 Misc.3d 1235(A), 115 N.Y.S.3d 833 (Table). Summary judgment must be denied where there exists no doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.S.2d 223, 413 N.Y.S.2d 141 (1978).

A motion for summary judgment is to be filed and supported by an affidavit of a person "having knowledge of the facts; it shall recite all the materials facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit[.]" CPLR 3212 (b).

Notwithstanding, an affidavit, with "hearsay evidence" is insufficient to satisfy the movant's burden of establishing a prima facie showing of summary judgment. *Wen Ying Ji v. Rockrose Development Corp.* (App. Div. 1st Dep't. 2006) (citing to *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]; AIU Ins. Co. v. American Motorist Ins. Co., 8 A.D.3d 83, 85, 778 N.Y.S.2d 470 [2004]).

In deciding a CPLR 3211(b) motion, the defendant is entitled to the benefit of "every reasonable intendment of the pleading which is to be liberally construed (Warwick v. Cruz, 270 AD2d 255, 255, 704 NYS2d 849 [2000]). A defense should not be stricken where there are questions of fact requiring a trial (see e.g. Atlas Feather Corp v. Pine Top Ins. Co., 128 AD2d 578, 578-579, 512 NYS2d 844 [1987])". *534 E.11th st Hous. Dev. Fund Corp v. Hendrick*, 90 A.D.3d 541, 935 N.Y.S.2d 23 (App. Div. 1st. Dep't. 2011).

"Under, res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties or the same cause of action." *Parker vs. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.S.2d 343, 690 N.Y.S.2d 478 (1999). Said more clearly, "a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising

out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding." *Bayer v. City of New York,* 115 AD3d 897, 983 N.Y.S.2d 61 (App. Div. 2nd Dep't. 2014). Both, "Res judicata and collateral estoppel are related doctrines that are designed to limit or preclude relitigation of matters that have already been determined (People v. Evans, 94 N.Y.2d 499, 502, 706 N.Y.S.2d 678, 727 N.E.2d 1232). Res judicata generally precludes relitigation of *claims*, while collateral estoppel precludes relitigation of issues (id.)." *Fusco vs. Kraumlap Realty Corp.*, 1 A.D.3d 189, 767 N.Y.S.2d 84 (App. Div. 1st Dep't. 2003)

However, "[t]he doctrine of collateral estoppel is a flexible one that is premised on fairness." *Casolino vs. Baynes*, 157 A.D.2d 699, 549 N.Y.S.2d 797 (App. Div.2nd. Dep't. 1990). And "[t]he equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules." *Buechel vs. Bain* 97 N.Y.S.2d 295, 740 N.Y.S.2d 252 (2001).

"The general rule is that "a judgment of a court of competent jurisdiction is final and conclusive upon the parties, not only as to issues actually determined, but as to every other question which the parties might or ought to have litigated…" Stokes v. Stokes, 172 N.Y. 327, 344-345, 65 N.E. 176 (NY 1902). *Catco Assocs., LP vs. Goodwin*, 7 Misc.3d 1020(A), 801 N.Y.S.2d 231 (District Court. Suffolk. Cty. 2005).

"Under New York's transactional approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transactions or series of transactions are barred, even if based upon different theories or if seeking a different remedy." (O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158; see Fontani v.

Hershowitz, 12 A.D.3d at 637, 784 N.Y.S.2d 903). *Ram v. Hershowitz*, 76 A.D.3d 1022, 908 N.Y.S.2d 106 (App. Div. 2nd Dep't. 2010).

In the instant matter, the Respondent relies heavily on holding of *Matter of Bleecker St. Invs., LLC vs. Zabari*, a case decided by the Appellate Division which found that the collateral estoppel did not apply to bar a tenant from challenging the non regulated rent status of an apartment where, "the record establishes that the Loft Board did not provide notice of the 2005 determination to the tenant who then occupied the apartment." *Matter of Bleecker St. Invs., LLC vs. Zabari*, 148 A.D.3d 577, 50 N.Y.S.3d 332 (App. Div. 1st. Dep't. 2017).

The facts of this proceeding are that William Goins became the tenant of the subject apartment, pursuant to a lease dated March 5, 1998. *NYSCEF # 23,* Pg. 2. The Petitioner thereafter filed a Final Rent Order with the Loft Board resulting, on January 23, 2001, in Order 2605. *NYSCEF # 23,* Pg. 3. Order 2605 found the fifth floor unit not subject to rent regulation and owner occupied; the Loft Board hearing officer was informed the Petitioner was renting the apartment in March 1998 to Mr. Goins. NYSCEF # 35. Mr. Goins then attempted to vacate Order 2605 on July 16, 2013 which the Loft Board rejected "as the deadline for reconsideration of the Order has long expired." Thereafter, Mr. Goins filed an administrative appeal which was also denied, and he filed an Article 78, that was denied as "time-barred." *NYSCEF # 23,* Pg. 6.

Notwithstanding, neither the Petitioner's, the Loft Board's or any of the Court's records indicate that Mr. Goins received notice of the application for a Final Rent Order in 2000-2001, despite being a tenant in the apartment. Mr. Goins therefore did not have an opportunity to litigate the issues, and pursuant to precedent of *Matter of Bleecker St. Inv., LLC,* the instant Respondent is not collaterally estopped from challenging the regulated status of the apartment by order 2605. The court is not persuaded by Petitioner's assertion that Mr. Goins had "full and fair

opportunity to litigate the issues," as a result of the application filed in 2013 with the Loft Board or the Article 78. Neither of those applications or filings are replacements for the actual notice that should have been provided to Mr. Goins, particularly when Mr. Goins did not have the merits of his claim decided. As such, the court finds that Petitioner's motion to strike Respondent's defenses is denied, as Respondent has made a sufficient showing of merit concerning its proposes defenses and counterclaims. Respondent can challenge the regulatory status of the apartment.

If the Respondent can then challenge the regulatory status, then the next question for the court is whether the apartment is subject to rent regulation.

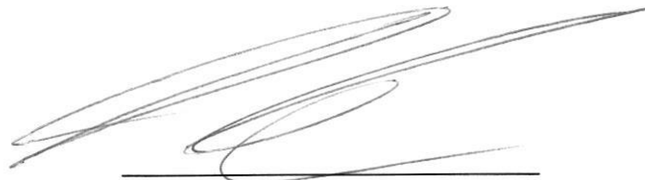
Order 2605 states the subject apartment is not subject to rent regulation because it is owner occupied, however pursuant to a letter sent by the then owner (Walker Street Equities) to the Loft Board Hearing Officer (Arthur Bangs), it states that the apartment is rented by Bill Goins. Specifically the letter states: "I. Walker Street Equities, a partnership of Lenoard Langman and John Fortenberrry purchased 46 Walker Street NY, NY, in 1983 from Rita and Mendel Gombinski. The fifth floor unit was occupied by Rita and Mendel Gombinski at the time. As part of the sale the Gombinksi's vacated the fifth floor unit. Steven Gomnbinski is the son of Rita and Mendel Gombinski. He has never occupied the fifth floor unit under the ownership of Walker Street Equities. From 1983 through 15 March 1998 the fifth floor unit was occupied by Loenoard Langman or John Fortenberry. The fifth floor unit was rented to Bill Goins on 15 March 1998." *See* NYSCEF # 35, NYSCEF # 23 (Pg. 3). The letter was submitted to the court as a certified copy in the custody of the New York City Loft Board. Pursuant to said letter, it is evident that the apartment was not owner occupied at the time of Order 2605.

Further, it is clear from the Multiple Dwelling Law (MDL) § 286 that the exemption from rent regulation only applies to condominiums and cooperative apartments in interim multiple dwellings, and should not have applied to the instant unit when Order 2605 was issued. Further, that the subject apartment is not 6 units or more is irrelevant to instant analysis as the Respondent is seeking relief under the Loft Law and not the Emergency Protection Act of 1974. As such, the court finds that the subject apartment is subject to Rent Stabilization by virtue of Article 7-C of the Multiple Dwelling Law.

The court thus denies Petitioner's motion for summary judgment and grants Respondent's motion for summary judgment, dismissing the instant petition. Respondent's overcharge counterclaim is severed.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that Petitioner's Motion seeking summary judgment, a final judgment, a default judgment and dismissing Respondent's defenses is DENIED and Respondent's motion for Summary Judgment dismissing the instant petition is GRANTED.



Hon. Alberto M. Gonzalez, HCJ
ALBERTO GONZALEZ
JUDGE, HOUSING COURT

Dated: New York, New York
May 30, 2024