2020-03-24

Kushner Vill. 329 E. 9th LLC v. Winkler

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, HOUSING PART F

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KUSHNER VILLAGE 329 EAST 9TH LLC

Petitioner, Landlord,

-against- **Index No. L&T 87375/15**
DECISION AND ORDER

UTA WINKLER,

Respondent-Tenant

"JOHN DOE" & "JANE DOE"

Respondents-Occupants.

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FRANCES A. ORTIZ, JUDGE

Recitation as required by CPLR 2219(a), of the papers considered in the review of the petitioner's motion to restore and respondent's cross motion to dismiss and for summary judgment on counterclaims.

Papers	**Numbered**
Notice of Motion & Affirmation…….....	1
Notice of Cross Motion, Affirmation & Affidavit…….....	2
Affirmation & Affidavit in Opposition to Cross Motion.....	3
Affirmation & Affidavit in Reply……..……..……	4

Upon the foregoing cited papers, the Decision/Order of this Court on these consolidated motions is as follows:

This a non-payment proceeding that was initially filed in December 2015. On June 13, 2017 respondent agreed per two attorney stipulation to pay petitioner post-petition use and occupancy of $19, 655.52[1] by July 14, 2017. Subsequently, the matter was settled on January

[1] The stipulation does not indicate the specific time frame for the $19,655.52. Per the 2015 petition the monthly rent for the premises was $1,637.96.

12, 2018 pursuant to another stipulation. The terms indicated that the parties agreed upon a contractor performing remediation[2] work at the premises with access on February 2018. Petitioner agreed to compensate respondent for a hotel stay as may be required during the work. The case was marked off calendar.

PETITIONER'S MOTION IN CHIEF

Then, on April 22, 2019 petitioner moved to restore the matter, amend the petition through April 2019, and for final judgment and issuance of a warrant of eviction. Petitioner in the motion claimed that respondent breached the June 13, 2017 stipulation because she did not pay on going use and occupancy, although she paid the agreed $19, 655.52. *(Mironenko Affir'm ¶ 9).* However, upon this Court's review of that stipulation, there is no language in the stipulation requiring ongoing payment of use and occupancy. On default of respondent the motion to restore the matter was granted per order of Judge Michelle Schreiber dated April 22, 2019. The order restored the matter to the calendar on May 7, 2019. Neither side appeared on May 7, 2019, as a result the case was dismissed.

The instant motion by petitioner seeks to vacate the dismissal. According to counsel for petitioner, there was a miscommunication with respondent's newly retained counsel. Based on the miscommunication, their stipulation adjourning the matter to June 4, 2019 was not filed with the court resulting in the default dismissal. *(Mironenko Affir'm ¶s 7 & 8).*

[2] According to the respondent's Second Affirmative Defense of breach of warranty of habitability in her amended answer, there was a flood in her kitchen on or about November 25, 2013. The flood consisted of gushing water from construction in the above apartment. This caused her kitchen ceiling to collapse.

A motion court's determination to vacate a default judgment is a discretionary one based on common law interpretation of statutory law. *Deutsche Bank Nat'l Tr. Co. v. Kirschenbaum, 179 A.D.3d 407 (1st Dep't 2020) citing Nash v. Port Auth. of N.Y. & N.J., 22 N.Y.3d 220, 226 (2013).* If a party shows a reasonable excuse for a default and a meritorious cause of action, the dismissal may be vacated. *Grant v. Rattoballi, 57 A.D.3d 272 (1st Dep't 2008); (CPLR 5015).* Here, petitioner's attorney in his affirmation has provided a reasonable excuse for the default on May 7, 2019 in that there was a miscommunication between the attorneys. This resulted in a failure to file the adjournment stipulation. *(Mironenko Affir'm ¶s 7 & 8).* Petitioner has provided a reasonable excuse for the default and a facially meritorious claim[3] to the non-payment petition where he can seek to amend the petition to date. *(Mironenko Affir'm ¶s 13 & 16 - to initial motion to restore dated April 22, 2020).* Under these circumstances, the petitioner's motion to restore the matter and vacate the dismissal is granted. Accordingly, the default dismissal is vacated.

RESPONDENT'S CROSS MOTION FOR DISMISSAL

Respondent opposes petitioner's motion and cross moves for dismissal and summary judgment on her counterclaims. Specifically, respondent seeks dismissal based on documentary evidence *(CPLR 3211(a) (1))* and *Multiple Dwelling Law (MDL) §302*, directing disgorgement of all amounts paid pursuant to court order and use and occupancy, vacating the prior use and occupancy payments pursuant to recently enacted changes to the *RPAPL*, and granting summary judgment to her on issues of liability as to the counterclaims imposed in her amended answer.

[3] Any substantive defenses to the underlying non-payment in the answer and cross motion will be addressed in the cross motion.

The basis of respondent's cross motion to dismiss is that petitioner may not collect rent for the subject premises because the subject building does not have a proper certificate of occupancy ("C of O") from the New York City, Department of Buildings ("DOB"). Based on the New York City, Department of Finance Tax Assessment records, the subject building was built in 1900. Under *MDL §301, (*1),

> 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, except that no such certificate shall be required in the case of:

and *MDL §301 (1) (b)* states,

> b. Any old-law tenement, or any class A multiple dwelling erected after April twelfth, nineteen hundred one, which was occupied for two years immediately before January first, nineteen hundred nine, and in which no changes or alterations have been made except in compliance with the tenement house law or this chapter, or wherein:
> (1) two or more apartments are combined creating larger residential units, and
> (2) the total legal number of families within the building is being decreased, and
> (3) the bulk of the buildings is not being increased….

Additionally, *MDL §302 (1) (b),* indicates*:*

> b. No 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 said premises for nonpayment of such rent.

Specifically, respondent contends that a permanent building-wide C of O is required due to the construction of a new floor with two new penthouses on the top of the building. According to DOB, Code Notes, existing buildings must obtain a new or amended C of O when there is work that changes the use, egress or occupancy of the building. Buildings built before

1938 aren't required to have a Certificate of Occupancy – unless later alterations changed its use, egress or occupancy. A Temporary Certificate of Occupancy ("TCO") indicates that the property or partial property is safe for occupancy. However, TCOs usually expire every 90 days. If outstanding issues for a permanent C of O have not been completely resolved before the expiration date, then the TCO may be renewed. No one may legally occupy a building until the DOB has issued a C of O or TCO. A final C of O will be issued by DOB when the completed work substantially conforms to the approved plans for a new building or major alteration. *(Exhibit F, www.nyc.gov/buildings).*

Respondent attaches to her motion a series of documents from the DOB website regarding the "job" to add an additional story on top of the existing subject building for one of the sixth floor penthouses. *(Exhibits F & G).* The "job" request was initially made to DOB in February 2011. According to *Exhibit F*, the C of O deadline was February 25, 2011. Instead of issuance of a permanent C of O by the deadline, there have been six TCOs issued for the building's sixth floor. *(Exhibit G).* The most recent TCO expired February 13, 2017. According to that TCO and the five prior TCOs, petitioner was required to fulfill thirteen (13) outstanding requirements to obtain a final certificate of occupancy by February 25, 2011. These thirteen outstanding requirements included: final cost affidavit (PW3), final site survey, street tree sign off, final plumbing sign off, final electrical sign off, final construction sign off, verify tax lot, C of O objection with verification of address/TOPO stamp, violations search, open applications search, folder review, C of O objection "….will need inspection for the rest of floors, before those floors can be given a.." C of O. *(Exhibit F – DOB – B-Scan List of Required Items, pages 2 & 3).*

In sum, respondent asserts that the additional penthouse units have increased the number of units in the subject building which requires a new permanent C of O, regardless of the fact that building was previously "grandfathered in" with no need for a C of O. According to respondent, this is especially necessary when there has been a complete restructuring of the building's stability, firestopping, and other items that need to address the increase load of the non-fireproof building.

Petitioner in opposition argues that the subject building was constructed prior to 1938 and as such does not have a requirement for a C of O. *(Exhibit C in opposition – building I card).* According to petitioner, it obtained a temporary C of O for the top floor but as the remaining floors were unaltered, it contends it does not need to obtain a C of O for the continued use of the other floors. However, petitioner's counsel does state that "…at the end of the project, the building would obtain a new certificate of occupancy." *(Hall Affir'm ¶ 19).* Petitioner argues that First Department case law applies the *MDL §302 (1) (b)* bar to the collection of rent and non-payment proceeding, only under three different circumstances[4], which are inapplicable to

[4]All of these First Department cases cited by petitioner pre-date *Chazon LLC v Maugenest, 19 N.Y.3d 410 (2012). Chazon supra* made those three different circumstances or limitations no longer applicable. "[I]n 2012, the Court of Appeals made it clear that no such limitation was mandated under the law in its decision in *Chazon…" 1165 Fulton Ave HDFC v. Goings, 65 Misc. 3d 1210(A) (Bronx Cty, Civ. Ct. 2019).* The Court of Appeals, in *Chazon supra.,* held that the plain text of *Multiple Dwelling Law § 302 (1) (b)* bars not only an action to recover rent, but also an "action or special proceeding . . . for possession of said premises for nonpayment of such rent...," if the multiple dwelling building does not have a certificate of occupancy as required by *Multiple Dwelling Law § 301 (1).* Further, the Court held that there is nothing anywhere else to explain how that can be reconciled with the text of the statute. It simply cannot. The Court went on to say that if it is an undesirable result, the problem is one to be addressed by the Legislature.

respondent. First, the C of O violation must render the subject tenant's unit unlawful. Second, the arrears sought must be only for the illegal units. Third, the tenant is not complicit in the existence and maintenance of the illegal apartment.

Petitioner argues that the subject apartment is lawful since the inception of the building and maintains the same lawful configurations and location. Also, petitioner contends that the rent sought is for a lawful unit. Lastly, petitioner contends that respondent is not the cause of the unlawful apartment so the third circumstance is not applicable. Rene Zemp, an agent of the petitioner, states in her affidavit in opposition that although petitioner applied to add an additional floor to the subject building and filed the appropriate paper work with DOB, the actual construction of the additional floor has not commenced. *(Zemp Affi'd ¶ 4).*

Respondent in reply submits an affidavit from Madeleine Lauve. Ms. Lauve states that she has been to the subject building on or about February 28, 2019. She took pictures of the building mailboxes. These photos show door bells buzzers in the marquis area with labels for Penthouse 1 (PH1) with a name "Sooraj" and Penthouse 2 (PH2) C- with name "Gamboa," D - with name Gamboa and G – with name "Diaz" and PH2 mailboxes *(Exhibit E).* Ms. Lauve states, she walked through the building and she actually saw the penthouse doors but did not actually get into the penthouses. *(Lauve Affi'd ¶8).* However, she states that the penthouse units appear to be occupied as of last February. *(Lauve Affi'd ¶8).*

Respondent's counsel in her reply affirmation states that in late February 2019, she visited the subject building. She personally observed the interior public hallways, building marquis area buzzer listing all the tenants including the two penthouse apartments. She walked

up the stairs, saw the doors leading to the penthouses, and observed new construction in the hallways including a sprinkler system. *(LoGuidice Reply Affir'm ¶s 36 & 37).*

Additionally, respondent in reply contends that there is no issue of fact that adding a whole floor to the subject building requires a certificate of occupancy. Respondent argues that adding a whole floor increases the bulk of a building. Respondent, also, contends that construction finished on the penthouses as far back as five years ago in 2015.

In support of the contention that the petitioner has fully erected the two penthouses on the building's sixth floor and even advertised them for rental as far as 2015, respondent annexes copies of internet screen shot pages of Street Easy for PH1. *Exhibit C* contains seven pages of Street Easy histories as recent as January 2020 showing PH1 at $3,200 monthly rent and PH2 at $4,500 monthly rent, photographs of PH1 bathroom and full description of the one bedroom, one bath penthouse with private patio. Another page shows the unit history for PH1 with rental history as far back as August 24, 2015 at $3,200 monthly, and another page showing a photograph of PH2 bedroom with 10 other screen shot pages of the unit. Respondent also submits pictures of the outside of the subject building from the back yard side showing the top floor units with a different brick face color from the rest of the floors. *(Exhibit D to reply*). Then, *Exhibit G* to the reply shows older photos from www.propertyshark.com showing the original configuration of the subject building without the penthouse units.

Lastly, respondent notes that there is a DOB partial stop work order on the subject building, since May 2018. *(Exhibit F to reply*). Further, this Court takes judicial notice of the DOB website indicating that there is a partial stop work order on the building issued by the Borough Commissioner due to audit objections PW-1 Section 26 and failure to certify correction

of class 1 violation. *(https://www1.nyc.gov/site/buildings/homeowner/certificate-of-occupancy-page).*

DISCUSSION ON CROSS MOTION FOR DISMISSAL

The pleading in a motion to dismiss pursuant to *CPLR 3211* is afforded a liberal construction. *CPLR* 3026. The facts alleged on the complaint or petition must be accepted as true and afford the plaintiff or petitioner the benefit of every possible inference and determine only whether the facts alleged fit within any cognizable legal theory. *Leon v Martinez, 84 N.Y.2d 83 (1994); Fishberger v Voss, 51 A.D.3d 627 (2nd Dep't 2008); Gillings v. New York Post, No. 100138/16, 2018 WL 5812026, at *1 (2nd Dep't. 2018) (quoting Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996 (2nd Dep't 2010).* A dismissal is warranted only if the documentary evidence submitted resolves all factual issues as a matter of law and conclusively establishes a defense to the asserted claim as a matter of law. *CPLR 3211(a) (1); Matter of Walker, 117 A.D.3d 838, 839 (2nd Dep't 2014).*

Furthermore, if the evidence submitted in support of the motion is not "documentary," the motion must be denied. *CPLR 3211(a) (1); Prott v Lewin & Baglio, LLP, 150 A.D.3d 908 (2nd Dep't 2017).* To constitute documentary evidence, the evidence "…must be unambiguous, authentic, and undeniable." *Granada Condominium III Assn. v Palomino, supra at 997.* Documentary evidence can include judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. *Prott v Lewin & Baglio, LLP, supra.*

Here, the documentary evidence submitted by respondent in support of the motion undeniably shows that petitioner has not obtained a permanent nor current temporary certificate

of occupancy for the subject building, despite the documentary proof that a whole top floor has been added to the subject building. *Binn v. Muchnick, Golieb & Golieb, P.C., 180 A.D.3d 598 (1st Dep't 2020*). This Court took judicial notice of information from the DOB and Department of Finance websites on the subject building. Specifically, this Court took notice of the fact that the building was constructed in 1900 and that petitioner did not show compliance with the thirteen (13) outstanding DOB requirements needed to obtain a permanent C of O from the agency, the expired TCOs and the partial stop work order for the building.

Buildings built before 1938 are not required to have a C of O, unless later alterations changed its use, egress or occupancy. Although the subject building was constructed in 1900 and prior to 1938, the addition of an entire floor on the top of the building constitutes a substantial alteration, thereby requiring petitioners to obtain a C of O for the entire building. *W. 47th Holdings LLC v. Eliyahu, 64 Misc. 3d 133(A) (AT 1st Dep't 2019).*

Explicitly, other documentary evidence includes photographs of the exterior of the subject building showing an additional floor and of the door buzzers in marquis area and mailboxes for the penthouse apartments, Street Easy internet advertisement showing screen shot pages of the interior of the penthouse apartments as far back as August 2015, and the DOB documents showing petitioner's request to add the top floor. *(Exhibits C, D & E to reply and Exhibits F & G to the cross motion).*

Further, this documentary evidence resolves all factual issues and conclusively establishes respondent's defense to the petitioner's asserted claim of non-payment of rent as a matter of law. Specifically, the defense establishes that under *Multiple Dwelling Law § 302* no rent is collectible by the petitioner when a building lacks a valid certificate of occupancy

if the dwelling is occupied *in whole or in part* in violation of *Multiple Dwelling Law § 301(1). Multiple Dwelling Law § 302(1)(b).* Therefore, petitioner cannot maintain this non-payment of rent proceeding. *GVS Properties LLC v. Vargas, 172 A.D.3d 466 (1st Dep't 2019); 49 Bleecker, Inc. v. Gatien, 157 A.D.3d 619, 620 (1st Dep't 2018); Chazon, LLC v. Maugenest, supra.*

Nor may the owner of such dwelling maintain an action or special proceeding for possession of the premises for nonpayment of rent, even if the tenant's apartment was not one of the newly created apartments. "If that is an undesirable result, the problem is one to be addressed by the Legislature." *Chazon, 19 N.Y.3d at 416, supra.* The intent of *Multiple Dwelling Law § 302 (1) (b)* is to benefit and further the public interest in the safety of buildings. *Cashew Holdings, LLC v. Thorpe-Poyser, 66 Misc. 3d 127(A) (AT 2nd Dep't 2019).* Accordingly, respondent's cross motion to dismiss based on documentary evidence is granted for the reasons discussed above. The petition is dismissed.

RESPONDENT'S CROSS MOTION FOR SUMMARY JUDGMENT on COUNTERCLAIMS

Respondent cross moves for summary judgment on the issue of liability as to two counterclaims imposed in her amended answer. These include breach of warranty of habitability and legal fees pursuant to *RPL §234.*

Summary judgment is appropriate where the movant establishes the claim by tender of evidentiary proof in admissible form sufficiently to warrant the court as a matter of law to direct judgment in its favor. *Rodriguez v. City of New York, 31 N.Y.3d 312, 317 (2018)*; *Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 N.Y.2d 1065 (1979).* The failure to make

such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986)*. Here, respondent has not submitted evidentiary proof in admissible form sufficiently to warrant the court as a matter of law to direct judgment in her favor on the breach of warranty of habitability and attorney's fees.

First, the counterclaim in the answer as to the breach of warranty of habitability and the affidavit of respondent does not sufficiently establish a basis for judgment in her favor without a trial. Accordingly, the matter is set down for a trial on respondent's counterclaim for breach of warranty of habitability. Second, the request for summary judgment on the attorney's fees counterclaim in the answer is denied without prejudice to submission of respondent's lease showing an attorney's fees provision.

Lastly, respondent seeks disgorgement of all amounts paid pursuant to court order and use and occupancy in this proceeding and vacatur of the prior use and occupancy payments pursuant to recently enacted changes to the *RPAPL*.

While *Multiple Dwelling Law § 302* does not by its own terms provide for the recovery of rent previously paid for in use and occupancy, when read harmoniously with *Multiple Dwelling Law § 325*[5], it does not allow for the recovery of such back rent voluntarily paid. *Goho Equities v. Weiss, 149 Misc. 2d 628, 631 (AT 1st Dep't 1991).* Moreover, respondent in the June 13, 2017

[5] "If a resident of an unregistered dwelling voluntarily pays rent or an installment of rent when he had a right to withhold the same under this subdivision, he shall not thereafter have any claim or cause of action to recover back the rent or installment of rent so paid. A voluntary payment within the meaning of this subdivision means payment other than one made pursuant to judgment in an action or special proceeding." *Multiple Dwelling Law § 325 (2)*

stipulation voluntarily agreed to pay the $19, 655.52 in use and occupancy. Contrary to respondent's contention, there is no language in that stipulation indicating payment of use and occupancy was made without prejudice. Accordingly, respondent's request to disgorge all amounts paid pursuant to court order and use and occupancy is denied.

The relief that seeks vacatur of the prior use and occupancy payments pursuant to recently enacted changes to the *RPAPL* is denied as moot for the reasons already discussed above and based on the dismissal of the non-payment petition.

The matter is restored to the Part F calendar on May 19, 2020 at 9:30 a.m. for trial on respondent's breach of warranty of habitability counterclaim.

ORDERED that petitioner's motion to restore is granted,

And it is Further

ORDERED that respondent's cross motion for dismissal is granted,

And it is Further

ORDERED that respondent's cross motion for summary judgment is denied.

This is the decision and order of the Court, copies of which are being emailed and mailed to those indicated below.

Dated: New York, NY
March 24, 2020

_____/S_____
Frances A. Ortiz, JHC

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