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Bronx Park Phase II Preserv. LLC v. Simaga

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART K

BRONX PARK PHASE II PRESERVATION LLC L&T Index No.: 040737/2018

Petitioner,

DECISION/ORDER

-against-

BASIRU SIMAGA

Respondents,

Address: 2000 Valentine Avenue
Apt 615
Bronx, New York 10457

Recitation, as required by CPLR § 2219 (a), of the papers considered in review of Respondent's Motion.

PAPERS	NUMBERED
Respondent's Notice of Motion; Attorney Affirmation; Affidavits in Support; Memorandum of Law; & Exhibits ("A" – "J")	1, 2, 3, 4, 5
Petitioner's Affirmation in Opposition & Exhibits ("1" - "2")	6, 7
Respondent's Memorandum of Law in Reply	8

Upon the foregoing cited papers, the Decision and Order on Respondent's Motion is as follows:

BACKGROUND

Bronx Park Phase II Preservation LLC ("Petitioner") commenced the within summary holdover proceeding against Basiru Simaga ("Respondent") seeking possession of 2000 Valentine Avenue, Apartment 615, Bronx, New York 10457 ("the subject premises") on the ground that the Respondent violated a substantial obligation of his tenancy. Specifically, Petitioner asserts that Respondent's lease included a conditional limitation which provided for its early termination where the Respondent failed to maintain his Section 8 benefits through the CVR New York Westchester HCV Program. The predicate notices and the facts contained therein

assert that the Respondent triggered this conditional limitation when he was terminated from the Section 8 Program.

Respondent, represented by counsel, moves to dismiss the instant proceeding pursuant to CPLR § 3211 (a)(1) and (a)(7). Respondent asserts that this proceeding should be dismissed as the grounds of this holdover proceeding have been cured. For the reasons cited below, Respondent's motion is GRANTED.

DISCUSSION

a. *The General Standard on a CPLR § 3211 (a)(1) Motion*

CPLR § 3211(a)(1) permits dismissal of an action where “a defense is founded upon documentary evidence.” A motion to dismiss under CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes the factual allegations contained in the pleadings: conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]). Documents that have traditionally qualified for evidentiary consideration under CPLR § 3211(a)(1) are those which are a) unambiguous; b) of undeniable authenticity; and c) reflect content that is essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, Inc., LLC*, 171 AD3d 189 [1st Dept 2019]; *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept.1995]; *Koziatek v SJB Dev. Inc.*, 172 AD3d 1486 [3d Dept 2019]; *Mehrhof v Monroe-Woodbury Central School District*, 168 AD3d 713 [2d Dept 2019]). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 AD3d 1157 [2d Dept 2019]). Factual affidavits, however, do not constitute documentary evidence within the meaning of the statute (*Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]).

In considering the documents offered by the movant to negate the claims in a complaint or petition, a court must adhere to the concept that the allegations in the pleadings are presumed to be true, and that the pleading is entitled to all reasonable inferences (*Leon v Martinez*, 84 NY2d 83 [1994]). However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence (*Robinson v Robinson*, 303 AD2d 234 [1st Dept 2003]).

b. *Standard on a CPLR § 3211 (a)(7) Motion*

The standard on a CPLR § 3211[a][7] motion is “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602 [1st Dept 2016]). In its review, the

court takes the facts as alleged in the pleadings as true and accords the plaintiff or petitioner the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d at 87-88; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]).

“In deciding such a pre-answer motion, the court is not authorized to assess the relative merits of the [petitioner’s] allegation against the [respondent’s] contrary assertions or to determine whether or not [petitioner] has produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). However, “allegations consisting of bare legal conclusions, as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

c. The Law and Its Application

In the matter at bar, Respondent’s Section 8 benefits from the CVR New York Westchester HCV Program (hereinafter “CVR”) were terminated in 2017. Respondent now asserts in his moving papers that the eviction remedy herein sought by the Petitioner does not lie since Respondent’s Section 8 subsidy was restored. Petitioner stands in opposition. Although Petitioner does not dispute the fact that Respondent’s Section 8 benefits were restored, it asserts that the Respondent has not cured all claims alleged in the Petitioner’s notices since there is approximately \$3,655 outstanding in HAP arrears which accrued during the time his Section 8 subsidy was terminated.

Since the documentary evidence establishes that the Respondent’s section 8 subsidy was reinstated, the Court dismisses the instant holdover proceeding (*see 53-63 Partners, L.P. v Paez*, 63 Misc.3d 158 [A] [App Term 1st Dept 2019]; *DU 1st Realty Co. LP v Robinson*, 35 Misc 3d 138[A] [App Term, 1st Dept 2012]).

This Court’s recent decision in an unpublished case in the matter of *Bronx Park Phase II Preservation, LLC v. Sakanoko*, NYLJ, Feb. 20, 2020 at p.21, col.1 [Civ Ct, Bronx County 2020] does not call for a different result. In that proceeding, the landlord’s predicate notices noted that the tenant’s lease contained a conditional limitation which provided for its early termination when the tenant lost its Section 8 subsidy. Those predicate notices, however, cited 24 CFR 982.310 (d)(1)(iv) as an additional basis to terminate the tenancy. This provision of the federal regulations permits a landlord to terminate a tenancy for good cause where there is “a business or economic reason for termination of the tenancy.” Although the tenant in that proceeding similarly restored his Section 8 subsidy during the pendency of the

proceeding, the Court declined to grant the tenant's motion pursuant to CPLR § 3211 and CPLR § 3212 by reasoning that the tenant only cured one of the two claims in the predicate notices: the landlord had a remaining claim under 24 CFR 982.310 (d)(1)(iv).

In *Bronx Park Phase II Preservation, LLC v. Sakanoko*, the claim under 24 CFR 982.310 (d)(1)(iv) was viable because the landlord suffered a significant economic loss in the sum of \$27,437 in unpaid HAP payments; the landlord could not recover the unpaid subsidy from the PHA; the landlord was barred from collecting the unpaid Section 8 subsidy from the tenant due to federal regulations (24 CFR 982.310 [(b)[1)]); and a question remained as to whether the tenant engaged in wrongful and/or purposeful acts that ultimately lead to the termination of his benefits and the loss of his subsidy. Thus, in that proceeding, the landlord could yet prove at trial that the tenant's actions lead to the loss of the unpaid HAP payments; that such actions provide "a business or economic reason for termination of the tenancy"; and that the same warrant the remedy of eviction. The tenant, in turn, had two options. Litigate the underlying claim under 24 CFR 982.310 (d)(1)(iv) and challenge the assertion that he engaged in wrongful and/or purposeful acts. Or, in the alternative, provide for a cure by paying the unpaid HAP payments even though the tenant was not legally obligated to do so under the law.

In contrast, Petitioner failed to cite 24 CFR 982.310 (d)(1)(iv) as an additional basis to terminate the tenancy herein. Therefore, given the above, Respondent's motion to dismiss the instant proceeding is granted.

CONCLUSION

Accordingly, it is hereby:

ORDERED, those prongs of Respondent's motion seeking dismissal are GRANTED.

This constitutes the Decision/Order of this Court.

Dated: Bronx, New York
 March 23, 2020



HON. KRZYSZTOF LACH
Judge, Housing Court