

789 St. Marks Realty Corp. v Blakely

2025 NY Slip Op 34468(U)

September 8, 2025

Civil Court of the City of New York, Kings County

Docket Number: Index No. LT-328650-24/KI

Judge: Sergio Jimenez

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART J

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789 ST. MARKS REALTY CORP,

Index No. LT-328650-24/KI

Petitioner,

-against-

DECISION AND ORDER

WANDA BLAKELY,

Motion Seq. No. 1

Respondent.
-----X

Present:

Hon. Sergio Jimenez
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent’s motion (Seq. 1) to amend the answer and for summary judgment and any other relief as the court may find appropriate:

Papers Numbered

Notice of Motion (Seq. 1) with affidavits and exhibits.....1 (NYSCEF #6-9)
Affirmation in Opposition.....2 (NYSCEF #11-12)
Answering/Replying Papers.....3 (NYSCEF #13-15)

This non-payment proceeding was commenced in October of 2024, seeking rent from June -August of 2024. The court now considers respondent’s motion for leave to amend the answer, and having done so, granting CPLR § 3212(b) summary judgment dismissing the proceeding on the grounds the subject building is occupied in contradiction to the certificate of occupancy or, alternatively, dismissal for defective rent demand. Petitioner opposes. The parties, both represented by counsel, fully briefed the motion. The court heard argument on August 5, 2025, and reserved decision.

Amendment of the Answer

Courts are generally liberal in granting leave to amend answers (*Hill Plaza Enters. NY, LLC v Terris*, 82 Misc3d 132[A][App Term 2d Dept, 2024]; *Thanasoulis v Shapiro*, 81 Misc3d 132[A][App Term 1st Dept, 2023]). As per the CPLR, leave to amend the answer should be freely given, absent prejudice or surprise, unless it can be shown the defense or counterclaim is “palpably insufficient or devoid of merit” (CPLR 3025[b]; *Wells Fargo Bank, N.A. v Spataforte*, 183 AD3d 853 [2020]).

Here, petitioner does not move to strike the proposed amended answer, or claim it was surprised or would be unfairly prejudiced by its filing. Petitioner's primary objection is the proposed amended answer is verified by respondent's attorney and not respondent herself. RPAPL § 743 allows a respondent in a summary eviction proceeding to answer the petition orally or in an unverified written answer, and seemingly no authority requires amended answers to be treated differently (RPAPL § 743; *Bruce L. Stein v Jeff's Express*, 37 Misc.3d 94 [App. Term 2nd Dep't 2012]; *ELG 1275 LLC v Reyes*, 53 Misc 3d 1209[A] [Civ Ct, Bronx County 2016]). Accordingly, the portion of respondent motion seeking to amend the answer is granted, and the proposed annexed amended answer is deemed filed and served.

However, the court finds respondent does not provide sufficiently detailed and specific allegations to overcome the *prima facie* evidence that she was properly served with the predicate rent demand. Respondent's affidavit only states she did not receive it, with no other details provided. "Bare and unsubstantiated denials of service are insufficient to rebut the presumption of proper service created by a duly executed affidavit of service, and a hearing is not required where the defendant fails to swear to specific facts rebutting the statements in the process server's affidavit" (*Tuttnauer USA Co., Ltd. v. Russo*, 216 A.D.3d 846, 847 [2d Dept 2023] [internal quotation marks omitted]). Accordingly, the court strikes respondent's first defense and any other jurisdictional defenses.

Summary Judgment

On a motion for summary judgment, the movant must show through admissible evidence that they are entitled to relief as a matter of law, because no facts remain in dispute (CPLR § 3212; *Exit Empire Realty v Zilelian*, 137 AD3d 742, 743 [2d Dept 2016]). If the movant meets the burden of showing entitlement to judgment as a matter of law burden, the opposing party must demonstrate that there is an issue requiring trial (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *cf. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] ["Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers."]).

Respondent seeks summary dismissal alleging the subject building is occupied in violation of its certificate of occupancy, as a violation of the New York State Multiple Dwelling Law (MDL). Respondent cites to numerous open Department of Buildings ("DOB") violations on the subject property, including most notably: Environmental Control Board ("ECB")

Violation 34642575R, issued April 25, 2008, for “Altered building occupied without a valid certificate of occupancy,”; ECB Violation 35362679L, issued December 5, 2018, for “Failure to comply with commissioner’s order to file a certificate of correction with the department on buildings,” regarding Violation 34642575R; and ECB Violation 39075349M issued December 8, 2022, for unpermitted subdivision of an apartment into an additional apartment. Taking judicial notice of the DOB violations on the DOB website, pursuant to CPLR § 4518(c), the court notes Violation 34642575R was resolved on August 14, 2025, while the others remain open.

MDL § 301 provides, “no multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department 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.” (MDL § 301). MDL § 302 provides the penalty, “If any dwelling or structure be occupied in whole or in part for human habitation in violation of [MDL § 301], no rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefore, or for possession of said premises for nonpayment of such rent.” (MDL § 302; *See also Chazon, LLC v Maugenest*, 19 N.Y.3d 410 [2012]; *8224 Bay Parkway LLC v Odom*, 86 Misc 3d 1255[A] [Civ Ct, Kings County 2025][granting dismissal after finding two open ECB violations contrary to the building's certificate of occupancy were *prima facie* evidence the certificate of occupancy violations existed]).

Petitioner does not dispute the existence of current certificate of occupancy violations. Instead, it argues it can maintain this proceeding because the violations do not adversely affect the structural integrity of the building or respondent’s specific unit. Petitioner relies solely on pre-1993, 1st Department cases to support its argument.

However, post the *Chazon* decision, courts have adopted a strict reading of the MDL and have found rent is not retroactively recoverable for any period of noncompliance. (*Chazon, LLC v Maugenest*, 19 N.Y.3d 410 [2012]; *Fields v Adelman*, 35 Misc 3d 130[A][App Term 2nd Dep’t 2012]; *208 Himrod St., LLC v Irizarry*, 42 Misc 3d 145(A) [App Term Dep’t 2014] [“Contrary to landlord's further contention, the lack of a certificate of occupancy precludes landlord's collection of rent in the entire building, not just in the illegally altered apartments.”]; *West 47th Holdings LLC v. Eliyahu*, 64 Misc 3d 133[A][App Term, 1st Dept 2019]; *GMT 3435 Realty LLC v Hyman*, 83 Misc 3d 1287[A][Civ Ct, Bronx County 2024][finding the very existence of an open ECB violation stating the premises is occupied contrary to the certificate of occupancy

mandates dismissal and precluding the landlord from collecting rent when the ECB violation existed]; *1245 Stratford, LLC v Osbourne*, 84 Misc 3d 1228[A][Civ Ct, Bronx County 2024].

Conclusion

Due to the undisputed open ECB violations stating the occupancy of the subject building is in violation of the Certificate of Occupancy, from at least April 25, 2008, to August 14, 2025, petitioner cannot collect rent in this proceeding. Accordingly, Respondent's motion is granted, and the proceeding is dismissed without prejudice. The court need not address the remaining arguments in Respondent's motion, as they are moot.

This constitutes the decision and order of the court.

Dated: September 8, 2025
Brooklyn, New York


Sergio Jimenez
Judge, Housing Court

Sergio Jimenez, JHC

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**CIVIL COURT
KINGS COUNTY**