

57 Elmhurst LLC v Tamay

2024 NY Slip Op 32092(U)

June 12, 2024

Civil Court of the City of New York, Queens County

Docket Number: Index No. L&T 55529/2020

Judge: Clinton J. Guthrie

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: HOUSING PART B

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57 ELMHURST LLC,

Index No. L&T 55529/20

Petitioner,

-against-

**DECISION/ORDER UPON
MOTION TO DISMISS AT
TRIAL**

JESUS PEREZ TAMAY ET AL.,

Respondents.
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Present:

Hon. CLINTON J. GUTHRIE
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent’s motion to dismiss, in effect pursuant CPLR § 4401, at the close of petitioner’s prima facie case at trial:

Papers	Numbered
Memorandum of Law.....	<u>1 (NYSCEF #98)</u>

Upon the foregoing cited papers, the decision and order on respondent’s motion, made orally at the close of petitioner’s prima facie case at trial, is as follows.

PROCEDURAL HISTORY AND TRIAL

This summary nonpayment proceeding was commenced in 2020. After various stays occasioned by the COVID-19 pandemic and further proceedings, a trial commenced before this court on September 11, 2023. Petitioner called its initial witness, Daniel Decastro, petitioner’s property manager, on that date. The court also admitted several prima facie documents, including a certified DHCR (Division of Housing and Community Renewal) registration history for the subject premises, a certified deed for the subject building, a certified Multiple Dwelling Registration (MDR), the initial rent-stabilized lease with respondents Jesus Perez Tamay and

Elsa Maria Tamay (dated April 3, 2017), a renewal lease with respondents dated December 30, 2019, and a rent ledger.¹ Mr. DeCastro testified that respondents applied for ERAP (Emergency Rental Assistance Program) and that petitioner received a payment from the ERAP program in November 2021 in an amount of over \$47,000.00.

After a pause in the trial occasioned by petitioner's filing of a motion for use and occupancy, the trial resumed on November 20, 2023, at which time petitioner rested after the court took judicial notice of the NYC Department of Housing Preservation and Development (DHPD) building registration information.

Thereafter, on January 8, 2024, petitioner was permitted to reopen its prima facie case upon consent. Petitioner called Shiromie Mansah as a witness. Ms. Mansah testified that she is petitioner's office manager and was present at the closing in 2018 whereby petitioner was transferred the subject building. She testified that she received documents from the prior owner from an office in New Jersey. She testified that the prior owner was "Treetop." When questioned who appeared at the closing from the prior owner, she could not remember the person's name. Petitioner attempted to admit into evidence certain documents marked for identification as Exhibit 9. Respondent objected and the court allowed briefing on the objection. By Decision/Order dated February 8, 2024, this court sustained the objection to Exhibit 9 (*see* NYSCEF Doc. 89).

Ms. Mansah's testimony continued on February 29, 2024. Petitioner renewed its attempt to admit petitioner's Exhibit 9 and the court again sustained an objection to petitioner's Exhibit 9. At the conclusion of Ms. Mansah's testimony, petitioner rested. Respondent's attorney then made an oral motion to dismiss. The court permitted briefing on the oral motion. Only

¹ Petitioner briefly called respondent Jesus Tamay as a witness to partially authenticate the initial rent-stabilized lease and the renewal lease.

respondent's attorneys submitted a memorandum of law. The court permitted additional adjournments for the parties to settle but the efforts were unavailing, and the court reserved decision on the oral motion to dismiss on May 15, 2024.

DISCUSSION & CONCLUSION

In a summary proceeding brought under Article 7 of the RPAPL, a petitioner bears the burden of proving each of the elements of its cause of action (*see 1646 Union, LLC v. Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]). In this nonpayment proceeding, petitioner established the existence of a rental agreement in the form of a renewal lease that was in effect at the time of the commencement of the proceeding (*see Fairfield Beach 9th, LLC v. Shepard-Neely*, 77 Misc 3d 136[A], 2022 NY Slip Op 51351[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]; *265 Realty, LLC v. Trec*, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). Petitioner also established that the subject premises was registered as a multiple dwelling and that the rent charged to respondents had been registered with DHCR (*see Villas of Forest Hills Co. v. Lumberger*, 128 AD2d 701, 702 [2d Dept 1987] ["[Pleading the] rent regulatory status and compliance with the appropriate statutes and codes and to actually be in compliance therewith is necessary for a court to order the requested relief."]).

However, petitioner failed to demonstrate that respondent was in default in the payment of rental arrears under the last rental agreement in effect between the parties (*see Shepard-Neely*, 2022 NY Slip Op 51351[U], *4; *6 W. 20th St. Tenants Corp. v. Dezertsov*, 75 Misc 3d 135[A], 2022 NY Slip Op 50529[U], *1 [App Term, 1st Dept 2022]). The ledger admitted into evidence shows earmarked ERAP payments for each month from April 2020 (the first month of the renewal lease in evidence) through March 2021 (the last month of said lease) (*see Neptune Dev.*

Corp. v. Kalogiannis, 63 Misc 3d 164[A], 2019 NY Slip Op 50933[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2019] [“Earmarked rent payments must be applied to the periods for which they are earmarked[.]”]). It is undisputed that no renewal lease was signed thereafter, as this is the subject of a parallel holdover proceeding pending between the parties (Index No. L&T 320054/22), which is also before this court.

Moreover, while Judge Maria Ressos allowed amendment of the petition to date in a Decision/Order dated July 13, 2022, petitioner did not sustain a claim for rent due after the last lease expired on March 31, 2021. As this proceeding involves a rent-stabilized tenancy, petitioner may not deem the lease renewed (*see Samson Mgt., LLC v. Hubert*, 92 AD3d 932, 934 [2d Dept 2012]) or consider any payments made after the expiration of the most recent lease to have created a new tenancy (*see Fairfield Beach 9th, LLC v. Shepard-Neely*, 74 Misc 3d 14, 15 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). Thus, any amounts due after the expiration of the most recent lease would constitute use and occupancy. A summary nonpayment proceeding may not be maintained to collect use and occupancy (*see Rochdale Vil., Inc. v. Chadwick*, 73 Misc 3d 131[A], 2021 NY Slip Op 50958[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]).

Accordingly, the court finds that petitioner failed to meet its prima facie burden at trial in this nonpayment proceeding. The court does not reach respondent’s argument that petitioner could not substantiate the legal rent registered with DHCR that is sought herein. Any such determinations will be made, if appropriate, in the context of respondent Elsa Maria Tamay’s overcharge counterclaim. Respondent’s oral motion to dismiss is therefore granted and the petition is dismissed (*see also* CPLR § 409(b)). The clerk shall issue a judgment dismissing the petition (*see* CPLR § 411).

The proceeding will be restored for trial in Part B on respondent Elsa Maria Tamay's counterclaims on June 12, 2024 at 2:15 PM (*see generally R & O Mgt. Corp. v. Ahmad*, 12 Misc 3d 85, 86-87 [App Term, 2d Dept, 2d & 11th Jud Dists 2006]).

This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: Queens, New York
June 12, 2024



HON. CLINTON J. GUTHRIE
J.H.C.

SO ORDERED - HON. CLINTON J. GUTHRIE