2020-04-17

327-333 E. 90 Realty LLC v. Weinstein

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK: HOUSING PART R

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327-333 E. 90 REALTY LLC **Index No. 65767/2019**

Petitioner-Landlord,

Against

Mark S. Weinstein

Respondent-Tenant.

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HON. ANNE KATZ

In this nonpayment proceeding petitioner seeks possession of 327 E.90th Street, New York, New York 10128 ("premises"). The petition alleges the premises are exempt from "Rent Control, NYC Rent Stabilization Law of 1969 as Amended or the Emergency Tenant Protection Act of 1974 because the premises became vacant after April 1, 1994 and the vacancy rent was $2,000.00 or more". The petition also alleges that respondent, Mark S. Weinstein, is in possession of the premises pursuant to a written lease in which respondent promised to pay petitioner $2,895.00 as monthly rent.

On July 16, 2019, petitioner served respondent with a "Notice to Tenant" which required respondent to pay $5,562.50 as rental arrears through July, 2019. Respondent failed to make payment and petitioner commenced this proceeding by Notice of Petition and Petition dated August 7, 2019. Respondent submitted a *pro se* Answer, dated August 23, 2019. The Answer alleged a general denial. The proceeding was returnable in Part D on September 5, 2019. On December 20, 2019 the proceeding was transferred to Part R for trial. A trial was conducted on February 19, 2020.

On February 24, 2020, the instant Order to Show Cause was filed by newly retained counsel for respondent. Respondent was referred to Mobilization for Justice through the Assigned Counsel Program. Respondent now seeks permission for leave to amend his *pro se* Answer pursuant to *CPLR 3025(b).* Respondent also seeks leave to conduct limited discovery under *CPLR §408.* Lastly, respondent requests a stay of this proceeding pending discovery, together with any other relief this Court deems proper.

Amended Answer-General

Respondent argues that *CPLR 3025(b)* directs that leave to amend an answer shall be freely granted absent significant prejudice to the opposing party *Edenwald Contracting v. New York, 60 NY2d 957, 471 NYS2d 55 (1983).* Moreover, respondent argues that when the pleadings at issue are prepared by a *pro se* litigant, it is appropriate for the court to allow an amendment of the *pro se* Answer. *153 Street Apartment LLC. v. Alveranga, 30 Misc3d 129 (958 NYS2d 647 (App. Term 1st Dept 2010).* Lastly, respondent argues that the proposed amendments are meritorious and do not pose any prejudice to petitioner.

Petitioner argues that respondent should not be granted leave to amend his *pro se* Answer. Petitioner argues that respondent's alleged new defenses are "palpably without merit" and prejudicial *Gordon v. Oster, 36 AD3d 525 (1st Dept, 2007).*

First & Second Affirmative Defenses - Regulatory Status/Overcharge

As First and Second Affirmative Defenses, respondent alleges the premises are subject to the Rent Stabilization Law and Code; respondent has been overcharged; and the petition must be dismissed because it does not reflect the correct regulatory status of the premises. According to respondent, a review of the rent regulatory history shows that in 2008 the owner purported to effectuate a deregulation of the premises via "high rent vacancy decontrol". Respondent alleges the high vacancy decontrol was illegal because, during the time the premises was deregulated, petitioner was in receipt of a J-51 tax abatement. Therefore, according to respondent, the premises should have been stabilized. *NYC Admin. Code 26-504.2(a); Roberts v. Tishman Speyer Props, L.P. 13 NY3d 270, 890 NYS2d 388 (2009).* Respondent also argues that his rent should be frozen at the last registered rent in 2005 and be brought back under the auspices of rent stabilization *Moore v. Greystone Props, 81 LLC, 176 AD3d 516, 108 NYS3d (AD1, 2019*). Additionally, respondent argues that as petitioner illegally deregulated the premises during receipt of J-51 benefits, respondent believes he has a claim for rent overcharge.

Respondent also points out that a review of the rent registrations for the premises demonstrates that between 2004 and 2005 the registered rent for the premises increased from $1,135.17 to $1,735.00. This increase was approximately a 53% increase in rent. A review of the rent guidelines shows that in 2005 petitioner was only allowed to take a 17% vacancy increase. Therefore, respondent also challenges the unexplained 36% increase which petitioner took in 2005.

Petitioner argues that respondent's First and Second Affirmative Defenses are without merit. Petitioner argues that respondent moved into the premises in 2014, after expiration of the J-51 benefit and rejects respondent's argument that its failure to register the premises in 2009, 2010 and 2011 dictate that respondent is only required to pay the last registered rent. In support of its argument, petitioner cites the case of *BLDG Management Co., Inc. v. Orelli (AT 1st Dept, 2018).* In *Orelli, supra,* the tenant moved into his apartment after the expiration of J-51 benefit and deregulation of the apartment. In that case, the landlord reevaluated the regulatory status of the apartment, after the Roberts decision was issued, using the rent stabilization guidelines. In *Orelli* ,after the new calculations were done, the landlord concluded the rent was still over $2,000.00. Despite the landlord's new calculations, the lower court held that based upon the owner's failure

to register the apartment, he could only charge the last regulated rent with no increases. On appeal, the Appellate Term reversed the lower court's decision. The Appellate Term held that because the rent calculations showed the rent exceeded the $2,000.00 threshold for deregulation, the apartment was properly deregulated, and the increases were proper. Petitioner further argues that its absence of rent registrations for its former tenants does not affect the rent or status of respondent, who moved in after the expiration of the J-51 benefit. Petitioner alleges that the additional 35% increase was based upon Individual Apartment Improvements ("IAIs") it performed at the premises. Based upon the foregoing, petitioner argues that respondents First and Second Proposed Affirmative Defenses are specious and without merit.

This Court finds respondent' First and Second Affirmative Defenses have merit. It is undisputed that petitioner received a J-51 benefit from 2001 through 2011 and despite receipt of the J-51 benefit the premises were deregulated in 2008 and never re-registered as stabilized in accordance with Roberts, *supra; Gersten v. 56 7th Ave. LLC 88 AD3d 189, 928 NYS2d 515 (App. Div. 1st Dept 2011).* This Court distinguishes this proceeding from *Orelli* because in *Orelli* the Court found petitioner had a good faith explanation why the premises were not registered. In this proceeding, petitioner has failed to offer any explanation for its failure to register the premises. Moreover, under these circumstances, it is apparent that any prejudice which may occur to petitioner is outweighed by the prejudice caused to respondent if petitioner unlawfully deregulated the premises. This Court must make note of the recent Court of Appeals decision in *In the Matter of Regina Metropolitan Co., v. New York State Division of Housing and Community Renewal, --N.E. 3d, 2020 WL 1557900, 2020 Sip. Op. 02127 (Ct. App April 2, 2020* which does not alter the respondent's right to amend his answer to include his defenses based upon petitioner's alleged illegal deregulation of the premises and overcharge.

Third Affirmative Defense-Service

Respondent alleges it must be allowed to amend its Answer to include defective service of the Notice of Petition and Petition. Respondent alleges that based upon defective service this proceeding must be dismissed. Respondent alleges that service is defective because petitioner's process server failed to make reasonable attempts to effectuate personal service since both attempts made to effectuate personal service were made about the same time each day.

A review of the Affidavit of Service shows that reasonable attempts were made. To constitute "reasonable" one attempt at service must be during working hours and the other made during non-working hours. *MK Secure Holdings LLC v. Chen (App. Term 1st Dept) 2018 Slip Op. 50719.* In the case at bar, the first attempt was made on Saturday at 3:00 pm (non-working hours) and the second attempt was made on Monday at 1:29 pm (working hours). Accordingly, service was proper, and respondent may not assert his Third Affirmative Defense.

First Counterclaim- Breach of the Warranty of Habitability

Respondent alleges that he has experienced months without heat, holes in the bathroom ceiling and leaks, and a hole in a large portion of the premises ceiling in violation of *NY Real Property Law 235-b*. If respondent proves these conditions existed, that petitioner was aware of the

conditions and failed to cure the conditions, the counterclaim is inextricably intertwined to the underlying nonpayment proceeding and appropriate. Generally, "a counterclaim is permissible if it is inextricably intertwined to the landlord's entitlement to rent or possession of subject apartment of the underlying proceeding." (*Wai Chan v. Gao Xiao Ying,* 10 Misc.3d 1065[A], 2005 N.Y. Slip Op 52166[U], *3 [Hous Part, Civil Ct, N.Y. County Dec. 23, 2005]. Clearly the warranty of habitability is intertwined to petitioner's claim for rent.

Second Affirmative Defense-Overcharge

Respondent alleges that he has been overcharged based upon the illegal deregulation of the premises during receipt of a J-51 benefit. As stated above, counterclaims that are inextricably intertwined to the underlying nonpayment proceeding because they go directly to the landlord entitlement to rent and/or possession are appropriate. *Wai Chan, supra.* It is clear that an overcharge defense and counterclaim is on direct point with the petitioner's ability to collect rent in this proceeding. *Ying,* 10 Misc.3d 1065[A], 2005 N.Y. Slip Op 52166[U], *3 [Hous Part, Civil Ct, N.Y. County**.**

Third Counterclaim- Legal Fees

Respondent's counterclaim for legal fees is also appropriate. Generally, courts will enforce lease provisions which preclude a tenant from interposing a counterclaim unless the counterclaim is inextricably intertwined with the landlord's entitlement to rent or possession of premises." *Wai Chan, supra.* Although such a provision exists in the lease herein, respondent's counterclaim for legal fees is inextricably intertwined to the underlying proceeding. Paragraph 18 of the lease allows petitioner to recover attorneys 'fees. As such, respondent may be entitled to the reciprocal right to recover attorneys' fees under Real Property Law Section 234, if he is the prevailing party. Accordingly, the counterclaim is appropriate and not prejudicial.

Discovery

Respondent seeks leave of this Court to conduct limited discovery. Respondent argues it is well settled that where the regulatory status of an apartment is at issue, discovery is necessary and appropriate *Mautner-Glick Corp. V. Higgins, 2019 NY Slip Op 2929 (App. Term 1st Dept 2019. NY Slip. Op. 52097(U), 66 Misc3d 132(A) (App. Term 1st Dept 2019*).

Petitioner argues discovery is not appropriate and has agreed to provide the records in its possession with regard to rent history and the IAI's. Petitioner argues that respondent's request for discovery should be denied because the rent in 2005 was legal and reliable.

This Court finds that respondent has proved "ample need" for discovery. *New York University v. Farkas, 121 Misc2d 643, 468 NYS2d 808 (Civ. Ct 1983).* In accordance with the requirements espoused in *Farkas, supra*. respondent has articulated a cause of action for overcharge, the information is within petitioner's exclusive control and/or knowledge and based upon the facts presented herein this Court is satisfied that respondent's request for discovery is not a fishing expedition. A review of The Proposed Notice to Produce reveals the discovery requests are

narrowly tailored to the issue of the J-51 abatement and IAI's. No prejudice will occur to petitioner by this Order since the Court directs all discovery to be complete within 30 day of receipt of this Decision.

Respondent also alleges the HSTPA, passed in June, 2019, changed the process and standards by which a tenant could challenge the regulatory status of an apartment and courts have applied the HTSPA to allow a tenant, asserting an overcharge claim, to conduct discovery. *Widsam Realty Corp. v Joyner, 2019.* The recent Court of Appeal decision, *In the Matter of Regina Metropolitan Co., v. New York State Division of Housing and Community Renewal, supra.* made it clear that Part F of the Housing Tenant Protection and Stability Act, which addresses overcharge calculations and treble damages may not be applied retroactively or to pending cases. Therefore, it is not relevant to the case at bar. However, it is clear that current public policy favors an expansion of tenants' rights with regard to deregulation and J-51 benefits. Thus, since respondent meets the six-prong test as set forth in *Farkas, supra.*, and in keeping with current public policy, this Court finds discovery is appropriate under the circumstances herein.

Conclusion

Accordingly, respondent is granted leave to amend his Answer to include his First and Second Affirmative Defenses and First, Second and Third Counterclaims. Respondent is denied leave to amend his Answer to include his Third Affirmative Defense. Respondent's request for discovery is granted and all discovery must be complete within 30 days. This constitutes the Decision and Order of this Court.

This proceeding may be restored by motion or stipulation upon the completion of discovery.

Dated: Nassau, New York
April 17, 2020

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Hon. Anne Katz