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2021-04-23

817 W. End Co. LLC v. Delong

Recommended Citation

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART C   Motion Seq. # 2

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817 WEST END CO., LLC   L&T Index # 71131/18

               Petitioner-Landlord

    -against-

FRANCES DELONG   **DECISION/ORDER**
817 West End Avenue, Apt. 3E
New York, New York 10025

               Respondent-Tenant   Hon. Clifton A. Nembhard

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion for an order granting her partial summary judgment pursuant to CPLR 3212 and dismissing the petition with prejudice pursuant to CPLR 3211(a)(7).

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits	_____
Replying Affidavits	_____
Exhibits	_____
Other	_____

Upon the foregoing papers, the Decision / Order on this motion and is as follows:

Background

Petitioner commenced the instant nonpayment proceeding in August 2018 to recover rent arrears from November 2016 to August 2018 totaling $39,204.74. Prior to commencement petitioner served a Five Day Notice seeking the sum of $37,379.47 calculated as follows: $476.28 balance in November 2016; $1,690.85 a month from December 2016 to March 2017; $1,818.10 from April 2017 to December 2017 and $1,950.27 a month from January 2018 to July 2018. Frances Delong ("respondent") interposed a pro se answer asserting that the rent, or part of the rent had already been paid to petitioner. Respondent failed to appear on the initial court date and

petitioner was awarded a default judgment for the rent sought in the petition. On October 25, 2018, the Court granted respondent's order to show cause and vacated the default judgment. On or about September 6, 2019, respondent served and filed an amended answer asserting seven affirmative defenses and two counterclaims. She now moves for partial summary judgment and dismissal of the petition with prejudice.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 321 [Ct App 1986]. If such a showing is made the burden shifts to the opponent of the motion to establish the existence of material issues of fact sufficient to require a trial. *Friends of Animals, Inc. v. Associated Furs Mfrs., Inc.*, 46 NY2d 1065 [Ct App 1979].

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are afforded a liberal construction, the allegations of the complaint are accepted as true, and the plaintiff is accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 NY2d 83 [Ct App 1994]. In deciding a motion to dismiss the test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments". *Pace v. Perk*, 81 AD2d 444 [Ct App1981].

Respondent seeks dismissal of the proceeding on the grounds that the rent demand is fatally defective. A proper rent demand is a statutory prerequisite to a nonpayment proceeding and an element of a landlord's prima facie case. RPAPL 711(2); *EOM 106-15 217th Corp. v. Severine, 62 Misc. 3d 141* (A) [App Term 2nd Dept 2019]. A demand not only warns the tenant of an impending law suit but also affords her the opportunity to pay any rent arrears in order to avoid litigation. *See, J.D. Realty Assocs. v Jorrin*, 166 Misc2d 175 [Civ Ct NY 1995]. Therefore, the demand must set forth the approximate good faith amount of rent owed and fairly apprise the tenant of the periods for which rent is allegedly due and in what amounts. *Schwartz v. Weiss-Newell*, 87 Misc2d 558 [Civ Ct NY 1976]. A rent demand is not a pleading and cannot be amended. Thus, a nonpayment proceeding based on a defective rent demand must be dismissed without prejudice. *Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786 [Ct App 1980].

Here respondent argues that the rent demand is not a good faith approximation of what she owes because it fails to credit her for payments made and fails to reflect her Senior Citizen Rent Increase Exemption ("SCRIE"). Specifically, respondent avers that she paid the rent for December 2016, January 2017, March 2017 through June 2017, August 2017, January, 2018, February 2018 and April 2018 through August 2018. In addition, the SCRIE benefit froze her rent effective February 2018. In support of her contention, respondent submits copies of the cancelled checks and a letter from the Department of Finance dated January 8, 2019 indicating that her appeal was approved and as a result, her rent on December 31, 2017 became her SCRIE frozen rent through December 31, 2019.

As an initial matter, the Court finds respondent's argument regarding petitioner's failure to account for her SCRIE subsidy unavailing. The SCRIE letter retroactively froze respondent's rent at $1,818.10 seven months after petitioner commenced this proceeding. Consequently, at the time the rent demand was served, the $1,950.27 sought for February 2018 through August 2018 was in fact respondent's rent.

Petitioner's failure to credit respondent's payments however renders the demand defective. It is a general principle that a payment of rent intended for a certain period must be applied to that period. Consequently, a landlord is not entitled to apply tenant's earmarked checks as it sees fit. *Kew Realty Co. v. Charles* NYLJ, June 3, 1998 at 27 col 2 [App Term 2nd Dept 1998]. Here all of respondent's cancelled checks are clearly earmarked for the months intended. Despite this, petitioner did not apply them as respondent intended. As a result, the demand is not a good faith approximation of the months owed by respondent.

Petitioner's argument that dismissal is warranted because the pleadings fail to state the regulatory status of the subject premises is also persuasive. Pursuant to RPAPL § 741, a petition must state the facts upon which the proceeding is based. Where a tenancy is subject to a specific type of regulation the petition must set forth the tenant's regulatory status, because it may determine the scope of the tenant's rights. *See, Matter of [*37] Volunteers of Am.-Greater N.Y., Inc. v Almonte*, 65 AD3d 1155 [2nd Dept 2009]. A petition that fails to satisfy this requirement is subject to dismissal. *MSG Pomp Corp. v. Doe*, 185 AD2d 798 [1st Dept 1992]. The petition here alleges that respondent's apartment is not subject to rent control as a result of luxury decontrol and the expiration of the prior decontrol lease. However respondent alleges, and petitioner does dispute, that she has lived in the apartment since 1969. The DHCR records also indicate that it was initially registered as rent controlled in 1984 and was rent controlled at the time this proceeding was commenced. Moreover, there is nothing in the registration to suggest that there was a change in tenancy since 1984.

As to the second branch of the motion, the finds that respondent is entitled to partial summary judgment. Even if the demand were allowed to stand, it seeks stale rent. Laches, an equitable defense based on fairness, bars the enforcement of a right where there has been an unreasonable delay that results in prejudice. *Dante v. 310 Assocs*, 121 AD2d 332 [1st Dept 1986]. To establish the defense the respondent must prove that: (1) her conduct gave rise to this proceeding; (2) petitioner delayed in asserting its claim for relief despite the opportunity to do so; (3) she lacked knowledge or notice that the petitioner would assert its claim; and (4) she will be prejudiced if petitioner is accorded the relief it seeks. *Dedvukaj v. Madonado*, 115 Misc2d 211 [Civ Ct Bx 1982]. Satisfaction of these conditions raises the presumption that the landlord is guilty of laches. To rebut the presumption, the petitioner must show a reasonable excuse for its delay. If petitioner fails to do so, it will be barred from obtaining a judgment of possession as it relates to the stale rent. *Dedvukaj v. Madonado, supra.*

Applying the foregoing principles to the instant proceeding, the Court finds that respondent has established a prima facie case for laches. The first condition is clearly met as petitioner commenced this proceeding alleging that respondent failed to pay her rent as due. The second condition is established by the fact that petitioner is seeking rent some twenty-one months after it allegedly started to accrue and the absence of any impediment to it bring a lawsuit earlier. Next,

respondent avers that she had no idea that petitioner would be starting this case. Lastly, respondent is a 79 year old senior citizen whose source of income consists of social security, which is not enough to cover her monthly rent, and a part time job. She therefore is not able to pay the accumulated arrears. *Rota Holding Corp. No.2 v. Shea*, 21 Misc3d 1127(A) [Civ Ct NY 2008].

Conclusion

Based on the foregoing, the motion is granted in its entirety. The proceeding is dismissed for lack of a proper rent demand and for failure to properly describe the subject apartment. Said dismissal is without prejudice. Petitioner however is precluded from seeking a possessory judgment for rental arrears which accrued prior to May 2018.

SO ORDERED

This constitutes the decision and order of the court.

HON. CLIFTON A. NEMBHARD

Date: April 23, 2021
    New York, New York   Hon. Clifton A. Nembhard, JHC