

2720 Realty Co. v Joseph
2025 NY Slip Op 35579(U)
June 29, 2025
Civil Court of the City of New York, Kings County
Docket Number: Index No. LT-307719-25/KI
Judge: Elyssa O. Slutzky
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: HOUSING PART F2720 REALTY CO,
Petitioner,

Index No. 307719/25

-against-
TRICIA JOSEPH

DECISION/ORDER

Present: Hon. Elyssa O. Slutzky, JHC

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Respondent Tricia Joseph's ("Respondent") Notice of Motion (Seq. 1) seeking an Order pursuant to CPLR §3025(b) granting her leave to file an Amended Answer and deeming the such Amended Answer served and filed *nunc pro tunc*; and pursuant to CPLR §3212 granting Respondent summary judgment on her affirmative defense which alleges that occupancy of the subject building is in contravention of the Certificate of Occupancy and therefore, Petitioner is in violation of MDL §301 and may not maintain this nonpayment proceeding pursuant to MDL §302.

Papers Numbered**Notice of Motion (Seq. 1) with Affirmation, Affidavit and Exhibits NYSCEF #7-15****Procedural History**

Petitioner commenced this nonpayment proceeding seeking to recover possession of the premises located at 2720 Foster Avenue, Apartment 6G, Brooklyn, New York 11210. Prior to commencing this proceeding, Petitioner served Respondent with a Fourteen Day Notice, dated February 14, 2025, requiring Respondent to pay \$6,492.00 by March 7, 2025, or surrender possession of the premises. Respondent failed to tender payment or vacate the premises and on March 10, 2025, 2025, Petitioner commenced this proceeding by Notice of Petition and Petition. On April 2, 2025, Respondent interposed a *pro se* Answer alleging partial payments and "hardship". On October 2, 2025, counsel for Respondent submitted a Notice of Appearance and filed the within motion. Subsequently, on March 13, 2026, counsel for Petitioner was relieved by Court Order. Petitioner failed to appear and oppose the motion to be relieved, despite a facially valid affidavit of service. This proceeding was then adjourned to June 25, 2026, for a hearing on the instant motion. The Court mailed postcards to Petitioner, informing it of the newly scheduled date. Despite service of the postcard, Petitioner failed to appear in Court. To date, Petitioner has not submitted any papers opposing this motion.

Amended Answer

Counsel for Respondent moves this Court to Amend the *pro se* Answer to include the following defenses and counterclaims: failure to state a cause of action as Petitioner has demanded rent for a period in which the building was occupied in a manner contrary to its Certificate of Occupancy and seeks rents that were paid; defective rent demand in that it seeks rental arrears for a period of time in which the building was occupied in a manner contrary to its Certificate of Occupancy, and thus in violation of MDL §301, MDL§302 and it seeks rents already paid; occupancy contrary to Certificate of Occupancy thus, Petitioner is precluded from collecting rent for the: warranty of habitability; rent impairing violations; and attorneys' fee.

Pursuant to CPLR § 3025(b), a party is permitted to “amend [their] pleading or supplement it...at any time by leave of Court or by stipulation of all parties.” Courts freely grant leave to amend a pleading “unless the amendment proposed is, as matter of law, palpably improper, or it prejudices or surprises the opposing party.” (*Coleman v Worster* 140 AD3d 1002 [2016]. The burden of “demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion.” (*Wells Fargo Bank, N.A. v Spatafore*, 183 AD3d 853 [2020]). Here, Petitioner offers no opposition to demonstrate prejudice, surprise or that the Proposed Amended Answer is patently devoid of merit. (*Reyes v Brinks Global Services USA, Inc.*, 112 AD3d 805 [2nd Dept 2013]). Based upon the foregoing, Respondent is granted leave to interpose her Amended Answer. Such Amended Answer shall be deemed served and filed *nunc pro tunc*.

MDL §§301 & 302

Respondent argues that summary judgment must be granted based upon the open OATH/ECB violation, which conclusively resolves that the occupancy of the building does not conform with Certificate of Occupancy requirements violating §28-218.3.2 of the New York City Administrative Code, entitled “Changes inconsistent with existing certificate of occupancy.,” §28-218.3.2 of the New York City Administrative reads:

No change shall be made to a building, open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building or open lot or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new or amended certificate of occupancy.

MDL § 301(1) provides:

[n]o 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 § 302(b) provides:

[n]o 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.”

Summary Judgment

Summary judgment is appropriate where no triable issues of material fact are present, and judgment can be entered as a matter of law. (CPLR §3212(b); Andre v Pomeroy, 35 NY2d 361 [1974]). A motion for summary judgment shall be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficient to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR. §3212[b]). To make a *prima facie* showing of entitlement to judgment as a matter of law, a party must present sufficient evidentiary proof in admissible form to demonstrate the absence of any triable issue of material fact (Weingrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once the moving party has made such a showing, the burden shifts to the party opposing the motion to supply proof in admissible form sufficient to establish an issue of material fact that requires resolution by a trial. (Zuckerman v New York, 49 NY2d 557 [1980]). Failure of the party opposing summary judgment to present sufficient evidence of a factual issue requires that the motion be granted. (Ferrante v American Lung Assn, 90 NY2d 623[1997]). Here, Respondent has presented *prima facie* evidence that Petitioner is in violation of the use of its Certificate of Occupancy Respondent submits the Certificate of Occupancy reflecting the following permitted uses of the subject building: floor one-a doctor's office and seven families; floors two through six-eight families. Respondent also submits a NYC Department of Buildings OATH/ECB Violation Details, violation #34767265K, with a violation date of April 7, 2009. The OATH/ECB report states : "Occ contrary to that allowed by the C of O or DOB records." This report was printed on or about October 2, 2025, and states that the violation remains open. In opposition to Respondent's *prima facie* showing of entitlement to summary judgment, Petitioner fails to submit any evidence suggesting that the violation does not exist or has been corrected. Accordingly, Respondent's motion for summary judgment is granted. Petitioner may not maintain this nonpayment proceeding based upon its violation of MDL §301. Pursuant to MDL §302, this proceeding is dismissed. (In Matter of 49 Bleecker, Inc.v. Gation, 157 AD3d 619, [1st Dept 2018]).

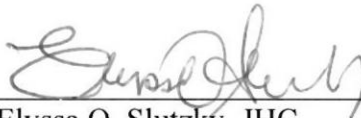
WHEREFORE, it is

ORDERED that Respondent's motion for leave to interpose an Amended Answer is **GRANTED**, and the Amended Answer is deemed served and filed, *nunc pro tunc*, and it is further

ORDERED that Respondent's motion for summary judgment is **GRANTED** and this proceeding is **DISMISSED**.

This constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
June 29, 2025



Elyssa O. Slutzky, JHC