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Francis v. Stein

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

-----X
SADE C FRANCIS,

Petitioner,

-against-

MANNY STEIN; 1229-1273 REALTY LLC; the
DEPT. OF HOUSING PRESERVATION
AND DEVELOPMENT (DHPD),

Respondents.
-----X

L&T Index No.
30042/19

Motion Seq. No. 1

DECISION/ORDER

Present:

Hon. HOWARD J. BAUM
Judge, Housing Court

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the motion by Respondents Manny Stein and 1229-1273 Realty LLC seeking the dismissal of the proceeding:

Papers

Numbered

Notice of motion, Affirmation and Exhibit annexed.....	<u>1</u>
Affidavit in Opposition	<u>2</u>
Reply Affirmation	—

After oral argument and upon the foregoing cited papers, the decision and order on this motion is as follows:

Sade Francis (“Petitioner”) commenced this HP proceeding seeking an order to correct violations she alleged existed in the apartment that is the subject of this proceeding, the imposition of civil penalties if the existing violations were not corrected in a timely manner and a finding, pursuant to NYC Admin Code §§ 27-2005(d), that alleged acts and/or omissions by Respondent Manny Stein and/or Respondent 1229-1273 Realty LLC (“Respondents”) constitute

harassment as well as various forms of relief to which she may be entitled if such a finding is made. The New York City Department of Housing Preservation and Development (“DHPD”) is also a respondent.

Petitioner, a self-represented litigant at the commencement of this proceeding,¹ alleged within her petition that the apartment in which she resides is in a multiple dwelling. Further, she has alleged several conditions within the apartment in need of repair. Additionally, as to her claim that she has been harassed, Petitioner alleges Respondents have repeatedly failed to make repairs in the apartment in a timely manner and that violations of record have been issued.²

Petitioner’s cause of action seeking the entry of an order to correct was resolved on July 17, 2019 with the entry, on consent, of an order to correct. This consent order had the effect of bifurcating the harassment cause of action from the other relief sought in the petition.

In this motion, Respondents seek the dismissal of the harassment claim based on their assertion that, pursuant to CPLR 3211(a)(3), Petitioner “has no standing to sue” and/or, pursuant to CPLR 3211(a)(7), Petitioner has failed to state a cause of action. The factual basis of the motion is an e-mail sent by Petitioner, dated December 11, 2019, in which she states that she and her daughter no longer live in the apartment. Thus, Respondents argue that if Petitioner does not

¹ Petitioner retained an attorney by the first date this proceeding was on the court’s calendar, July 17, 2019.

² Petitioner has also checked off the boxes, in the form provided to self-represented tenants to fill out when filing a harassment HP proceeding, pursuant to NYC Admin Code § 27-2005(d), alleging Respondents have used force or implied the use of force against her (corresponding to the definition of harassment stated in NYC Admin Code § 27-2004[a][48][a]) and failing to comply with a vacate order by failing to correct the conditions that led to the issuance of the vacate order (corresponding to the definition of harassment stated in NYC Admin Code § 27-2004[a][48][c]). However, no specific facts have been stated in the petition in support of these alleged bases for a finding of harassment.

reside in the apartment she lacks the standing to maintain this proceeding, and that she has therefore failed to state a cause of action,³ and this proceeding should be dismissed.

In opposition, Petitioner's attorney states in a memorandum of law that, despite what was stated in the e-mail, Petitioner has not surrendered the apartment or removed her possessions and maintains the apartment as her home. However, no affidavit has been submitted by Petitioner or anyone else with personal knowledge of these facts. Instead, Petitioner has submitted a copy of a February 5, 2020, stipulation of settlement in a non-payment proceeding between the parties,⁴ executed by Petitioner as evidence that she is still defending her right to the apartment.

Discussion

Preliminarily, CPLR 3211(a)(3) states that a proceeding should be dismissed where "the party asserting the cause of action has not legal capacity to sue." This provision, which is one of the grounds under which Respondents assert Petitioner's harassment cause of action should be dismissed, is frequently confused with, but distinct from, the concept of a petitioner lacking standing to maintain a claim. *Graziano v. County of Albany*, 2 NY3d 475 (2004); *Community Bd.*

³ Respondents have not presented any basis, other than their assertion that she lacks standing, in support of their assertion that Petitioner has failed to state a cause of action.

⁴ The stipulation of settlement in the non-payment proceeding, known as *1225-1273 Realty Corp. v. Francis*, Bronx County L&T Index No. 54975/19, includes provisions in which the parties agreed that a sum certain was owed in rent arrears through February 29, 2020; that the arrears were to be paid by March 5, 2020; that several conditions in the apartment were allegedly in need of repair; that access for repair work was to be provided on specified dates; and that either party could restore the proceeding to the court's calendar in the event the other side defaulted on the agreement.

7 of Borough of Manhattan v. Schaffer, 84 NY2d 148 (1994); *Security Pacific Nat. Bank v. Evans*, 31 AD3d 278 (1st Dept 2006).

The legal capacity to sue, as used in CPLR 3211(a)(3), relates to a party's status, for example "that of an infant, an adjudicated incompetent, a trustee, or certain governmental entities..." *Security Pacific Nat. Bank v. Evans*, 31 AD3d 278 (1st Dept 2006). In contrast, standing involves a determination as to whether the "party seeking relief [in a court proceeding] has a sufficiently cognizable stake in the outcome" to have a right to come to court to ask for a judicial resolution of the matter. *Graziano v. County of Albany*, 2 NY3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148 (1994); see also, *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 30 NY3d 377 (2017). "The standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions." *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148, 155 (1994), citing *Cuomo v. Long Is. Light. Co.*, 71 NY2d 349 (1988).

Although Respondents have stated one of the grounds for the dismissal of the harassment cause of action is CPLR 3211(a)(3), their arguments in support of the motion are based on Petitioner's lack of standing. Accordingly, considering Respondents have not presented an argument for this proceeding to be dismissed based on Petitioner's lack of capacity to sue, the motion is denied to the extent it seeks dismissal pursuant to CPLR 3211(a)(3).

Further, under the circumstances of this proceeding, Respondents' assertions that Petitioner lacks standing to maintain the proceeding, in effect, that her claim is no longer justiciable if she has vacated the premises, and that she has therefore failed to state a cause of

action, are unavailing. Respondents cite to an unreported decision in *Robyn v. Acona*, New York County L&T Index No. 1566/19, in which the court, citing to *Elshiekh v. 76th St. Owners Corp.*, 36 Misc 3d 139(A) (App Term 2d, 11th & 13th Jud Dist 2012) dismissed an HP proceeding, like this, with a claim of harassment, because there was no dispute the petitioner had vacated the premises. The decision, in a short form order, does not state any other facts related to the case.

Respondents' reliance on *Robyn v. Acona*, *supra*, is misplaced. Here, there is a dispute as to whether Petitioner has relinquished possession of the premises. Although Petitioner did not submit an affidavit from anyone with personal knowledge to contradict what she said in her December 11, 2019 e-mail, Respondents have not disputed that she is actively litigating a non-payment proceeding in Housing Court and signed a stipulation of settlement on February 5, 2020, approximately 2 months after the e-mail.

Moreover, contrary to Respondents' argument, *Elshiekh v. 76th St. Owners Corp.*, 36 Misc 3d 139(A) (App Term 2d, 11th & 13th Jud Dist 2012), is distinguishable from the issues in dispute in this motion. In *Elshiekh*, the court ruled that a tenant who has been lawfully evicted lacks the standing to maintain an HP proceeding seeking an order to correct violations in the apartment from which the tenant was evicted. Thus, in accordance with *Graziano v. County of Albany*, and *Community Bd. 7 of Borough of Manhattan v. Schaffer*, *supra*, the court recognized that an evicted tenant lacks a sufficiently cognizable stake in whether violations in an apartment from which he has been evicted are corrected to seek a judicial order requiring the correction of the violations.

This ruling in *Elshiekh* is inapplicable to Petitioner's claim of harassment. Unlike an evicted tenant's lack of entitlement to the entry of an order to correct, Petitioner's current

physical possession of the apartment, alone, is not determinative of whether she has standing to maintain this proceeding to obtain the relief she is seeking on her claim that she has been harassed pursuant to NYC Admin Code § 27-2005(d).

Local Law 7 of 2008, which included the cause of action for harassment codified in NYC Admin Code § 27-2005(d),⁵ was enacted as a remedial statute to bar acts and omissions by a landlord intended to cause a person lawfully entitled to occupy a dwelling to vacate the dwelling or surrender or waive any rights in relation to the occupancy. *Aguaiza v. Vantage Properties, LLC*, 69 AD3d 422 (1st Dept 2010); *317 West 89th Street, LLC v. Engstrom*, 36 Misc 3d 1242(A) (Sup Ct NY County 2012).

NYC Admin Code § 27-2004(a)(48), the statutory section that defines what constitutes harassment, pursuant to NYC Admin Code § 27-2005(d), plainly states that a harassment claim may be maintained even if a tenant, such as Petitioner, has vacated the apartment that is the subject of the proceeding. That section of the administrative code states, in pertinent part,

[T]he term “harassment” shall mean any act or omission by or on behalf of an owner that (i) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following acts or omissions, [including] (b-2) repeated failures to correct hazardous or immediately hazardous violations of this code or major or immediately hazardous violations of the New York city construction codes, relating to the dwelling unit or the common areas of the building containing such dwelling unit, within the time required for such corrections. NYC Admin Code § 27-2004(a)(48)(b-2). [Emphasis added].

⁵ Local Law 7 of 2008 also added NYC Admin Code § 27-2004(a)(48); and amended NYC Admin Code §§ 27-2115 and 27-2120 to include provisions related to the newly created harassment cause of action.

Moreover, NYC Admin Code § 27-2004(a)(48) states that where the person filing a harassment claim resides in a multiple dwelling (as Petitioner has alleged by checking off the box on the form petition that states she does “not live in a one or two family house”), there “shall be a rebuttable presumption [that the type of acts or omissions enumerated within the statutory section] were intended to cause such person to vacate such dwelling unit or surrender or waive any rights in relation to such occupancy.”

Thus, considering that the repeated failure by an owner to correct hazardous or immediately hazardous violations of the Housing Maintenance Code, as has been pleaded by Petitioner, is included in the definition of harassment and if this alleged failure can be established by Petitioner at trial there is a rebuttable presumption that it was intended to cause her to vacate the apartment, there is no basis to conclude that Petitioner has not stated a claim pursuant to NYC Admin Code § 27-2005(d). Moreover, under these circumstances, even if Respondents’ assertion that Petitioner is not currently residing in the premises is true, it can hardly be said she no longer has a sufficiently cognizable stake in the outcome of her harassment claim to have a right to come to court to ask for a judicial resolution of the matter (*Graziano v. County of Albany and Community Bd. 7 of Borough of Manhattan v. Schaffer, supra*) when the legislature enacted Local Law 7 to specifically address claims by a lawful occupant of an apartment that acts or omissions by an owner caused them to vacate the apartment and authorized lawful occupants to “apply to the housing part for an order directing the owner to appear before the court” for an

adjudication of such harassment claims in the context of this type of HP proceeding (NYC Admin Code § 27-2115[h][1]).⁶

Accordingly, even if Petitioner has vacated the subject premises while this proceeding was pending, she satisfies the two-part test for determining standing in this proceeding in that she has alleged an “injury in fact” within her petition and the injury for which she is seeking a remedy plainly falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which this proceeding was commenced. *See, New York State Assn. of Nurse Anesthetists v. Novello*, 2 NY3d 207 (2004), citing *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761 (1991) and *Matter of Colella v Board of Assessors*, 95 NY2d 401 (2000).

For these reasons, Respondents’ motion is to dismiss this proceeding on the ground of Petitioner’s lack of standing and failure to state a cause of action is denied.

This proceeding is placed back on the court’s calendar on May 14, 2020 at 9:30 am, Part H, (Room 590) for the parties to appear before the court for a preliminary trial conference and to choose a trial date if this proceeding is not otherwise settled. Considering the court is currently working on a reduced schedule through at least March 27, 2020, and that date may be extended, as circumstances require, to best secure everyone’s health and safety, the parties should confirm that the court will be hearing this proceeding on May 14th before coming to court on that day.

⁶ This Decision/Order makes no determination as to what may be included within the “compensatory damages” that may be awarded to a lawful occupant of a dwelling upon a finding that she has been harassed by an owner. *See*, NYC Admin Code § 27-2115(o)(i).

This constitutes the decision and order of the court.

Dated: Bronx, New York
March 23, 2020

A handwritten signature in cursive script, appearing to read 'H. Baum', written over a horizontal line.

**HON. HOWARD J. BAUM,
J.H.C.**

HOWARD J. BAUM
JUDGE, HOUSING COURT